FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405

|  |  |
| --- | --- |
| Citation: | Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 |
|  |  |
| Parties: | **AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708) and GROCERY HOLDINGS PTY LTD (ACN 007 427 581)** |
|  |  |
| File numbers: | VID 253 of 2014VID 609 of 2014 |
|  |  |
| Judge: | **GORDON J** |
|  |  |
| Date of judgment: | 22 December 2014 |
|  |  |
| Catchwords: | **CONSUMER LAW** – unconscionable conduct – admitted contraventions of Australian Consumer Law – unconscionable conduct in business transactions – dealings with suppliers – threats of commercial consequences if demands not met – demanding payments – refusing to pay or repay money – enforcement and remedies – s 87B undertaking – orders sought by consent – appropriate relief in the circumstances  |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth)*Evidence Act 1995* (Cth)*Federal Court of Australia Act 1976* (Cth)  |
|  |  |
| Cases cited: | *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564*Australian Competition & Consumer Commission v Alvaton Holdings Pty Ltd* [2010] FCA 760 *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) ATPR 41-562*Australian Competition & Consumer Commission v Coles Supermarkets Australia Pty Limited (No 2)* [2014] FCA 1022*Australian Competition & Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665 *Australian Competition & Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513*Australian Competition & Consumer Commission v Econovite Pty Ltd* [2003] FCA 964*Australian Competition & Consumer Commission v Global One Mobile Entertainment Limited* [2011] FCA 393 *Australian Competition & Consumer Commission v Lux Distributors Pty* *Ltd* [2013] FCAFC 90*Australian Competition & Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378*Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 *Australian Competition & Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326*Australian Competition & Consumer Commission v The Construction, Forestry, Mining and Energy Union* (2007) ATPR 42-140*Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548*Australian Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd (Trading as Mac’s Liquor)* [2003] FCA 530*BMW Australia Ltd v Australian Competition & Consumer Commission* [2004] FCAFC 167*Cameron v Qantas Airways Ltd* (1995) 55 FCR 147*Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421*Global One Mobile Entertainment Pty Ltd v Australian Competition & Consumer Commission* [2012] FCAFC 134*Hadgkiss v Aldin (No 2)* [2007] FCA 2069*Hurley v McDonalds Australia Ltd* (2000) ATPR 41-741*NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285*Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543*Secretary, Department of Health & Ageing* *v Pagasa Australia Pty Ltd* [2008] FCA 1545*Singtel Optus Pty Ltd v Australian Competition & Consumer Commission*  [2012] FCAFC 20*Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150  |
|  |  |
| Date of hearing: | 15 December 2014 |
|  |  |
| Date of last submissions: | 16 December 2014 |
|  |  |
| Place: |  |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 230 |
|  |  |
| Counsel for the Applicant: | Mr N O’Bryan SC with Ms R Orr SC, Mr M Hodge and Ms G Coleman |
|  |  |
| Solicitor for the Applicant: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondents: | Mr N Young QC with Mr M Moshinsky QC, Mr M Borsky and Ms C van Proctor |
|  |  |
| Solicitor for the Respondents: | Allens |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 253 of 2014 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)First RespondentGROCERY HOLDINGS PTY LTD (ACN 007 427 581)Second Respondent |

|  |  |
| --- | --- |
| JUDGE: | GORDON J |
| DATE OF ORDER: | 22 DECEMBER 2014 |
| WHERE MADE: | MELBOURNE |

THE COURT NOTES THAT:

1. The First Respondent (**Coles**) and the Second Respondent (**GHPL**) have given an undertaking to the Applicant pursuant to s 87B of the *Competition and Consumer Act 2010* (Cth) (**Act**) relating to each of the Tier 3 suppliers who have made a payment of an Active Retail Collaboration rebate (the **ARC rebate**) to Coles or GHPL in the course of its Active Retail Collaboration Program (**ARC**).

THE COURT DECLARES THAT:

**Austech**

2. In October 2011, in trade or commerce in connection with the acquisition of grocery products from Austech Products Pty Ltd (**Austech**), Coles, by:

2.1. requiring Austech to make an agreement to pay an ongoing rebate to it or GHPL, and making threats of commercial consequences to it if it did not, namely that Coles:

2.1.1. would provide certain ranging information requested by Austech but only after Austech agreed to pay the ongoing rebate; and

2.1.2. would cease giving assistance to Austech from Coles’ replenishers; and

2.2. refusing to take into account the reasons given to Coles by Austech why the rebate would not have the benefit to it that Coles claimed,

engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of Sch 2 to the Act (**Australian Consumer Law**).

**Oates**

3. In October 2011, in trade or commerce in connection with the acquisition of grocery products from E. D. Oates Pty Ltd (**Oates**), Coles, by requiring Oates to make an agreement to pay an ongoing rebate to it or GHPL, and making threats of commercial consequences to it if it did not, namely that if Oates did not sign up to ARC:

3.1. this may impact on Coles’ decisions about ranging Oates’ products relative to other suppliers;

3.2. there may be risks to promotional activity for Oates’ products; and

3.3. Oates would be classified as a ‘transactional’ supplier, which may have implications for ranging,

engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**Paton’s**

4. In October 2011, in trade or commerce in connection with the acquisition of grocery products from Paton’s Macadamia Plantations Pty Ltd (**Paton’s**), Coles, by requiring Paton’s to make an agreement to pay an ongoing rebate to it or GHPL, and making threats of commercial consequences to it if it did not, namely that Coles:

4.1. would not promote Paton’s products;

4.2. would not acquire new products from Paton’s;

4.3. would not provide Paton’s with forecasting information that had been provided without charge prior to the requirement,

engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**Stuart Alexander**

5. In October 2011, in trade or commerce in connection with the acquisition of grocery products from Stuart Alexander & Co Pty Ltd (**Stuart Alexander**), Coles, by requiring Stuart Alexander to make an agreement to pay an ongoing rebate to it or GHPL, and making threats of commercial consequences to it if it did not, namely that Coles:

5.1. would not acquire new products from Stuart Alexander; and

5.2.would not promote Stuart Alexander’s products,

engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**Tru Blu**

6. In October 2011, in trade or commerce in connection with the acquisition of grocery products from Tru Blu Beverages Pty Ltd (**Tru Blu**), Coles, by:

6.1. requiring Tru Blu to make an agreement to pay an ongoing rebate to it or GHPL, and making threats of commercial consequences to it if it did not, namely that Coles:

6.1.1. would not meet with Tru Blu;

6.1.2. would not continue any contractual negotiations then on foot with Tru Blu; and

6.2. refusing to take into account the reasons given to Coles by Tru Blu why the rebate would not have the benefits to it that Coles claimed,

engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

THE COURT ORDERS THAT:

7. Coles pay the Commonwealth of Australia, within 30 days of the date of this Order, pecuniary penalties pursuant to s 224 of the Australian Consumer Law, in respect of the contraventions declared in paragraphs 2 to 6 of this Order, as follows:

7.1. in the case of Austech, the sum of $700,000;

7.2. in the case of Oates, the sum of $800,000;

7.3. in the case of Paton’s, the sum of $800,000;

7.4. in the case of Stuart Alexander, the sum of $700,000; and

7.5. in the case of Tru Blu, the sum of $700,000.

8. Coles pay the Applicant, within 30 days of the date of this Order, a contribution towards its costs of and incidental to these proceedings in the sum of $1 million, and otherwise there be no order as to costs.

9. The proceedings otherwise be dismissed.

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

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 609 of 2014 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)First RespondentGROCERY HOLDINGS PTY LTD (ACN 007 427 581)Second Respondent |

|  |  |
| --- | --- |
| JUDGE: | GORDON J |
| DATE OF ORDER: | 22 DECEMBER 2014 |
| WHERE MADE: | MELBOURNE |

THE COURT NOTES THAT:

1. The First Respondent (**Coles**) and the Second Respondent (**GHPL**) have given an undertaking to the Applicant pursuant to s 87B of the *Competition and Consumer Act 2010* (Cth) (**Act**) relating to each of the suppliers named in the Statement of Claim in these proceedings.

THE COURT DECLARES THAT:

**Austech**

2. In June 2011, in trade or commerce and in connection with the acquisition of grocery products from Austech Products Pty Ltd (**Austech**), Coles, by demanding payments of $25,845 and $15,516.74 towards Coles’ profit where this had not been the subject of prior agreement between either Coles or GHPL and Austech and the payments were attributable to issues that arose before Austech owned the relevant product, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of Sch 2 of the Act (**Australian Consumer Law**).

3. In June 2011, in trade or commerce and in connection with the acquisition of grocery products from Austech, Coles by:

3.1. demanding a $5,700 retrospective payment for the cost to Coles of waste in relation to Austech’s products;

3.2. requiring a response to that demand within hours, where the payment was not the subject of prior agreement; and

3.3. using a purported profit gap claim as leverage in the negotiations,

engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

4 Between July and November 2011, in trade or commerce and in connection with the acquisition of grocery products from Austech, Coles, by refusing to cease deducting and retaining payments under an agreement with Austech for deferred rebates which was due to expire, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**Oates**

5. In June and July 2011, in trade or commerce and in connection with the acquisition of grocery products from E. D. Oates Pty Ltd (**Oates**), Coles, by demanding and processing a payment of $246,000 towards Coles’ profit, which was outside terms and conditions and without the agreement of Oates, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

6. Between July 2011 and December 2011, in trade or commerce and in connection with the acquisition of grocery products from Oates, Coles, by refusing to repay the monies referred to in paragraph 5 of this Order, and by retaining those monies, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**Colonial Farm**

7. Between October and November 2011, in trade or commerce and in connection with the acquisition of grocery products from Colonial Farm (Aust.) Pty Ltd (**Colonial Farm**), Coles, by requiring an agreement by which Colonial Farm would pay for 100% of the cost of waste in relation to Colonial Farm’s products in circumstances where Coles was aware that Colonial Farm was in financial difficulty and did not take into account Colonial Farm’s explanation that its products were not appropriate for a 100% waste agreement, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**Bayview**

8. In October and November 2011, in trade or commerce and in connection with the acquisition of grocery products from Bayview Seafoods Pty Ltd (**Bayview**), Coles, by requiring an agreement by which Bayview would pay for 100% of the cost of waste in relation to Bayview’s products in circumstances where Coles was aware that Bayview was in financial difficulty and did not take into account Bayview’s explanation of the cause of the waste, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

9. In October and November 2011, in trade or commerce and in connection with the acquisition of grocery products from Bayview, Coles, by requiring and accepting a payment from Bayview for late delivery of Bayview’s products of $30,500 where this had not been the subject of prior agreement with Bayview, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**Benny’s**

10. Between August and November 2011, in trade or commerce and in connection with the acquisition of grocery products from Benny’s Confectionery Pty Ltd (**Benny’s**), Coles by, on two occasions, imposing penalties on Benny’s for short or late delivery of Benny’s products totalling $1,639 without notice to or prior agreement with Benny’s, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

11. Between August and November 2011, in trade or commerce and in connection with the acquisition of grocery products from Benny’s, Coles, by refusing to repay the penalties referred to in paragraph 10 of this Order, engaged in conduct that was in all the circumstances unconscionable in contravention of s 22 as it then stood of the Australian Consumer Law.

**THE COURT ORDERS THAT:**

12. Coles pay the Commonwealth of Australia, within 30 days of the date of this Order, pecuniary penalties pursuant to s 224 of the Australian Consumer Law, in respect of the contraventions declared in paragraphs 2 to 11 of this Order, as follows:

12.1. in respect of the contravention declared in paragraph 2 of this Order, the sum of $650,000;

12.2. in respect of the contravention declared in paragraph 3 of this Order, the sum of $500,000;

12.3. in respect of the contravention declared in paragraph 4 of this Order, the sum of $650,000;

12.4. in respect of the contravention declared in paragraph 5 of this Order, the sum of $650,000;

12.5. in respect of the contravention declared in paragraph 6 of this Order, the sum of $900,000;

12.6. in respect of the contravention declared in paragraph 7 of this Order, the sum of $550,000;

12.7. in respect of the contravention declared in paragraph 8 of this Order, the sum of $550,000;

12.8. in respect of the contravention declared in paragraph 9 of this Order, the sum of $650,000;

12.9. in respect of the contravention declared in paragraph 10 of this Order, the sum of $600,000;

12.10. in respect of the contravention declared in paragraph 11 of this Order, the sum of $600,000.

13. Coles pay the Applicant, within 30 days of the date of this Order, a contribution towards its costs of and incidental to these proceedings in the sum of $250,000, and otherwise there be no order as to costs.

14. The proceeding otherwise be dismissed.

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

|  | **INDEX** |  |
| --- | --- | --- |
|  | **Contents** | **Par** |
| **1** | **INTRODUCTION** | [1] |
|  | 1.1 The Proceedings | [3] |
| **2** | **VID 253 OF 2014 – THE ARC PROCEEDING** |  |
|  | **2.1 Background**  | [12] |
|  | 2.1.1 Coles’ market share and power  | [13] |
|  | 2.1.2 Coles’ Trading Arrangements and the ARC rebate | [19] |
|  | **2.2 Contraventions** |  |
|  | 2.2.1 Section 22 of the ACL | [34] |
|  | 2.2.2 Suppliers | [37] |
|  | 2.2.2.1 Austech | [40] |
|  | 2.2.2.2 Oates | [45] |
|  | 2.2.2.3 Paton’s | [51] |
|  | 2.2.2.4 Stuart Alexander | [57] |
|  | 2.2.2.5 Tru Blu | [63] |
|  | **2.3 Principles applicable to relief** |  |
|  | 2.3.1 Orders sought by agreement | [69] |
|  | 2.3.2 Declarations | [74] |
|  | 2.3.3 Penalties | [81] |
|  | 2.3.3.1 Factors relevant to setting a penalty | [83] |
|  | 2.3.3.2 Other penalty factors including approach to penalties sought by agreement of the parties | [84] |
|  | **2.4 Analysis of Proposed Penalties** | [87] |
|  | 2.4.1 Nature, extent and duration of conduct and the circumstances in which conduct took place |  |
|  | 2.4.1.1 Extent of the conduct | [89] |
|  | 2.4.1.2 Background circumstances relating to the contravening conduct | [90] |
|  | 2.4.1.2.1 Coles general business practices and profit targets | [91] |
|  | 2.4.1.2.2 Development of the ARC Plan | [93] |
|  | 2.4.1.2.3 Delivery of the ARC Instructions | [95] |
|  | 2.4.1.3 Relationship of the background circumstances to specific instances of unconscionable conduct | [96] |
|  | 2.4.1.4 Nature of the conduct | [97] |
|  | 2.4.2 Amount of loss caused and profit gained | [107] |
|  | 2.4.3 Whether the respondent has engaged in similar prior conduct | [110] |
|  | 2.4.4 Size of contravener, including market share, and its financial position | [111] |
|  | 2.4.5 The deliberateness of the contravening conduct | [114] |
|  | 2.4.6 Involvement of senior employees or management | [115] |
|  | 2.4.7 Culture of compliance and corrective measures in response to contravention | [117] |
|  | 2.4.8 Co-operation | [122] |
|  | 2.4.9 Maximum penalties and one transaction principle | [125] |
|  | 2.4.10 Identifying the penalties for particular contraventions | [129] |
|  | 2.4.11 Totality principle | [132] |
|  | 2.4.12 Conclusion on appropriate penalty | [133] |
|  | **2.5 Costs** | [134] |
| **3** | **VID 609 of 2014 – THE CLAIMS PROCEEDING** |  |
|  | **3.1 Background** | [135] |
|  | 3.1.1 Coles’ market share and power | [139] |
|  | 3.1.2 Coles’ Trading Arrangements | [140] |
|  | 3.1.3 Coles’ Business Practices | [141] |
|  | 3.1.3.1 Profit gaps | [142] |
|  | 3.1.3.2 Waste and markdowns | [144] |
|  | 3.1.3.3 Short or Late Deliveries | [146] |
|  | **3.2 Contraventions** |  |
|  | 3.2.1 Section 22 of the ACL | [148] |
|  | 3.2.2 Suppliers | [149] |
|  | 3.2.2.1 Austech | [150] |
|  | 3.2.2.2 Oates | [163] |
|  | 3.2.2.3 Colonial Farm | [170] |
|  | 3.2.2.4 Bayview | [176] |
|  | 3.2.2.5 Benny’s | [185] |
|  | **3.3 Principles applicable to relief** | [194] |
|  | **3.4 Analysis of proposed penalties** | [198] |
|  | 3.4.1 Nature, extent and duration of conduct and the circumstances in which conduct took place |  |
|  | 3.4.1.1 Extent of the conduct | [199] |
|  | 3.4.1.2 Background circumstances relating to the contravening conduct | [200] |
|  | 3.4.1.3 Relationship of the background circumstances to specific instances of unconscionable conduct | [201] |
|  | 3.4.1.4 Nature of the conduct | [202] |
|  | 3.4.2 Amount of loss caused and profit gained | [211] |
|  | 3.4.3 Whether the respondent has engaged in similar prior conduct | [215] |
|  | 3.4.4 Size of contravener, including market share, and its financial position | [216] |
|  | 3.4.5 The deliberateness of the contravening conduct | [217] |
|  | 3.4.6 Involvement of senior employees or management | [218] |
|  | 3.4.7 Culture of compliance and corrective measures in response to contravention | [220] |
|  | 3.4.8 Co-operation | [222] |
|  | 3.4.9 Maximum penalties and one transaction principle | [223] |
|  | 3.4.10 Identifying the penalties for particular contraventions | [226] |
|  | 3.4.11 Totality principle | [228] |
|  | 3.4.12 Conclusion on appropriate penalty | [229] |
|  | **3.5 Costs** | [230] |
|  | **ANNEXURE 1 – VID 253 OF 2014 -** Statement of Agreed Facts and Admissions |  |
|  | **ANNEXURE 2 – VID 609 OF 2014 -** Statement of Agreed Facts and Admissions |  |
|  | **ANNEXURE 3 –** s 87B Undertaking  |  |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 253 of 2014VID 609 of 2014 |

|  |  |
| --- | --- |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)First RespondentGROCERY HOLDINGS PTY LTD (ACN 007 427 581)Second Respondent |

|  |  |
| --- | --- |
| JUDGE: | GORDON J |
| DATE: | 22 DECEMBER 2014 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

##### INTRODUCTION

1. **Coles** (collectively the First and Second Respondents) is the second largest retailer of grocery products in Australia. Coles engaged in unconscionable conduct in its dealings 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. Coles now admits that its conduct was contrary to law and involved serious breaches of s 22 of the Australian Consumer Law (**ACL**) as it then stood in Sch 2 to the *Competition and Consumer Act 2010* (Cth) (**Act**), meriting serious punishment.
2. Coles and the applicant (the **ACCC**), have reached agreement as to the relief they submit is appropriate to be sought from the Court to resolve the proceedings. As will be explained, Coles and ACCC have agreed that Coles should pay penalties totalling $10 million, should pay $1.25 million towards the ACCC’s costs and should establish a system that will permit those harmed by Coles’ conduct to recover compensation. Coles’ conduct was of a kind which merits severe penalty. But for Coles making the admissions it has now made and acknowledging the gravity of its contravening conduct, the conduct and circumstances in which it was committed would have warranted imposing penalties at or close to the maximum the law permits. In light of Coles’ admissions and acknowledgement, the time at which they were made and the other features of the orders upon which the parties agree (including in particular the arrangements for access to compensation), orders will be made substantially in the terms agreed by the parties.

###### The Proceedings

1. The ACCC filed two proceedings against Coles.
2. The first proceeding (VID 253 of 2014) (the **ARC Proceeding**)was commenced by the ACCC on 5 May 2014 following an investigation into dealings between Coles and what were called **Tier 3 Suppliers**. There were approximately 220 Tier 3 Suppliers, being suppliers where the annual sum spent by Coles on acquiring that supplier’s grocery products was generally greater than $3 million and for whom Coles’ documents stated Coles represented a “very significant part” of the supplier’s business: Annexure 1, par 27.
3. The ACCC alleged, and Coles has now accepted, that Coles contravened s 22 of the (then) ACL in relation to five Tier 3 Suppliers when Coles made demand for payment of an Active Retail Collaboration rebate (the **ARC rebate**) in the course of its Active Retail Collaboration Program (**ARC**). The ARC rebate was a payment made from a supplier to Coles, calculated as a percentage of the price Coles paid for the products and deducted by Coles from monies owed to the supplier for products that it had already supplied to Coles.
4. Coles admits that the conduct disclosed in a statement of agreed facts and admissions (**SoAFA**), set out in **Annexure 1** to these reasons for judgment, was unconscionable and contrary to law. The facts agreed to, and the admissions made, in the SoAFA are made pursuant to s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**) for the purposes of the ARC Proceeding, and are admissions upon which the Court may rely to pronounce judgment and make orders. It will be necessary to return to consider those facts and admissions.
5. Coles and the ACCC reached agreement as to the terms of relief they contended appropriate to be sought from the Court to resolve the ARC Proceeding whilst acknowledging that the question of relief is for the Court to determine in its discretion. In general terms, the ACCC and Coles asked that the Court make declarations of contraventions pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**), order payment by Coles of pecuniary penalties totalling $3,700,000 pursuant to s 224 of the ACL and order payment by Coles of a contribution to the ACCC’s costs in the amount of $1 million pursuant to s 43 of the Federal Court Act.
6. The second proceeding (VID 609 of 2014) (the **Claims Proceeding**)was commenced by the ACCC on 16 October 2014. In the Claims Proceeding, the ACCC alleged that Coles, by its conduct in relation to its dealings with five named suppliers, contravened s 22 of the (then) ACL. In general terms, that conduct involved Coles seeking payments from those suppliers outside of the terms of the arrangements negotiated between the supplier and Coles. The payments demanded by Coles were for so called profit gaps, waste and markdowns and short or late deliveries and were deducted by Coles from monies due to be paid to that supplier for products that it had already supplied to Coles. Coles now admits that it had no reasonable basis for making the claims that it made and that conduct (disclosed in a separate SoAFA, set out in **Annexure 2** to these reasons for judgment) was unconscionable and contrary to law. The facts agreed to and the admissions made in that SoAFA were again made pursuant to s 191 of the Evidence Act for the purposes of the Claims Proceeding, and are admissions upon which the Court may rely to pronounce judgment and make orders. It will be necessary to return to consider those facts and admissions.
7. Coles and the ACCC reached agreement as to the terms of relief they contended appropriate to be sought from the Court to resolve the Claims Proceeding whilst again acknowledging that the question of relief is for the Court to determine in its discretion. In general terms, the ACCC and Coles asked that the Court make declarations of contraventions pursuant to s 21 of the Federal Court Act, order payment by Coles of pecuniary penalties totalling $6,300,000 pursuant to s 224 of the ACL and order payment by Coles of a contribution to the ACCC’s costs in the amount of $250,000 pursuant to s 43 of the Federal Court Act.
8. In relation to both proceedings, Coles has provided an undertaking under s 87B of the Act. It is **Annexure 3** to these reasons for judgment. The undertaking is an important element of Coles’ agreement with the ACCC and the Court’s assessment of the relief the parties seek by agreement. It will be necessary to consider that undertaking later in these reasons for judgment.
9. Each proceeding will be considered in turn. For each proceeding, the reasons for judgment will address the nature and background to that proceeding, the admitted contraventions and the applicable principles in relation to the relief sought. The reasons will then consider the appropriateness of the proposed declarations of contravention and the pecuniary penalties.

##### VID 253 of 2014 – THE ARC PROCEEDING

###### Background

1. The following summary is sourced from, and cross referenced to, the SoAFA in Annexure 1. The contravening conduct occurred from about 1 April 2011 to about 31 December 2011 (the **ARC** **relevant period**): Annexure 1, par 3.

Coles’ market share and power

1. During the ARC relevant period, Coles carried on business, in trade or commerce, as a supermarket retailer. Coles engaged in a business of acquiring grocery products from suppliers, and selling those products to customers in Australia through Coles’ retail stores (the **Coles business**): Annexure 1, pars 4-6. Coles referred, and continues to refer, to the steps and infrastructure involved in acquiring grocery products for retail sale from suppliers and distributing them to Coles’ retail stores for display and sale as its **Supply Chain**: Annexure 1, par 7. During the ARC relevant period, Coles supplied approximately 30% of the grocery products supplied for retail sale to customers in Australia. Together with Woolworths, Coles supplied approximately 60% to 70% of the grocery products for retail sale to customers in Australia: Annexure 1, par 9.
2. The Coles business had revenue in the order of $22.1 billion for the financial year ending 30 June 2011 and in the order of $23.3 billion for the year ending 30 June 2012: Annexure 1, par 10.
3. The Coles business was, and continues to be, structured by reference to groups of similar or related grocery products (**General Categories**): Annexure 1, pars 11-13. In that structure:
4. Each General Category was managed by a General Manager (**GM**);
5. Within each General Category, the Coles business was managed by reference to smaller groups of similar or related grocery products (**Business Categories**);
6. Each Business Category was managed by a Business Category Manager (**BCM**);
7. Each BCM reported to a GM;
8. Within each Business Category, the Coles business was managed by reference to smaller groups of similar or related products (**Categories**);
9. Each Category was managed by a Category Manager (**CM**); and
10. Each CM reported to a BCM.

The GMs and BCMs were Coles’ **Senior Managers**, and together with the CMs acted on behalf of Coles in relation to the contravening conduct.

1. Coles’ suppliers range from large multinational companies to very small Australian suppliers. By about August 2011, Coles had created three categories of suppliers – Tier 1 Suppliers, Tier 2 Suppliers and Tier 3 Suppliers. The Tier 1 Suppliers were identified by Coles as its largest suppliers with the most complex supply chains, and included Nestle, General Mills and Procter & Gamble. The Tier 2 Suppliers were identified by Coles as large suppliers with “simple” supply chains. As noted earlier, the Tier 3 Suppliers comprised approximately 220 suppliers. Those suppliers were identified by Coles as, and believed by Coles to be, its “smaller” suppliers in terms of the annual sum spent by Coles on acquiring the supplier’s grocery products (the **COGS**) as compared to the annual sum spent by Coles on acquiring grocery products from Tier 1 and Tier 2 suppliers, were suppliers whose COGS were generally greater than $3 million and were suppliers for whom Coles’ documents stated Coles represented a “very significant part” of the supplier’s business: Annexure 1, pars 24-27.
2. Many of Coles’ smaller suppliers have total annual revenue which represents less than a fraction of one per cent of Coles’ annual revenue, including the Tier 3 Suppliers the subject of the admitted contraventions: Annexure 1, par 10.
3. For the purpose of these admitted contraventions, the Tier 3 Suppliers were:
4. Austech Products Pty Ltd (**Austech**);
5. E.D. Oates Pty Ltd (**Oates**);
6. Paton’s Macadamia Plantations Pty Ltd (**Paton’s**);
7. Stuart Alexander & Co Pty Ltd (**Stuart Alexander**); and
8. Tru Blu Beverages Pty Ltd (**Tru Blu**).

Coles’ Trading Arrangements and the ARC rebate

1. During the ARC relevant period, Coles acquired grocery products for retail sale from its suppliers pursuant to arrangements negotiated between Coles and each supplier (**Trading Arrangements**): Annexure 1, par 14. Most of the conditions relating to the acquisition by Coles of grocery products from a supplier, including whether Coles would continue to acquire products from that supplier, were determined by representatives of Coles: Annexure 1, par 17.
2. The Trading Arrangements required that Coles be paid various rebates by the suppliers on an ongoing basis. Coles’ conduct in relation to the incorporation of the ARC rebate into the Trading Arrangements for a supplier is the subject of the ARC Proceeding. The nature of a rebate, and the ARC rebate in particular, has been described earlier: see [5] above and Annexure 1, par 16.
3. By about 9 September 2011, Coles determined that the ARC rebate would be divided into two components (Annexure 1, pars 23 and 29):
4. An amount said to be attributed by Coles to the value to the supplier from Coles changing its ordering patterns to order grocery products from the supplier in more economically efficient ordering quantities (**EOQ ordering**); and
5. An amount said to be attributed by Coles to the value to the supplier of data sharing on an internet-based “Supplier Portal” and associated changes of 35 day order plan, nine week sales forecast, six week promotional lock-down and 12 week notice for product deletion (**data sharing**).
6. By about 10 October 2011, Coles had determined that the ARC rebate to be paid by Tier 3 Suppliers would be the sum of a data sharing component of 0.7% of the price Coles paid for a supplier’s grocery products and an EOQ ordering component fixed at a percentage amount of the price Coles paid for a supplier’s grocery products that equated to the value Coles attributed to the supplier of EOQ ordering: Annexure 1, par 31.
7. Coles calculated the rebate for EOQ ordering by:
8. Making a series of assumptions about Tier 3 Suppliers’ activities when picking a pallet and delivering the pallet to Coles;
9. Attributing costs to each of those activities based on Coles’ own costs; and
10. Inserting data about those activities, historical ordering patterns and costs into a standard formula that was used for all Tier 3 Suppliers regardless of each Tier 3 Supplier’s individual circumstances.

Coles set a target of $16 million for the amount of money it would seek to obtain in ARC rebates from Tier 3 Suppliers in the financial year ended 30 June 2012: Annexure 1, pars 32-33.

1. By about 14 October 2011, Coles had developed a plan for applying ARC to Tier 3 Suppliers (the **Tier 3 ARC Plan**). The Tier 3 ARC Plan was approved by Senior Managers: Annexure 1, pars 34 and 36. The Tier 3 ARC Plan was initially implemented by a CM. If necessary, action would be escalated to a BCM or GM. The Tier 3 ARC Plan involved a number of steps. The steps were deliberate, orchestrated and relentless. The steps were described in the following terms (Annexure 1, par 34):

34.1. CMs would:

34.1.1. on or around 17 or 18 October 2011, seek the agreement of each Tier 3 Supplier to make ongoing payments to Coles by the incorporation of the ARC rebate into their Trading Arrangements with Coles (referred to by Coles, and in the remainder of this document, as ‘the **Ask**’);

34.1.2. deliver the Ask in accordance with a standardised script provided by Coles (the **Script**);

34.1.3. respond to questions from Tier 3 Suppliers about the benefits that were said to flow to them from data sharing and EOQ ordering using a set of prescribed answers;

34.1.4. at their discretion, provide the Supplier with a two-page document that was in a standardised form and purported to explain the basis on which the ARC rebate was calculated (the **Background Materials**);

34.1.5. at their discretion, provide Suppliers with a Supplier Portal information pack which explained some features of the portal;

34.1.6. record the agreement of Tier 3 Suppliers to the Ask in an executed amended version of the Supplier’s Trading Terms incorporating the ARC rebate on an ongoing basis (the **Revised Trading Terms**);

34.1.7. not have the authority to negotiate on the amount of the ARC rebate with the Tier 3 Supplier but could escalate the negotiation to a more senior person within Coles;

34.1.8. seek to have Tier 3 Suppliers agree to the Ask within a number of days;

34.1.9 if the CM could not obtain the agreement of a Tier 3 Supplier to the Ask, notify the Tier 3 Supplier that its position on the Ask would be ‘escalated’ to a BCM.

34.2. if a CM could not obtain the agreement of a Tier 3 Supplier to the Ask, responsibility for obtaining the Tier 3 Supplier’s agreement was to be ‘escalated’ from the CM to the BCM to whom the CM reported;

34.3. the BCM to whom responsibility for obtaining the Supplier’s agreement to the Ask had been ‘escalated’ had authority to accept agreement from the Tier 3 Supplier to the Ask in circumstances where the amount of the ARC rebate the Supplier agreed to pay was less than the amount originally sought from the Supplier;

34.4. if a BCM could not obtain the agreement of a Tier 3 Supplier, the BCM was to consider:

34.4.1. notifying the Supplier that its position on the Ask would be escalated within Coles, such as to the GM to whom the BCM reported;

34.4.2. escalating the Tier 3 Supplier’s position within Coles, such as to the GM to whom the BCM reported.

34.5. GMs had authority to accept an agreement by a Tier 3 Supplier in circumstances where the amount of the ARC rebate the Supplier agreed to pay was less than the amount originally sought from the Supplier;

34.6. ‘escalation’ of a Supplier’s refusal of the Ask involved the BCM or GM to whom the matter had been elevated making contact with the Tier 3 Supplier in an attempt to secure the Supplier’s agreement (**Escalation**).

1. The Script (identified in the extract in [24] above) contained statements to the effect that Coles had made changes to its Supply Chain, the changes Coles made to its Supply Chain would be of benefit to the supplier identified in the Script, and Coles had identified and calculated savings to that supplier’s business in respect of data sharing and EOQ ordering: Annexure 1, par 37. The Background Materials contained statements to the effect that data sharing would lead to value to the supplier of well over 0.7% of the price Coles paid for the supplier’s grocery products and EOQ ordering, where applicable to the supplier, would lead to value to the supplier of at least a specified percentage of the price Coles paid for the supplier’s grocery products: Annexure 1, par 38.
2. For the reasons that follow, the Tier 3 ARC Plan and, in particular, the Script and Background Materials, were contrary to law. In putting forward the Script and the Background Materials, Coles had attributed a value to a data sharing benefit that it considered would apply to all Tier 3 Suppliers taken as a whole, but had not identified or calculated any particular savings to any individual Tier 3 Supplier’s business, and had calculated the value of EOQ ordering by the method at [23] above but had not taken any steps to establish whether its assumptions reflected the actual value of EOQ ordering to any individual Tier 3 Supplier’s business: Annexure 1, par 39. In addition, the Script and the Background Materials did not contain information that explained or justified the basis on which the data sharing or EOQ ordering components of the ARC rebate had been determined by Coles: Annexure 1, par 40.
3. The CMs and the BCMs then attended training and were instructed to act in accordance with the Tier 3 ARC Plan: Annexure 1, par 41. For example, they were told (Annexure 1, par 42):

42.1 this is not optional for suppliers;

42.2. Coles ‘needed’ the CMs to achieve its $16 million target and that this was Coles’ ‘one off chance’ to close [its profit] gap at scale’;

42.3. they would be given a Script to follow and provided with Background Materials and FAQs to be used in the Tier 3 ARC process;

42.4. they were to finalise trading terms with each Tier 3 supplier, incorporating an ARC rebate, within two to three days of making the Ask;

42.5. if a supplier did not agree to pay an ARC rebate within one to two days, the CM or BCM was to consider using commercial leverage;

42.6. various prizes would be awarded to CMs and BCMs who ‘landed’ suppliers.

The training included presentations by Senior Managers.

1. The Tier 3 ARC Plan, as its core, was deliberate, orchestrated and relentless. As will be seen, its implementation by the CMs and the BCMs was also deliberate, orchestrated and relentless.
2. By about 14 October 2011, the CMs and BCMs had been provided with materials which directed their implementation of the Tier 3 ARC Plan: Annexure 1, par 43. The CMs had been provided with a list of the Tier 3 Suppliers to whom they were to deliver the Ask, as defined in the extract in [24] above. The BCMs had been provided with a list of the Tier 3 Suppliers to whom the CMs that reported to them were to deliver the Ask. CMs and BCMs had both been given a version of the Script for use by each CM in relation to each of the Tier 3 Suppliers, each of which contained the statements referred to in [25] above. The front page contained certain details concerning the supplier, including the supplier’s name, its supplier ID number, the CM and the BCM responsible for the supplier. The second page contained the amount of the ARC rebate that was to be sought from the particular supplier.
3. CMs and BCMs had also been given access to a version of the Background Materials for use by each CM in relation to each Tier 3 Supplier, each of which contained the statements referred to in [25] above, the name of the supplier and the amount of the ARC rebate that was to be sought from the supplier. CMs had been given access to revised trading terms for each Tier 3 Supplier to whom they were to deliver the Ask, which included the ongoing payments sought by way of the ARC rebate. BCMs had been given access to revised trading terms for each Tier 3 Supplier to whom the CMs who reported to them were to deliver the Ask, which included the ongoing payments sought by way of the ARC rebate: Annexure 1, par 43.
4. When the Tier 3 ARC Plan was implemented from 17 October 2011, Coles (Annexure 1, par 45):
5. Had not consulted with any Tier 3 Supplier regarding the actual value of data sharing to the Tier 3 Supplier or the actual value of EOQ ordering to the Tier 3 Supplier;
6. Had not identified or calculated any particular savings to any particular Tier 3 Supplier’s business in respect of data sharing;
7. Had not validated the assumptions it had made about the value of EOQ ordering to any particular Tier 3 Supplier with that Tier 3 Supplier; and
8. Had commenced negotiations with 18 of its Tier 1 and Tier 2 Suppliers about the amounts that those suppliers would pay to Coles in connection with the ARC program and only five of the 18 Tier 1 and Tier 2 Suppliers had agreed to pay any ARC rebate, and all for amounts below 0.7%.
9. Coles now accepts that by reason of the matters in [31] above, it should not have asserted to any Tier 3 Supplier that a 0.7% data sharing component of the ARC rebate reflected the actual value to that Tier 3 Supplier of data sharing and should not have made an assertion to any Tier 3 Supplier about the actual value of EOQ ordering to that Tier 3 Supplier: Annexure 1, par 46.
10. Against that background, it is appropriate to turn to the five admitted contraventions.

###### Contraventions

Section 22 of the ACL

1. Section 22 of the ACL (as it stood from 1 January to 31 December 2011, i.e. during the ARC relevant period) extended the unconscionable conduct provisions of the ACL to business transactions. It provided, relevantly, that a person must not, in trade or commerce, in connection with the acquisition or possible acquisition of goods from another person (other than a listed public company) engage in conduct that is, in all the circumstances, unconscionable.
2. Section 22(3) (as it stood during the ARC relevant period) set out a non-exhaustive series of considerations to which the Court may have regard for the purpose of determining whether Coles engaged in unconscionable conduct in relation to each of the Tier 3 Suppliers the subject of the admitted contraventions. Those considerations include, relevantly:
3. The relative strengths of the bargaining positions of Coles and each supplier: s 22(3)(a);
4. Whether each supplier was able to understand any documents relating to the acquisition or possible acquisition of their goods by Coles: s 22(3)(c);
5. Whether any undue influence or pressure was exerted on, or any unfair tactics were used against, each supplier by Coles in relation to the acquisition or possible acquisition of the supplier’s goods by Coles: s 22(3)(d); and
6. The extent to which Coles was willing to negotiate the terms and conditions of the contract with each supplier: s 22(3)(j)(i).
7. Courts have for some time characterised unconscionable conduct as conduct that is clearly unfair or unreasonable, or serious misconduct: see *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147 at 179 and *Hurley v McDonalds Australia Ltd* [1999] FCA 172 at [22]. Recently, in *Australian Competition & Consumer Commission v Lux Distributors Pty* *Ltd* [2013] FCAFC 90 at [41] the Court stated that “unconscionability” means “something not done in good conscience”. The Court went on to describe “unconscionability” as “conduct against conscience by reference to the norms of society that is in question” and that the norm “must be understood and applied in the context in which the circumstances arise”. It is against that test or description that the conduct is to be assessed.

Suppliers

1. Coles admits that during the ARC relevant period, it engaged in conduct, which was, in all of the circumstances, unconscionable in contravention of s 22 of the ACL, in relation to each of the Tier 3 Suppliers identified in [18] above.
2. The admitted contravention for each supplier will be considered in turn. As will become apparent, Coles’ conduct in relation to the suppliers had some recurring themes and actions. However, it also adopted certain tactics in relation to particular suppliers.
3. The recurring themes can be described as follows. Coles demanded that suppliers pay rebates to it. The rebates were amounts calculated by reference to past orders: orders that had been made and delivered. Coles pressed for speedy answers to its demands, often pointing to adverse commercial consequences it could and would impose on a supplier who did not agree. That conduct was unconscionable.

Austech

*Introduction and conduct*

1. Austech manufactures a range of household consumer products under the Orange Power, Aware, Actizyme and Stain Magic brands, which it supplies primarily to supermarkets. Coles acquired ten household consumer products from Austech for sale in Coles’ retail stores. Each product was sold by Coles under brands associated with Austech. The products acquired from Austech were part of the range acquired by Coles’ Homecare Business Category: Annexure 1, pars 111-112.
2. During the ARC relevant period, Coles was in a substantially stronger bargaining position than Austech, in particular because Coles represented a significant proportion of the sales of Austech’s products, Coles determined whether it would continue to acquire grocery products from Austech and whether it would substitute grocery products it was acquiring from Austech with products acquired from another supplier, and due to the matters set out in Annexure 1, par 17.
3. The following aspects of Coles’ admitted conduct are set out in detail in Annexure 1, pars 111-127: Coles’ admitted conduct prior to and during the Austech Ask, Austech’s response to the Austech Ask, Coles’ admitted threat to Austech and Austech’s agreement to the Austech Ask. It is that conduct which provides the foundation for the following findings of contravention.

*Finding of contravention of s 22 of the ACL*

1. In October 2011, Coles, in trade or commerce, in connection with the acquisition of grocery products from Austech, engaged in conduct that was, in all of the circumstances, unconscionable in contravention of s 22 of the ACL (as in force during the ARC relevant period). That unconscionable conduct involved Coles:
2. Requiring Austech to make an agreement to pay an ongoing rebate to it, and making threats of commercial consequences to Austech if Austech did not, namely that Coles would (i) provide certain ranging information requested by Austech but only after Austech agreed to pay the ongoing rebate and (ii) cease giving assistance to Austech from Coles’ replenishers;
3. Refusing to take into account the reasons given to Coles by Austech as to why the ARC rebate would not have the benefit to it that Coles claimed,

in all of the circumstances outlined in Annexure 1, Part III and pars 111 to 127.

1. Those circumstances included:
2. Coles being in a substantially stronger bargaining position relative to Austech: Annexure 1, par 113;
3. Coles failing to disclose sufficient details to enable Austech to understand how Coles had determined the figure of 0.7% for data sharing or the figure of 0.5% for EOQ ordering, which made up the Austech ARC rebate (Annexure 1, pars 117.3 and 121.3) and how the Austech ARC rebate reflected the value to Austech of data sharing: Annexure 1, par 127.1;
4. Coles exerting undue pressure and unfair tactics on Austech by:
	1. informing Austech that it was required to agree to the Austech Ask: Annexure 1, par 117.2.4;
	2. making repeated requests for a response to the Austech Ask from Austech despite the matters in (2) above: Annexure 1, par 121; and
	3. threatening Austech with commercial consequences as outlined in [43] above, if Austech did not agree to the Austech Ask;
5. Coles incorrectly asserting that the Austech ARC rebate reflected the value to Austech of data sharing and EOQ ordering in circumstances where it should not have made that assertion because Coles had not (Annexure 1, pars 39, 45, 117.4 and 118):
	1. consulted with Austech regarding the actual value of data sharing or EOQ ordering to Austech;
	2. identified or calculated any particular savings attributable to data sharing for Austech’s business; and
	3. established whether the assumptions it had used to calculate the EOQ ordering component of the rebate reflected the actual value of EOQ ordering to Austech’s business; and
6. Coles not conducting any informed negotiation with Austech about the value to Austech of data sharing or EOQ ordering: Annexure 1, par 127.2.

Oates

*Introduction and conduct*

1. Oates supplies mostly imported janitorial cleaning products, including chemicals, brushware and mops to Australian retailers and wholesalers. Coles acquired 35 products from Oates for sale in Coles’ retail stores. The products were sold under the Oates brand. The majority of the products Coles acquired from Oates were acquired for its Homecare Business Category: Annexure 1, pars 128-129.
2. During the ARC relevant period, Coles was in a substantially stronger bargaining position than Oates, in particular because Coles represented a significant proportion of the sales of Oates’ products, Coles determined whether it would continue to acquire grocery products from Oates and whether it would substitute grocery products it was acquiring from Oates with products acquired from another supplier, and due to the matters set out in Annexure 1, par 17.
3. The following aspects of Coles’ conduct are set out in detail in Annexure 1, pars 131-151: Coles’ admitted conduct prior to and during the Oates Ask, Coles’ admitted follow up to the Oates Ask, Coles’ admitted escalation of the Oates Ask, Coles’ admitted threat to Oates and Oates’ agreement to the Oates Ask. It is that conduct which provides the foundation for the following findings of contravention.

*Finding of contravention of s 22 of the ACL*

1. In October 2011, Coles, in trade or commerce, in connection with the acquisition of grocery products from Oates, engaged in conduct that was, in all of the circumstances, unconscionable in contravention of s 22 of the ACL (as in force during the ARC relevant period).
2. Coles’ unconscionable conduct involved requiring Oates to make an agreement to pay an ongoing rebate to it, and making threats of commercial consequences to it if it did not, namely that if Oates did not sign up to ARC:
3. This may impact on Coles’ decisions about ranging Oates’ products relative to other suppliers;
4. There may be risks to promotional activity for Oates’ products; and
5. Oates would be classified as a ‘transactional’ supplier, which may have implications for ranging,

in all of the circumstances set out in Annexure 1, Part III and pars 128 to 151.

1. Those circumstances included:
2. Coles being in a substantially stronger bargaining position relative to Oates: Annexure 1, par 130;
3. Coles failing to disclose sufficient details to enable Oates to understand how Coles had determined the figure of 0.7% for data sharing or the figure of 0.44% for EOQ ordering, which made up the Oates ARC rebate (Annexure 1, par 136.3) and how the Oates ARC rebate reflected the value to Oates of data sharing: Annexure 1, par 151.1;
4. Coles exerting undue pressure and unfair tactics on Oates by:
	1. Pressing Oates for a response to the Oates Ask within a short period of time: Annexure 1, pars 136.2.5, 136.2.6, 138.2, 138.3 and 143;
	2. Informing Oates that it was required to agree to the Oates Ask: Annexure 1, para 136.2.7;
	3. Making repeated requests for a response to the Oates Ask from Oates despite the matters in (2) above: Annexure 1, pars 138-140, 143 and 144; and
	4. Threatening Oates with commercial consequences (see [49] above) if Oates did not agree to the Oates Ask: Annexure 1, pars 147.2, 148 and 149.2; and
5. Coles incorrectly asserting that the Oates ARC rebate reflected the value to Oates of data sharing and EOQ ordering in circumstances where it should not have made that assertion because Coles had not (Annexure 1, pars 39, 45 and 136.4):
	1. Consulted with Oates regarding the actual value of data sharing or EOQ ordering to Oates;
	2. Identified or calculated any particular savings attributable to data sharing for Oates’ business; and
	3. Established whether the assumptions it had used to calculate the EOQ ordering component of the rebate reflected the actual value of EOQ ordering to Oates’ business; and
6. Coles not conducting any informed negotiation with Oates about the value to Oates of data sharing or EOQ ordering: Annexure 1, par 151.2.

Paton’s

*Introduction and conduct*

1. Paton’s manufactures chocolate coated macadamia nuts and other chocolate coated confectionery for domestic and international customers. Coles acquired six chocolate coated confectionery products from Paton’s for sale in Coles’ retail stores. Five of those products were private label products, which were acquired by Coles for sale under Coles’ own brands. The products were acquired from Paton’s for its Snacks and Beverages, or ‘Impulse’, Business Category (**Impulse Business Category**): Annexure 1, pars 48-49.
2. During the ARC relevant period, Coles was in a substantially stronger bargaining position than Paton’s, in particular because Coles represented a significant proportion of the sales of Paton’s products, Coles determined whether it would continue to acquire grocery products from Paton’s and whether it would substitute grocery products it was acquiring from Paton’s with products acquired from another supplier, and due to the matters set out in Annexure 1, par 17.
3. The following aspects of Coles’ admitted conduct are set out in detail in Annexure 1, pars 51-67: Coles’ admitted conduct prior to and during the Paton’s Ask, Paton’s response to the Paton’s Ask, including Coles providing revised Paton’s trading terms to Paton’s, Coles’ admitted escalation of the Paton’s Ask, Coles’ admitted threat to Paton’s and Paton’s agreement to the Paton’s Ask. It is that conduct which provides the foundation for the following findings of contravention.

*Finding of contravention of s 22 of the ACL*

1. In October 2011, Coles, in trade or commerce, in connection with the acquisition of grocery products from Paton’s, engaged in conduct that was, in all of the circumstances, unconscionable in contravention of s 22 of the ACL (as in force during the ARC relevant period).
2. Coles’ unconscionable conduct involved requiring Paton’s to make an agreement to pay an ongoing rebate to it, and making threats of commercial consequences to it if it did not, namely that Coles:
3. Would not promote Paton’s products;
4. Would not acquire new products from Paton’s;
5. Would not provide Paton’s with forecasting information that had been provided without charge prior to the requirement,

in all of the circumstances set out in Annexure 1, Part III and pars 48 to 67.

1. Those circumstances included:
2. Coles being in a substantially stronger bargaining position relative to Paton’s: Annexure 1, par 50;
3. Coles failing to disclose sufficient details to enable Paton’s to understand how Coles had determined the figure of 0.7% for data sharing or the figure of 0.55% for EOQ ordering, which made up the Paton’s ARC rebate (Annexure 1, pars 56.3, 59.4, 62 and 65.3) and how the Paton’s ARC rebate reflected the value to Paton’s of data sharing: Annexure 1, par 67.1;
4. Coles exerting undue pressure and unfair tactics on Paton’s by:
	1. Pressing Paton’s for a response to the Paton’s Ask within a short period of time: Annexure 1, pars 56.2.4, 56.2.5, 62.1, 65.1.2;
	2. Informing Paton’s that it was expected to agree to the Paton’s Ask: Annexure 1, par 65.1.1;
	3. Informing Paton’s that the Paton’s ARC rebate was a cost of doing business: Annexure 1, par 62.2;
	4. Making repeated requests for a response to the Paton’s Ask from Paton’s despite the matters in (2) above: Annexure 1, pars 60, 62 and 65; and
	5. Threatening Paton’s with commercial consequences outlined in [55] above if Paton’s did not agree to the Paton’s Ask: Annexure 1, par 65.2;
5. Coles incorrectly asserting that the Paton’s ARC rebate reflected the value to Paton’s of data sharing and EOQ ordering in circumstances where it should not have made that assertion because Coles had not (Annexure 1, pars 39, 45, 56.4 and 57):
	1. Consulted with Paton’s regarding the actual value of data sharing or EOQ ordering to Paton’s;
	2. Identified or calculated any particular savings attributable to data sharing for Paton’s business; and
	3. Established whether the assumptions it had used to calculate the EOQ ordering component of the rebate reflected the actual value of EOQ ordering to Paton’s business; and
6. Coles not conducting any informed negotiation with Paton’s about the value to Paton’s of data sharing or EOQ ordering: Annexure 1, par 67.2.

Stuart Alexander

*Introduction and conduct*

1. Stuart Alexander imports, markets and distributes branded products including chocolate, confectionery, chewing gum, salty snacks, beverages, sauces, syrups and tobacco, which it primarily supplies to supermarkets. Coles acquired goods for retail sale in Coles’ retail stores from Stuart Alexander for five different categories, including confectionery products that were acquired by Coles for its Impulse Business Category. The confectionery products that Coles acquired from Stuart Alexander were imported branded confectionery products: Annexure 1, pars 68-69.
2. During the ARC relevant period, Coles was in a substantially stronger bargaining position than Stuart Alexander, in particular because Coles represented a significant proportion of the sales of Stuart Alexander’s products, Coles determined whether it would continue to acquire grocery products from Stuart Alexander and whether it would substitute grocery products it was acquiring from Stuart Alexander with products acquired from another supplier, and due to the matters set out in Annexure 1, par 17.
3. The following aspects of Coles’ admitted conduct are set out in detail in Annexure 1, pars 71-92. Coles’ admitted conduct prior to and during the Stuart Alexander Ask, Coles’ admitted escalation of the Stuart Alexander Ask, Coles’ admitted threat to Stuart Alexander, Coles’ admitted provision of revised Stuart Alexander Confectionary trading terms to Stuart Alexander and Coles’ admitted further threats and escalation of the Stuart Alexander Ask. It is that conduct which provides the foundation for the following findings of contravention.

*Finding of contravention of s 22 of the ACL*

1. In October 2011, Coles, in trade or commerce, in connection with the acquisition of grocery products from Stuart Alexander, engaged in conduct that was, in all of the circumstances, unconscionable in contravention of s 22 of the ACL (as in force during the ARC relevant period).
2. Coles’ unconscionable conduct involved requiring Stuart Alexander to make an agreement to pay an ongoing rebate to it, and making threats of commercial consequences to it if it did not, namely that Coles would not acquire new products from Stuart Alexander and would not promote Stuart Alexander’s products, in all of the circumstances set out in Annexure 1, Part III and pars 68 to 92.
3. Those circumstances included:
4. Coles being in a substantially stronger bargaining position relative to Stuart Alexander: Annexure 1, par 70;
5. Coles failing to disclose sufficient details to enable Stuart Alexander to understand how Coles had determined the figure of 0.7% for data sharing or the figure of 0.31% for EOQ ordering, which made up the Stuart Alexander ARC rebate (Annexure 1, pars 76.3, 80 and 84) and how the Stuart Alexander ARC rebate reflected the value to Stuart Alexander of data sharing: Annexure 1, par 92.1;
6. Coles exerting undue pressure and unfair tactics on Stuart Alexander by:
	1. Pressing Stuart Alexander for a response to the Stuart Alexander Ask within a short period of time: Annexure 1, pars 76.2.4, 85 and 88;
	2. Making repeated requests for a response to the Stuart Alexander Ask from Stuart Alexander despite the matters in (2) above: Annexure 1, pars 79, 83, 85, 88 and 89; and
	3. Threatening Stuart Alexander with commercial consequences (see [61] above) if Stuart Alexander did not agree to the Stuart Alexander Ask: Annexure 1, pars 83 and 88;
7. Coles incorrectly asserting that the Stuart Alexander ARC rebate reflected the value to Stuart Alexander of data sharing and EOQ ordering in circumstances where it should not have made that assertion because Coles had not (Annexure 1, pars 39, 45, 76.4 and 77):
	1. Consulted with Stuart Alexander regarding the actual value of data sharing or EOQ ordering to Stuart Alexander;
	2. Identified or calculated any particular savings attributable to data sharing for Stuart Alexander’s business; and
	3. Established whether the assumptions it had used to calculate the EOQ ordering component of the rebate reflected the actual value of EOQ ordering to Stuart Alexander’s business; and
8. Coles not conducting any informed negotiation with Stuart Alexander about the value to Stuart Alexander of data sharing or EOQ ordering: Annexure 1, par 92.2.

Tru Blu

*Introduction and conduct*

1. Tru Blu manufactures, markets and supplies branded and private label carbonated (soft drink) beverages and cordials to retailers in Australia. The majority of the products that Coles acquired from Tru Blu for sale in Coles’ retail stores were private label products, which Tru Blu manufactured for Coles and packaged under Coles’ own brands. These products were acquired by Coles from Tru Blu on an order-to-order basis without a fixed-term contract. The products were acquired from Tru Blu for Coles’ Impulse Business Category: Annexure 1, pars 93-94.
2. During the ARC relevant period, Coles was in a substantially stronger bargaining position than Tru Blu, in particular because Coles represented a significant proportion of the sales of Tru Blu’s products, Coles determined whether it would continue to acquire grocery products from Tru Blu and whether it would substitute grocery products it was acquiring from Tru Blu with products acquired from another supplier, and due to the matters set out in Annexure 1, par 17.
3. The following aspects of Coles’ admitted conduct are set out in detail in Annexure 1, pars 96-110: Coles’ admitted conduct prior to and during the Tru Blu Ask, Tru Blu’s response to the Tru Blu Ask, Coles’ admitted threat to Tru Blu and action by Coles, Coles’ admitted further actions by Coles and Tru Blu’s response to the Tru Blu Ask. It is that conduct which provides the foundation for the following findings of contravention.

*Finding of contravention of s 22 of the ACL*

1. In October 2011, Coles, in trade or commerce, in connection with the acquisition of grocery products from Tru Blu, engaged in conduct that was, in all of the circumstances, unconscionable in contravention of s 22 of the ACL (as in force during the ARC relevant period).
2. Coles’ unconscionable conduct involved:
3. Requiring Tru Blu to make an agreement to pay an ongoing rebate to it, and making threats of commercial consequences to it if it did not, namely that Coles would not meet with Tru Blu and would not continue any contractual negotiations then on foot with Tru Blu; and
4. Refusing to take into account the reasons given to Coles by Tru Blu why the rebate would not have the benefits to it that Coles claimed,

in all of the circumstances set out in Annexure 1, Part III and pars 93 to 110.

1. The circumstances included:
2. Coles being in a substantially stronger bargaining position relative to Tru Blu: Annexure 1, par 95;
3. Coles failing to disclose sufficient details to enable Tru Blu to understand how Coles had determined the figure of 0.7% for data sharing or the figure of 0.1% for EOQ ordering, which made up the Tru Blu ARC rebate (Annexure 1, pars 99.4, 101 and 108.3) and how the Tru Blu ARC rebate reflected the value to Tru Blu of data sharing: Annexure 1, par 110.1;
4. Coles exerting undue pressure and unfair tactics on Tru Blu by:
	1. Pressing Tru Blu for a response to the Tru Blu Ask within a short period of time: Annexure 1, par 99.3;
	2. Making repeated requests for a response to the Tru Blu Ask from Tru Blu despite the matters in (2) above: Annexure 1, pars 104.1, 105 and 108; and
	3. Threatening Tru Blu with commercial consequences in [67] above if Tru Blu did not agree to the Tru Blu Ask: Annexure 1, pars 104.3, 105 and 108.2;
5. Coles incorrectly asserting that the Tru Blu ARC rebate reflected the value to Tru Blu of data sharing and EOQ ordering in circumstances where it should not have made that assertion because Coles had not (Annexure 1, pars 39, 45, 99.5 and 100):
	1. Consulted with Tru Blu regarding the actual value of data sharing or EOQ ordering to Tru Blu;
	2. Identified or calculated any particular savings attributable to data sharing for Tru Blu’s business; and
	3. Established whether the assumptions it had used to calculate the EOQ ordering component of the rebate reflected the actual value of EOQ ordering to Tru Blu’s business; and
6. Coles not conducting any informed negotiation with Tru Blu about the value to Tru Blu of data sharing or EOQ ordering: Annexure 1, par 110.2.

###### Principles applicable to relief

Orders sought by agreement

1. The parties jointly sought the making of particular orders by the Court.
2. The applicable principles are well established. First, there is a well-recognised public interest in the settlement of cases under the Act: *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285 at 291. Second, the orders proposed by agreement of the parties must be not contrary to the public interest and at least consistent with it: *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 at [18].
3. Third, when deciding whether to make orders that are consented to by the parties, the Court must be satisfied that it has the power to make the orders proposed and that the orders are appropriate: *Real Estate Institute* at [17] and [20] and *Australian Competition & Consumer Commission v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548 at [1]. Parties cannot by consent confer power to make orders that the Court otherwise lacks the power to make: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163.
4. Fourth, once the Court is satisfied that orders are within power and appropriate, it should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where both parties are legally represented and able to understand and evaluate the desirability of the settlement: *Australian Competition & Consumer Commission v Woolworths (South Australia) Pty Ltd (Trading as Mac’s Liquor)* [2003] FCA 530 at [21]; *Australian Competition & Consumer Commission v Target Australia Pty Ltd* [2001] FCA 1326 at [24]; *Real Estate Institute* at [20]-[21]; *Australian Competition & Consumer Commission v Econovite Pty Ltd* [2003] FCA 964 at [11] and [22] and *Australian Competition & Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2007] FCA 1370 at [4].
5. Finally, in deciding whether agreed orders conform with legal principle, the Court is entitled to treat the consent of Coles as an admission of all facts necessary or appropriate to the granting of the relief sought against it: *Thomson Australian Holdings* at 164.

Declarations

1. The Court has a wide discretionary power to make declarations under s 21 of the Federal Court Act: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-8; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2 and *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 99.
2. Where a declaration is sought with the consent of the parties, the Court’s discretion is not supplanted, but nor will the Court refuse to give effect to terms of settlement by refusing to make orders where they are within the Court’s jurisdiction and are otherwise unobjectionable: see, for example, *Econovite* at [11].
3. However, before making declarations, three requirements should be satisfied:
4. The question must be a real and not a hypothetical or theoretical one;
5. The applicant must have a real interest in raising it; and
6. There must be a proper contradictor:

*Forster v Jododex* at 437-8.

1. In this proceeding, these requirements are satisfied. The proposed declarations relate to conduct that contravenes the ACL and the matters in issue have been identified and particularised by the parties with precision: *Australian Competition & Consumer Commission v MSY Technology Pty Ltd* (2012) 201 FCR 378 at [35]. The proposed declarations contain sufficient indication of how and why the relevant conduct is a contravention of the ACL: *BMW Australia Ltd v Australian Competition & Consumer Commission* [2004] FCAFC 167 at [35].
2. It is in the public interest for the ACCC to seek to have the declarations made and for the declarations to be made(see the factors outlined in *ACCC* *v CFMEU* at [6]). There is a significant legal controversy in this case which is being resolved. The ACCC, as a public regulator under the ACL, has a genuine interest in seeking the declaratory relief and Coles is a proper contradictor because it has contravened the ACL and is the subject of the declarations. Coles has an interest in opposing the making of them: *MSY Technology* at [30]. No less importantly, the declarations sought are appropriate because they serve to record the Court’s disapproval of the contravening conduct, vindicate the ACCC’s claim that Coles contravened the ACL, assist the ACCC to carry out the duties conferred upon it by the Act (including the ACL) in relation to other similar conduct, inform the public of the harm arising from Coles’ contravening conduct and deter other corporations from contravening the ACL.
3. Finally, the facts and admissions in Annexure 1 provide a sufficient factual foundation for the making of the declarations: s 191 of the Evidence Act; *Australian Competition & Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665 at [57]-[59] endorsed by the Full Court in *Australian Competition & Consumer Commission v Dataline.Net.Au Pty Ltd* (2007) 161 FCR 513 at [92]; *Hadgkiss v Aldin (No 2)* [2007] FCA 2069 at [21]-[22]; *Secretary, Department of Health & Ageing* *v Pagasa Australia Pty Ltd* [2008] FCA 1545 at [77]-[79] and *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543.
4. For those reasons, declarations of contravention of s 22 of the ACL will be made recording Coles’ unconscionable conduct in relation to Austech ([43]-[44] above), Oates ([48]-[50] above), Paton’s ([54]-[56] above), Stuart Alexander ([60]-[62] above) and Tru Blu ([66]-[68] above).

Penalties

1. Sections 224(1)(a)(i) of the ACL relevantly empowers the Court, in respect of contraventions of provisions of Pt 2-2 (including s 22), to order the contravener to pay such pecuniary penalty in respect of “each act or omission” as the Court determines to be appropriate.
2. The ACCC and Coles jointly submitted that the Court should make orders imposing pecuniary penalties, pursuant to s 224, upon Coles totalling $3,700,000, in respect of its five admitted contraventions of s 22 of the ACL.

Factors relevant to setting a penalty

1. Section 224(2) of the ACL provides that, in determining the appropriate pecuniary penalty, the Court must have regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by a court in proceedings under Ch 4 or Pt 5-2 of the ACL to have engaged in any similar conduct. Those mandatory considerations are non-exhaustive.

Other penalty factors including approach to penalties sought by agreement of the parties

1. Section 224 of the ACL came into force on 1 January 2011. It was preceded by s 76E of the *Trade Practices Act 1974* (Cth) (the **TPA**) (now the Act) which came into force on 15 April 2010. The principles applied by this Court in determining penalties under s 76 of the TPA apply to penalties under s 76E of the TPA and s 224(2) of the ACL, unless the context of the infringements makes it plain that cannot be so: see *Global One Mobile Entertainment Pty Ltd v Australian Competition & Consumer Commission* [2012] FCAFC 134 at [114]-[119].
2. Recently, in *Australian Competition & Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 at [74]-[83], I addressed the other considerations that may be relevant to an assessment of a pecuniary penalty. I adopt that analysis. In conclusion, as stated in that judgment at [83]:

I remain of the view … that the role of the Court is to assess what it would do itself based on the facts. What penalty would the Court impose that is proportionate to the gravity of the contravening conduct? There is no prescribed method. The method will invariably vary depending on the facts.

1. It is against that background that I turn to consider the proposed penalties.

###### Analysis of Proposed Penalties

1. In applying those principles, the ACCC and Coles submitted that the proposed total penalty of $3.7 million is not inadequate or excessive, having regard to all relevant matters.
2. The maximum penalty for a body corporate for *each* act or omission that relates to a provision of Pt 2-2 of the ACL, which includes s 22, is $1.1 million. In considering the maximum penalties, Coles is not liable to more than one pecuniary penalty in respect of the same conduct: s 224(4)(b) of the ACL.

Nature, extent and duration of conduct and the circumstances in which conduct took place

Extent of the conduct

1. The admitted conduct occurred from April 2011 to December 2011. It concerned, and occurred during the course of, Coles’ communications with each of the five suppliers. The ARC rebates (the subject of these contraventions) have continued to apply to the Trading Arrangements of the five suppliers throughout the three year period since December 2011. Therefore, while the admitted contravening conduct itself occurred during a nine month period in 2011, the effects of those contraventions were experienced by each of the five suppliers from 2011 to 2014.

Background circumstances relating to the contravening conduct

1. Unconscionable conduct falls to be determined “in all the circumstances”: see Section 2.2.1 above. The conduct admitted by Coles to be unconscionable and in contravention of s 22 of the ACL in relation to each of the five suppliers took place in the context of the circumstances set out in Sections 2.1 and 2.2 above. Particular aspects of those circumstances should be emphasised.

Coles general business practices and profit targets

1. During the ARC relevant period, Coles set broad financial targets for its General Categories and Business Categories, including profit targets: see Annexure 1, par 19. Achieving profit targets was a significant focus of Coles in the ARC relevant period, and Coles incentivised its CMs and BCMs to meet these targets by way of prizes: see Annexure 1, pars 19 and 42.6.
2. One way for Coles’ CMs and BCMs to meet profit targets was by demanding or seeking additional payments from suppliers. Coles set aside specific days for this purpose (Annexure 1, par 19.3), and encouraged its CMs and BCMs to seek rebates and additional payments from suppliers. In addition to broad financial targets, Coles also set specific profit targets for particular initiatives. One such initiative was the Tier 3 ARC rebate target: Annexure 1, pars 19 and 33.

Development of the ARC Plan

1. In or around April 2011, Coles had identified that it could increase its EBIT by identifying opportunities for the recovery from suppliers of cost savings which Coles considered had been, or would be, achieved across its end to end supply chain: Annexure 1, par 21. In  about October 2011, Coles introduced the Tier 3 ARC Plan to its CMs and BCMs and conveyed to them that the Tier 3 ARC Plan was a one-off chance for Coles to close its profit gap: Annexure 1, pars 41 and 42.
2. The Tier 3 ARC Plan, as developed by Coles, was a strategy for Coles to close what it described as a “profit gap” which included the following features:
3. Seeking payments from its suppliers by way of an ongoing rebate in the suppliers’ Trading Arrangements: Annexure 1, pars 20-23 and 28;
4. The division of its suppliers into “tiers”, with Tier 3 comprising suppliers considered by Coles to be smaller and for whom Coles’ documents stated that Coles represented a “very significant part” of the supplier’s business: see Section 2.1.1 above and Annexure 1, pars 24-27;
5. Modification of the method by which Coles would seek payment of the ARC rebate from suppliers, by reference to the size of the supplier: Annexure 1, pars 34-35;
6. Pre-determined targets of the amount of money it wanted to obtain from suppliers, including $16 million from the Tier 3 Suppliers: Annexure 1, par 33;
7. Attributing values to the ARC rebate to be paid by each supplier to Coles but without having identified or calculated any such value to any particular Tier 3 Supplier: Annexure 1, pars 31 and 32;
8. Coles’ CMs and BCMs seeking the ARC rebate from its Tier 3 Suppliers based on the values Coles had attributed to the ARC rebate: Annexure 1, pars 56.1, 76.1, 98, 117.1 and 136.1; and
9. Conveying those instructions to CMs and BCMs, in the context of the importance of the Tier 3 ARC Plan to Coles: Annexure 1, pars 41-44.

Delivery of the ARC instructions

1. The ARC instructions included the following features (see Section 2.1.2 above):
2. They conveyed a focus on the importance of the ARC Plan to Coles’ profits, including by BCMs and GMs (who are Coles’ Senior Managers);
3. They conveyed that the CMs were not to negotiate the Ask;
4. They conveyed that there was a sense of urgency about having each supplier agree to new trading terms incorporating the ARC rebate within a number of days; and
5. They did not provide the CMs and BCMs with sufficient information about how Coles had attributed the values to the ARC rebate, such that those CMs and BCMs were then unable to provide adequate explanations of the ARC rebate to the supplier to whom they delivered the Ask.

Relationship of the background circumstances to specific instances of unconscionable conduct

1. Coles’ practices, plans and instructions were deliberate, orchestrated and relentless and formed the circumstances in which the unconscionable conduct against the five specific suppliers occurred.

Nature of the conduct

1. The conduct had common elements which are factors relevant to the determination of the appropriate penalty.
2. The five suppliers the subject of the admitted contraventions from whom Coles sought payment of the ARC rebate:
3. Were significantly smaller than Coles (all had annual revenue of less than a fraction of 0.1% of Coles’ annual revenue);
4. Were highly dependent on their ongoing sales to Coles for their business to remain viable;
5. Would have experienced significant detriment if Coles had ceased, or substantially decreased, its trading with them;
6. Were provided with inadequate and incorrect information by Coles in relation to the value to them of the ARC rebate;
7. Did not agree with, or could not understand, the value that Coles had attributed to the ARC rebate;
8. Were pressured by Coles to agree to the ARC rebate;
9. Feared the impact on their ongoing dealings with Coles if they refused to pay the ARC rebate, and felt that they had no choice but to agree to the ARC rebate; and
10. Commenced paying, and continued to pay, the ARC rebate, despite the fact that they did not consider, at the time they agreed to the ARC rebate, that ARC had the value to their business as represented by Coles.
11. In relation to these suppliers, Coles was motivated by profit in seeking agreement to the ARC rebate, did not convey to the suppliers that it was optional for them to agree to the ARC rebate, did not provide the suppliers with adequate information, or provided them with incorrect information, about the ARC rebate, and threatened commercial consequences as leverage to obtain the agreement of the suppliers.
12. In addition to those common elements, each supplier was subjected to particular threats of commercial consequences as follows:
13. In relation to Austech, Coles would cease giving support to the supplier from Coles’ replenishers and would provide certain ranging information requested by Austech but only after it agreed to pay the ongoing ARC rebate: see Section 2.2.2.1 above;
14. In relation to Oates, if it did not agree to the ARC:
	1. this may impact on Coles’ decision about the ranging of Oates’ products relative to other suppliers;
	2. there may be risks to promotional activity for Oates’ products;
	3. Oates would be classified as a ‘transactional’ supplier, which may have implications for ranging;
15. In relation to Paton’s and Stuart Alexander:
	1. Coles would not promote the supplier’s products;
	2. Coles would not acquire new products from the supplier;
16. In relation to Paton’s, Coles would not provide it with forecasting information that it had previously been provided with, without charge, prior to the Paton’s Ask;
17. In relation to Tru Blu, Coles would not meet with it about its business and Coles would not continue contractual negotiations then on foot with it.
18. The ACCC submitted, Coles accepts and the Court finds that each of those acts in [100], in all of the circumstances, was contrary to conscience and in contravention of s 22 of the ACL.
19. Coles’ misconduct was serious. I reject Coles’ submission that these contraventions are somehow distinguishable, or of a less serious nature, because they did not involve vulnerable consumers. Coles’ conduct did not involve vulnerable consumers. Coles’ conduct did involve vulnerable *suppliers* – some of Coles’ smaller suppliers: see Sections 2.2.1 and 2.2.2 above. Indeed, their lack of size was one of the reasons why they were classified as Tier 3 Suppliers and targeted by Coles. These vulnerable suppliers were up against Coles – the second largest retailer of grocery products in Australia. It is unsurprising that Coles admits that it had substantially stronger bargaining power. It is difficult to envisage circumstances involving a larger disparity in bargaining power.
20. Coles’ conduct was also serious because the admitted unconscionable conduct was difficult for the ACCC to detect due to the reluctance of smaller suppliers to report complaints about, and assist the ACCC with investigations into, the conduct of major retailers, when they rely on these retailers for the ongoing viability of their businesses. The contraventions also showed a failure of Coles’ internal compliance systems and processes, which had the potential to impact a number of suppliers with whom representatives of Coles had dealings.
21. Coles’ misconduct was serious, deliberate and repeated. Coles misused its substantial bargaining power. Its conduct was “not done in good conscience”.
22. Coles accepted that in its dealings with the five suppliers it treated them in a manner inconsistent with acceptable business practice, was not respectful of the suppliers’ needs for full and timely transparency, and nor did it properly respect the responsibility attached to Coles’ bargaining power.
23. The ACL provides for significant penalties for these contraventions. It is a matter for the Parliament to review whether the maximum available penalty of $1.1 million for each contravention of Pt 2-2 of the ACL by a body corporate is sufficient when a corporation with annual revenue in excess of $22 billion acts unconscionably. The current maximum penalties are arguably inadequate for a corporation the size of Coles.

Amount of loss caused and profit gained

1. Where it is easy to imagine detriment to consumers, the Courts have stated that the absence of evidence of loss or damage to consumers constitutes a factor in mitigation of penalty: *Singtel Optus Pty Ltd v Australian Competition & Consumer Commission* [2012] FCAFC 20 at [58]-[59] and the case there cited. That principle applies equally in assessing detriment to suppliers. Of course, the inability to quantify financial loss caused to the suppliers by the contraventions does not mean that no loss or harm has been suffered: see *Australian Competition & Consumer Commission v Global One Mobile Entertainment Limited* [2011] FCA 393 at [135].
2. Here, it was common ground that the five affected suppliers received access to the Supplier Portal and had their products ordered using EOQ ordering. However, it is not known whether those suppliers actually received the benefits alleged to exist by Coles throughout the period that those suppliers were making the demanded payments to Coles.
3. Coles’ wrongful conduct denied the five suppliers the ability to decide not to pay the ARC rebate, as their choices were to pay the additional rebate or be subject to commercially detrimental consequences, which would have likely caused them loss. That is unconscionable. The full extent of any loss or damage caused to the five suppliers by Coles’ unconscionable conduct has not been quantified. However, it can and should be inferred that Coles’ unconscionable conduct had a detrimental effect on each of the five suppliers.

Whether the respondent has engaged in similar prior conduct

1. Coles has not previously been alleged by the ACCC, nor been found, to have engaged in unconscionable conduct. Coles has, on a previous occasion, been found by the Court to have engaged in conduct in contravention of the ACL. These contraventions related to claims made by Coles that partially baked bread sold in its stores was freshly baked, or baked that day, which were held to be misleading and deceptive conduct in contravention of s 18, false or misleading representations about goods in contravention of s 29 and misleading conduct as to the nature of goods in contravention of s 33: *Australian Competition & Consumer Commission v Coles Supermarkets Australia Pty Limited (No 2)* [2014] FCA 1022. It is necessary to add to that analysis the findings of contravention in relation to the Claims Proceeding in Section 3 below. They cannot be, and should not, be ignored.

Size of contravener, including market share, and its financial position

1. These matters have been addressed earlier: see Section 2.1.1 above.
2. During the ARC relevant period, Coles was the second largest supplier of retail grocery products to customers in Australia supplying approximately 30% of the grocery products supplied for retail sale to customers in Australia and, together with Woolworths, supplied approximately 60-70% of the grocery products supplied for retail sale to customers in Australia: Annexure 1, par 9 and 10. Coles operated retail stores in every Australian State and mainland Territory. During the 2011 to 2012 financial year, Coles’ annual sales revenue derived from Coles’ retail supermarkets was about $23.3 billion and its profits were increasing.
3. Coles’ commercial activities substantially permeate the commercial and consumer life of the public. It is appropriate to take those facts into account in determining an appropriate level of penalty: *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) ATPR 41-562 at 43,815-6.

The deliberateness of the contravening conduct

1. The conduct in relation to each of the five suppliers was deliberate and was engaged in within the context of the broader ARC Program and the Tier 3 ARC Plan: see [5] and Section 2.1.2 above.

Involvement of senior employees or management

1. The ARC Program and Tier 3 ARC Plan have been described earlier: see [5] and Section 2.1.2. They were approved Coles’ corporate strategies. The contravening conduct in relation to the five suppliers involved Coles’ CMs and BCMs. BCMs are part of Coles’ senior management: Annexure 1, par 13.
2. Coles does not admit that any other members of Coles’ senior management engaged in the conduct the subject of the contraventions. However, Coles admits that its GMs and BCMs (who are Coles’ Senior Managers), at least were aware of, and encouraged, the practice of seeking money from suppliers to meet profit targets, endorsed the ARC plan, gave the ARC instructions to Coles’ CMs and BCMs and did not take adequate steps to prevent the contravening conduct by CMs and BCMs.

Culture of compliance and corrective measures in response to contravention

1. At the time of the contravening conduct, Coles had trade practices compliance policies in place. They did not prevent the conduct occurring. The conduct of Coles’ CMs and BCMs the subject of the admitted contraventions indicates that the programs Coles had in place were inadequate. Coles accepts that significant penalties are both a necessary and sufficient deterrent.
2. As these reasons for judgment record, Coles and the ACCC have negotiated a resolution of these proceedings. The ACCC now holds the view that Coles has accepted, at the most senior level of its business, that the conduct the subject of the contraventions was unacceptable and that there is genuine contrition at that level of the company regarding Coles’ treatment of its smaller suppliers. At the hearing, Senior Counsel for Coles informed the Court that Coles did accept, at the most senior level of its business, that the contravening conduct was unacceptable and involved serious contraventions, and Coles was genuinely contrite about its treatment of its suppliers.
3. It is important to record that Coles has undertaken to the ACCC to have an independent arbiter review its conduct with the Tier 3 Suppliers and assess their entitlement to refunds of any relevant payment. That undertaking, which is Annexure 3 to these reasons for judgment, is addressed further in Section 2.4.8 below.
4. The ACCC also acknowledged that Coles has taken a number of steps to address the failures that led to these contraventions including:
5. A best practice compliance framework and additional training to ensure Coles’ suppliers are treated in an open and fair manner;
6. A Supplier Charter, which sets out public commitments made by Coles in relation to how it will deal with suppliers;
7. A dispute resolution framework, which provides suppliers with the right to raise concerns on a confidential basis with an independent arbiter; and
8. Public support for a Food and Grocery Code.
9. Coles provided the Court with a copy of documents which recorded the matters referred to in [120] above. I have read those documents. I accept that on their face they record that Coles has taken the steps outlined. It is by no means clear that the steps address the failures that led to the contraventions because what led to them was not explained.

Co-operation

1. Coles has cooperated with the ACCC during the course of its investigation and in relation to the resolution of the proceeding.
2. Coles also has offered to the ACCC (and the ACCC has accepted) the statutory undertaking set out in Annexure 3 to these reasons for judgment in respect of the Tier 3 Suppliers. That undertaking is an important part of the resolution of this proceeding. As the ACCC submitted, this undertaking facilitated the confinement of these proceedings with the result that the ACCC no longer considers it necessary to pursue orders to protect the interests of all the Tier 3 Suppliers listed in Annexure A to that undertaking.
3. This cooperation, and Coles’ agreement to resolve the proceedings, has saved the ACCC and the Court (and hence ultimately the community) the cost and burden of a long, complex and expensive case. In those circumstances, Coles is entitled to a discount on the penalty that otherwise would have been appropriate, for its voluntary acknowledgment of liability and cooperation. Had Coles not cooperated, and had it been found to have committed the alleged contraventions following a contested hearing, the ACCC would have sought and the Court would have imposed significantly higher penalties.

Maximum penalties and one transaction principle

1. As noted above, the maximum penalty for a body corporate for each act or omission that relates to a provision of Part 2-2 of the ACL, which includes s 22, is $1.1 million: Item 1 of s 224(3) of the ACL.
2. Courts are required to pay careful attention to maximum penalties when imposing penalties because the Parliament has legislated for them, because they invite comparison between the worst possible case and the case before the court at the time and, in that regard they provide a yardstick, taken and balanced with all of the other relevant factors: *Markarian v The Queen* (2005) 228 CLR 357 at [31].
3. In considering the maximum penalties, Coles is not liable for more than one pecuniary penalty in respect of the same conduct: s 224(4)(b) of the ACL. In determining what constitutes the same conduct, regard may be had to the “one transaction” or “one course of conduct” principle as explained by the majority of the Full Court in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 194 IR 461 39 at [39] and [41]:

The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is “the same criminality” and that is necessarily a factual specific inquiry.

…

In other words, where two offences arise as a result of the same or related conduct that is not a disentitling factor to the application of the single course of conduct principle but a reason why a Court may have regard to that principle, as one of the applicable sentencing principles, to guide it in the exercise of the sentencing discretion. It is a tool of analysis which a Court is not compelled to utilise.

(Citations and emphasis omitted.)

1. The five admitted contraventions of s 22 of the ACL each involve discrete conduct against five individual suppliers. It is appropriate that a discrete penalty is imposed for each admitted contravention.

Identifying the penalties for particular contraventions

1. Having regard to all of those factors, I accept that the following penalties for each contravention are appropriate and they are imposed in relation to:
2. Austech, in the sum of $700,000;
3. Oates, in the sum of $800,000;
4. Paton’s, in the sum of $800,000;
5. Stuart Alexander, in the sum of $700,000;
6. Tru Blu, in the sum of $700,000.
7. These penalties provide a significant mark of the Court’s disapproval for the wrongdoing associated with each course of conduct (when examined against the statutory maximum for a single breach). It also makes appropriate allowance for the various mitigating features identified above.
8. The ACCC submitted, and Coles accepted, that the threats made to Oates and Paton’s were the more serious of the threats made against the five suppliers, as they involved threats to cease existing agreements with those suppliers, which would significantly impact the supplier’s business and ability to supply products to Coles in the future. The higher penalties in relation to Oates and Paton’s reflect this and are appropriate.

Totality principle

1. In determining the appropriate penalty, it is also relevant to take into account the “totality principle”. Put simply, the total penalty for related offences ought not to exceed what is proper for the entire contravening conduct involved: *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,169. That principle applies to civil penalties: *Australian Safeway Stores Pty Ltd* at 43,817.

Conclusion on appropriate penalty

1. In all these circumstances, taking into account the factors relevant to setting a penalty as well as applying the totality principle, the total pecuniary penalties for Coles of $3,700,000 are appropriate for the admitted contraventions. That sum should be paid to the Commonwealth within 30 days.

###### Costs

1. Coles agreed to pay $1 million towards the ACCC’s costs of and incidental to this proceeding within 30 days of the Court’s order. That order will be made.

##### VID 609 of 2014 – THE CLAIMS PROCEEDING

###### Background

1. The following summary is sourced from, and cross referenced to, the SoAFA in Annexure 2. As will be apparent, it repeats certain elements of the SoAFA filed in relation to the ARC Proceeding (see Annexure 1). Where the common material has been addressed in the context of the ARC Proceeding, the earlier analysis is identified and cross referenced to Annexure 2.
2. The circumstances relevant to the conduct in the Claims Proceeding relate to the period from about December 2010 to January 2012 but the conduct the subject of the admitted contraventions occurred from June 2011 to about December 2011 (**Claims relevant period**).
3. The Tier 3 Suppliers the subject of the Claims Proceeding were:
4. Austech;
5. Oates;
6. Colonial Farm (Aust.) Pty Ltd (**Colonial Farm**);
7. Baview Seafoods Pty Ltd (**Bayview**); and
8. Benny’s Confectionary Pty Ltd (**Benny’s**),

(collectively, the **Claims Suppliers**).

1. Coles acquired grocery products for retail sale from the Claims Suppliers pursuant to Trading Arrangements negotiated between Coles and each supplier: see Section 2.1.2 above and Annexure 2, par 13. The Claims Proceeding concerns unconscionable conduct where Coles sought payments from the Claims Suppliers outside of the Trading Arrangements. The payments were for so called profit gaps, waste and markdowns, and short or late deliveries and were deducted by Coles from monies due to be paid to that supplier for products that it had already supplied to Coles. Related conduct in relation to “deferred deals” and unauthorised withholding or retention of money was also unconscionable as outlined below.

Coles’ market share and power

1. Coles’ market share and power during the Claims relevant period is the same as that considered in Section 2.1.1 above: see Annexure 2, pars 4-12. The Claims Suppliers had, during the Claims relevant period, total annual revenue of less than 0.5% of Coles’ total annual revenue.

Coles’ Trading Arrangements

1. As with the ARC Proceeding, most of the conditions relating to the acquisition by Coles of grocery products from a supplier, including whether Coles would continue to acquire products from that supplier, were determined by Coles: Annexure 2, par 16.

Coles’ Business Practices

1. During the Claims relevant period, Coles continued to set sales and profit targets for its General Categories and Business Categories, and encouraged and / or required its CMs and BCMs to meet these profit targets, including by engaging in three practices – in relation to profit gaps, waste and markdowns and penalties for short or late deliveries (the **Claims Proceeding Practices**). It also awarded prizes to its CMs and BCMs for meeting profit targets and set aside days which were referred to within Coles as “Profit Day” or “Perfect Profit Day” and set targets for Business Categories of money to be “secured” by the Business Categories from suppliers, including for the Claims Proceeding Practices: Annexure 2, par 18. Each of these practices will be considered in turn.

Profit Gaps

1. Coles expected its profit in respect of a supplier’s products to increase in line with a supplier’s sales growth. If Coles’ profit on a supplier’s product was growing behind the supplier’s sales to Coles, Coles referred to the difference between the supplier’s sales growth and Coles’ profit growth as a **profit gap**: Annexure 2, par 19.
2. Coles knew that profit gaps in respect of any particular product could be caused by Coles’ own acts and omissions and by other matters which were largely or entirely outside the control of suppliers. That did not deter Coles. Instead, during the Claims relevant period, Coles encouraged and / or required its CMs and BCMs to seek payments or other funding from suppliers in order to make up purported profit gaps: Annexure 2, pars 20-21.

Waste and Markdowns

1. During the Claims relevant period, Coles recorded what it claimed to be the cost to it of products that Coles acquired from a supplier that were identified as lost, damaged or unfit for sale while in Coles’ retail stores (**waste**) and the cost to it of Coles’ employees or agents reducing, or marking down, the price in Coles’ retail stores of products Coles acquired from a supplier (**markdowns**): Annexure 2, par 22.
2. As was the case with profit gaps, Coles knew that waste and markdowns in respect of any particular product could be caused by its own acts or omissions rather than any act or omission by the supplier of that product. Again, that did not deter Coles. Instead, during the Claims relevant period, Coles encouraged and / or required its CMs and BCMs to seek payments from suppliers on the premise that Coles had recorded waste or markdowns for the supplier’s products: Annexure 2, pars 23-24.

Short or Late Deliveries

1. During the Claims relevant period, Coles determined that it would impose “penalties” or “fines”, in the form of monetary penalties, on suppliers that Coles had recorded as not delivering the products that Coles had ordered from them on time and in full in accordance with the order placed by Coles (**short or late deliveries**): Annexure 2, par 25.
2. Coles encouraged and / or required its CMs and BCMs to seek those monetary penalties but those monetary penalties were not calculated by reference to any assessment by Coles of the likely cost to Coles, if any, of the short or late delivery and where short or late deliveries may not lead to any loss to Coles: Annexure 2, par 26.

###### Contraventions

Section 22 of the ACL

1. This provision has been addressed earlier: see Section 2.2.1 above. Section 22 of the ACL was in the same form during the ARC relevant period and the Claims relevant period.

Suppliers

1. Coles admits that during the Claims relevant period it engaged in conduct which was, in all the circumstances, unconscionable in contravention of s 22 of the ACL (as it stood at the time), in relation to each Claims Supplier. The admitted contraventions for each Claims Supplier will be considered in turn. Again, as will become apparent, Coles’ conduct has some recurring themes and actions. However, it also adopted certain tactics in relation one or more of the Claims Suppliers.

Austech

*Introduction and conduct*

1. The products Austech manufactures and supplied to Coles are summarised in Section 2.2.2.1 above. During the Claims relevant period, Coles was in a substantially stronger bargaining position than Austech: see Section 2.2.2.1 above and Annexure 2, par 29.
2. The following aspects of Coles’ admitted conduct are set out in detail in Annexure 2, pars 30-78: Coles’ admitted purported profit gap claims, Coles’ admitted claims for retrospective waste payment, Coles’ admitted conduct in seeking and having Austech agree to the deferred deal and then refusing to end the deferred deal. It is that conduct which provides the foundation for the following findings of contravention.

*Findings of contravention of s 22 of the ACL*

1. In June 2011 (in relation to the profit gap and retrospective waste claims) and from July to November 2011 (in relation to the deferred deal conduct), Coles in connection with the acquisition of grocery products from Austech engaged in conduct that was, in all the circumstances, unconscionable resulting in three separate contraventions of s 22 of the ACL (as in force during the Claims relevant period).

*Profit gap*

1. The unconscionable conduct towards Austech which related to the profit gap involved Coles demanding that Austech make payments of $25,845 and $15,516.74 to it in relation to profit gaps, when the payments were not the subject of prior agreement between Coles and Austech and the payments were attributable to issues that arose before Austech owned the relevant product, in all of the circumstances set out in Annexure 2, Part III and pars 27 to 48.
2. Those circumstances included:
3. Coles being in a substantially stronger bargaining position relative to Austech: Annexure 2, par 29;
4. Coles knew or ought to have known it had no reasonable basis to believe that it was entitled to seek the payments: Annexure 2, pars 33, 39.2, 39.5, 40.1, 41 and 44.2;
5. Coles failing to disclose sufficient details to enable Austech to understand the basis upon which the demands for payments were made, and how each of the Austech purported profit gaps were calculated and were caused, despite requests for such information: Annexure 2, pars 31.3, 34.3, 35.1, 36.5, 38.1, 42.2 and 43.2;
6. Coles exerting undue pressure on Austech by pressing Austech for an urgent response to Coles’ demands for payments (Annexure 2, pars 35.3, 39.7 and 43.5) and asserting an entitlement to a higher payment for a profit gap, which it had no reasonable basis to believe it was entitled to, if Austech did not agree to make the payments referred to in [153] above (Annexure 2, pars 43.3, 44.2 and 45); and
7. Coles not being willing to negotiate the payments, including the amount or when Coles would withhold the money: Annexure 2, pars 31.2, 39.6, 43.4, 45, 46.4, 47 and 48.

*Retrospective waste*

1. The unconscionable conduct towards Austech which related to retrospective waste involved Coles demanding that Austech make a payment of $5,700 to it in relation to retrospective waste and using a purported profit gap claim as leverage in negotiations, in all of the circumstances set out in Annexure 2, Part III and pars 27 to 29 and 49 to 58.
2. Those circumstances were similar to those identified earlier in relation to the profit gap claim and included:
3. Coles being in a substantially stronger bargaining position relative to Austech: Annexure 2, par 29;
4. Coles knew or ought to have known it had no reasonable basis for asserting an entitlement to seek the payment: Annexure 2, pars 52 and 57.1;
5. Coles failing to disclose sufficient details to enable Austech to understand the causes of waste, what contribution, if any, Austech had made to the causes of waste, the basis upon which the demands were made or how the payment was calculated: Annexure 2, pars 51.1, 53 and 57.2;
6. Coles exerting undue pressure on Austech by pressing Austech for an urgent response to Coles’ requests for payments (Annexure 2, pars 50.3 and 57) and asserting an entitlement to a payment for a profit gap, which it had no reasonable basis to believe it was entitled to, if Austech did not agree to make the payment referred to in [155] above: Annexure 2, pars 54-57; and
7. Coles not being willing to negotiate the payments, including the amount: Annexure 2, pars 50.1, 53, 54 and 58.

*Deferred deal*

1. During the Claims relevant period, Coles used the term “deferred rebate” to refer to a rebate paid by a supplier to Coles that was calculated per unit of a supplier’s product and would be in effect for a certain period of time or would apply to a certain number of units of product.
2. During the Claims relevant period, Coles conducted a range review in relation to household cleaning products that it acquired from its suppliers for sale in Coles’ retail stores. Following that review, Coles advised Austech that its Shower Cleaner line was to be deleted, and Coles required Austech to fully fund the markdown of that product line.
3. Following a request from Austech, Coles agreed not to delete Shower Cleaner from Coles’ retail stores. Coles informed Austech that in order for Coles to continue to acquire products from Austech, Coles needed to improve its profit margin on those products, and required a deferred rebate from Austech.
4. On 25 August 2011, Austech indicated to Coles that it was financially difficult for Austech to make changes to improve Coles’ profit margin, partly because Austech had not increased its price to Coles for a number of years, despite an increase in the costs of essential raw materials. Notwithstanding that difficulty, after informing Coles that Austech considered it was necessary for Austech to have its products available for sale in Coles’ retail stores, Austech agreed to offer temporary deferred rebates on three of its product lines to improve Coles’ profit margin (the **Austech deferred deal**).
5. The unconscionable conduct towards Austech which related to the Austech deferred deal involved Coles refusing to end the Austech deferred deal and cease deducting payments pursuant to that agreement, in all of the circumstances set out in Annexure 2, Part III and pars 27 to 29 and 59 to 78.
6. Those circumstances included:
7. Coles being in a substantially stronger bargaining position relative to Austech, and particularly in relation to the relevant product: Annexure 2, pars 29 and 62;
8. Coles being informed that it was financially difficult for Austech to make the payments for the Austech deferred deal: Annexure 2, par 67;
9. Coles using unfair tactics by giving assurances that the Austech deferred deal would conclude on the agreed date in the context of a request for that assurance from Austech when Austech was at the same time being asked by Coles to consider a separate rebate being sought by Coles for the ARC rebate, and then refusing to end the Austech deferred deal (Annexure 2, pars 71-75); and
10. Coles not being willing to negotiate with Austech about the Austech deferred deal: Annexure 2, pars 75 and 78.

Oates

*Introduction and conduct*

1. The products Oates manufactures and supplied to Coles are summarised in Section 2.2.2.2 above. During the Claims relevant period, Coles was in a substantially stronger bargaining position that Oates: see Section 2.2.2.2 above and Annexure 2, par 81.
2. Coles’ admitted purported profit gap claims and unauthorised withholding and retention of money is set out in detail in Annexure 2, pars 82-110. It is that conduct which provides the foundation for the following findings of contravention.

*Findings of contravention of s 22 of the ACL*

1. In June 2011 (in relation to the profit gap claims) and from July to December 2011 (in relation to the unauthorised withholding and retention of money), Coles in connection with the acquisition of grocery products from Oates engaged in conduct that was, in all the circumstances, unconscionable resulting in two separate contraventions of s 22 of the ACL (as in force during the Claims relevant period).

*Profit gap*

1. The unconscionable conduct towards Oates which related to the profit gap involved Coles demanding and processing a payment for a purported profit gap of $246,000 towards Coles’ profit, which was outside previously agreed terms and conditions, and without the agreement of Oates, in all of the circumstances set out in Annexure 2, Part III and pars 79 to 93.
2. Those circumstances included:
3. Coles being in a substantially stronger bargaining position relative to Oates: Annexure 2, par 81;
4. Coles knew or ought to have known it had no reasonable basis for asserting an entitlement to seek the payment (Annexure 2, par 86) because, amongst other things, the payments were not the subject of prior agreement between Coles and Oates (Annexure 2, par 82) and Coles knew that a substantial cause of the profit gap was due to the unilateral actions taken by Coles: Annexure 2, pars 85.3 and 87.3;
5. Coles failing to disclose sufficient details to enable Oates to understand the basis upon which the demands were made, and how the Oates purported profit gap was calculated and was caused, despite requests for such information: Annexure 2, pars 83.3, 88-91 and 92.1; and
6. Coles exerting undue pressure and using unfair tactics on Oates by pressing Oates for an urgent response to Coles’ requests for payments (Annexure 2, pars 84.2 and 89.4), by informing Oates that Coles would not work collaboratively with Oates for the next year if Oates did not make the payment and by processing the payment without Oates’ approval: Annexure 2, par 89.2; and
7. Coles not being willing to negotiate the payment, including when Coles would withhold the money: Annexure 2, pars 83.2, 85, 87, 89.1 and 93.

*Unauthorised withholding and retention of money*

1. The unconscionable conduct towards Oates which related to the unauthorised withholding and retention of money involved Coles refusing to repay, and retaining, the monies referred to in relation to the profit gap above, in all of the circumstances set out in Annexure 2, Part III and pars 79 to 81 and 94 to 110.
2. Those circumstances included:
3. Coles being in a substantially stronger bargaining position relative to Oates: Annexure 2, par 81;
4. Coles knew or ought to have known it had no lawful entitlement to withhold and retain the money: Annexure 2, pars 94-99 and 102.2;
5. Coles exerting undue pressure and using unfair tactics on Oates by failing to return the money that it had withheld, without agreement or approval, from money due to Oates despite repeated requests from Oates for that to occur (Annexure 2, pars 97-99, 102, 105 and 107) and implying that the issue needed to be resolved so that Oates and Coles could continue their commercial relationship: Annexure 2, par 100.

Colonial Farm

*Introduction and conduct*

1. Colonial Farm manufactures “value-added” protein products such as meatballs or chicken kievs, which it supplies to retailers and other customers. Coles acquired approximately 11 frozen processed food products from Colonial Farm for sale in Coles’ retail stores. Three products were private label products, which were acquired by Coles for sale under Coles’ own brands. The products that Coles acquired from Colonial Farm were acquired by Coles for its Frozen Business Category and were supplied by Colonial Farm to Coles with a minimum shelf life of at least 12 months: Annexure 2, pars 111-2.
2. During the Claims relevant period, Coles was in a substantially stronger bargaining position than Colonial Farm, in particular because Coles represented a significant proportion of the sale of Colonial Farm’s products, Coles determined whether it would continue to acquire grocery products from Colonial Farm and whether it would substitute grocery products it was acquiring from Colonial Farm with products acquired from another supplier, and due to the matters set out in Annexure 2, par 16.
3. Coles’ admitted contravening conduct is set out in detail in Annexure 2, pars 114-138. It is that conduct which provides the foundation for the following findings of contravention.

*Findings of contravention of s 22 of the ACL*

1. In October and November 2011, Coles, in connection with the acquisition of grocery products from Colonial Farm, engaged in conduct that was, in all of the circumstances, unconscionable, resulting in a contravention of s 22 of the ACL (as in force during the Claims relevant period).
2. The unconscionable conduct involved requiring that Colonial Farm agree to pay for 100% of the cost of waste in relation to its products, when Coles was aware that Colonial Farm was in financial difficulty (Annexure 2, par 121.2) and when Coles did not take into account Colonial Farm’s explanation that its products were not appropriate for a 100% waste agreement (Annexure 2, par 123.2), in all of the circumstances set out in Annexure 2, Part III and pars 111 to 138.
3. Those circumstances included:
4. Coles being in a substantially stronger bargaining position relative to Colonial Farm: Annexure 2, par 113;
5. The effect of requiring Colonial Farm to agree to the 100% waste agreement was that Colonial Farm indemnified Coles against all of the purported costs of waste or markdowns, including those that were caused by Coles and were outside the control of Colonial Farm: Annexure 2, pars 115 and 130.3;
6. Coles failing to disclose sufficient details, despite requests for such information, to enable Colonial Farm to understand the causes of waste and markdown, what contribution, if any, Colonial Farm had made to the causes of waste and markdown and the basis upon which Coles required the waste agreement: Annexure 2, pars 117, 123.1 and 125-130;
7. Coles exerting undue pressure on Colonial Farm by pressing Colonial Farm for a response to Coles’ requests for the 100% waste agreement (Annexure 2, pars 125.4, 128.2 and 129.4), by informing Colonial Farm that Coles required Colonial Farm to agree to a 100% waste agreement (Annexure 2, pars 122.1, 125.2, 129.3 and 133.2) and by inferring that Colonial Farm’s future business with Coles depended on Colonial Farm agreeing to the waste agreement: Annexure 2, pars 122.2 and 125.3; and
8. Coles not being willing to negotiate with Colonial Farm about the agreement without also indicating that Coles required Colonial Farm to pay another unrelated rebate: Annexure 2, pars 133 and 136.

Bayview

*Introduction and conduct*

1. Bayview manufactures and supplies “value-added” gluten free and fish protein products to retailers and other customers. The goods Coles acquired from Bayview were frozen food products, with a long shelf life. They were acquired by Coles for its Frozen Business Category: Annexure 2, pars 139-140.
2. During the Claims relevant period, Coles was in a substantially stronger bargaining position than Bayview, in particular because Coles represented a significant proportion of the sale of Bayview’s products, Coles determined whether it would continue to acquire grocery products from Bayview and whether it would substitute grocery products it was acquiring from Bayview with products acquired from another supplier, and due to the matters set out in Annexure 2, par 16.
3. By October 2011, Coles was aware that Bayview was suffering financial hardship, partly as a result of the terms of its trading relationship with Coles: Annexure 2, par 142.
4. Coles’ admitted claim for a 100% waste agreement and its admitted imposition of a penalty for late delivery is set out in detail in Annexure 2, pars 143-169. It is that conduct which provides the foundation for the following findings of contravention.

*Findings of contravention of s 22 of the ACL*

1. In October and November 2011, Coles, in trade or commerce, in connection with the acquisition of grocery products from Bayview, engaged in conduct that was, in all of the circumstances, unconscionable, resulting in two separate contraventions of s 22 of the ACL (as in force during the Claims relevant period). That conduct related to a 100% waste management agreement and the imposition of a penalty for late delivery.

*100% waste agreements*

1. The unconscionable conduct towards Bayview in relation to the 100% waste agreement involved Coles requiring that Bayview agree to pay for 100% of the cost of waste in relation to its products, when Coles was aware that Bayview was in financial difficulty (Annexure 2, par 142) and when Coles did not take into account Bayview’s explanation of the cause of the waste (Annexure 2, par 146.1), in all of the circumstances set out in Annexure 2, Part III and pars 139 to 152.
2. Those circumstances included:
3. Coles being in a substantially stronger bargaining position relative to Bayview: Annexure 2, para 141;
4. The effect of requiring Bayview to agree to the 100% waste agreement was that Bayview indemnified Coles against all of the purported costs of waste or markdowns, including those that were caused by Coles and were outside the control of Bayview: Annexure 2, par 115;
5. Coles failing to disclose sufficient details, despite requests for such information, to enable Bayview to understand the causes of waste, what contribution, if any, Bayview had made to the causes of waste and the basis upon which Coles required the waste agreement: Annexure 2, pars 146.2 and 148;
6. Coles exerting undue pressure and using unfair tactics on Bayview by pressing Bayview for a response to Coles’ requests for payments despite the matters in (3) above (Annexure 2, par 145.5), conveying to Bayview on multiple occasions that it was necessary for Bayview to enter into the waste agreement (Annexure 2, pars 145.3, 147.1.2 and 152) and indicating that Coles’ ongoing trading relationship with Bayview and the viability of ranging Bayview’s products would be affected if Bayview did not agree to the 100% waste agreement: Annexure 2, pars 145.4 and 152.

*Penalty for late delivery*

1. The unconscionable conduct towards Bayview in relation to the penalty for the late delivery involved Coles requiring and accepting payment of a penalty of $30,500 from Bayview when the payment was not the subject of prior agreement between Coles and Bayview and Coles was aware that Bayview was in financial difficulty (Annexure 2, par 142), in all of the circumstances set out in Annexure 2, Part III and pars 139 to 141 and 153 to 169.
2. Those circumstances included:
3. Coles being in a substantially stronger bargaining position relative to Bayview: Annexure 2, par 141;
4. The penalty was not reasonably necessary for the protection of Coles’ legitimate interests because it was not calculated by reference to any assessment by Coles of the likely cost to Coles, if any, of Bayview not delivering on time: Annexure 2, pars 154 and 161.7;
5. The terms and conditions of the Trading Arrangements between Coles and Bayview did not include a term pursuant to which Coles could impose, or Bayview was required to pay, a penalty: Annexure 2, par 155;
6. Coles failing to disclose sufficient details, despite requests for such information, to enable Bayview to understand whether, and to what extent, the alleged late delivery had resulted in lost sales to Coles: Annexure 2, pars 161.6 and 163; and
7. Coles exerting undue pressure and using unfair tactics on Bayview, in circumstances where Coles was aware Bayview was suffering financial hardship, by pressing Bayview for an urgent response to Coles’ requests for payment (Annexure 2, par 159.2), making repeated requests for a response from Bayview (Annexure 2, pars 158, 159.2 and 162) and implicitly threatening that Coles would take measures that were commercially detrimental to Bayview if Bayview did not agree to make the payment: Annexure 2, par 162.3.

Benny’s

*Introduction and conduct*

1. Benny’s manufactures and supplies hard boiled lollies to supermarkets in Australia. Coles acquired a hard boiled confectionery product from Benny’s for sale in Coles’ retail stores. The product was acquired from Benny’s by Coles for Coles’ Impulse Business Category: Annexure 2, pars 170-171.
2. During the Claims relevant period, Coles was in a substantially stronger bargaining position than Benny’s, in particular because Coles represented a significant proportion of the sale of Benny’s products, Coles determined whether it would continue to acquire grocery products from Benny’s and whether it would substitute grocery products it was acquiring from Benny’s with products acquired from another supplier, and due to the matters set out in Annexure 2, par 16.
3. During the Claims relevant period, the Trading Arrangements between Benny’s and Coles did not include a term that required Benny’s to make a payment to Coles for short or late deliveries: Annexure 2, par 173.
4. Coles’ admitted imposition of a penalty for short or late delivery and its admitted unauthorised withholding and retention of money is set out in detail in Annexure 2, pars 174-193. It is that conduct which provides the foundation for the following findings of contravention.

*Findings of contravention of s 22 of the ACL*

1. In August to November 2011, Coles, in trade or commerce, in connection with the acquisition of grocery products from Benny’s, engaged in conduct that was, in all of the circumstances, unconscionable, resulting in two separate contraventions of s 22 of the ACL (as in force during the Claims relevant period). That conduct related to penalties for short or late delivery and unauthorised withholding and retention of money.

*Penalty for short or late delivery*

1. The unconscionable conduct towards Benny’s which related to the penalty for short or late deliveries involved Coles demanding that Benny’s pay two penalties totalling $1,639 in relation to alleged short or late delivery, when the payments were not the subject of prior agreement between Coles and Benny’s, and in all of the circumstances set out in Annexure 2, Part III and pars 170 to 193.
2. Those circumstances included:
3. Coles being in a substantially stronger bargaining position relative to Benny’s: Annexure 2, par 172;
4. The terms and conditions of the Trading Arrangements between Coles and Benny’s did not include a term pursuant to which Coles could impose, or Benny’s was required to pay, a penalty: Annexure 2, par 173;
5. The penalty was not reasonably necessary for the protection of Coles’ legitimate interests because it was not calculated by reference to any assessment by Coles of the likely cost to Coles, if any, of Benny’s not delivering on time: Annexure 2, pars 174, 175.2, 181.2, 181.4, 185.3 and 186.1;
6. The penalty was unfair and unreasonable because it was a standard rate fine for all suppliers and exceeded the margin that Benny’s made on each carton of the relevant product that Coles acquired from Benny’s: Annexure 2, pars 177.5, 181.2 and 181.4; and
7. Coles failing to disclose sufficient details to Benny’s about the alleged short or late deliveries, despite the requests for such information by Benny’s, and the disputes Benny’s raised about the accuracy of the information being relied upon by Coles: Annexure 2, pars 177, 181, 185.2, 188 and 192.

*Unauthorised withholding and retention of money*

1. The unconscionable conduct towards Benny’s which related to the unauthorised withholding and retention of money involved Coles refusing to repay the penalties referred to above, in all of the circumstances set out in Annexure 2, Part III and pars 170 to 193.
2. Those circumstances included:
3. Coles being in a substantially stronger bargaining position relative to Benny’s: Annexure 2, par 172;
4. The circumstances outlined in [191] above;
5. Coles exerting undue pressure and using unfair tactics on Benny’s, by withholding the payments in circumstances where Coles knew that Benny’s disputed Coles’ entitlement to the payments (Annexure 2, pars 177-193) and withholding the payments in circumstances where Coles knew or ought to have known that the amounts sought were unfair and unjustified having regard to the value of the penalty when compared to the price Coles paid to Benny’s for the products it acquired from Benny’s: Annexure 2, pars 177.5 and 185.3;
6. Coles not being willing to negotiate with Benny’s about the claims including informing Benny’s that the claims Coles had raised would stand (Annexure 2, pars 182 and 186.2), informing Benny’s that Coles would continue raising such claims against Benny’s (Annexure 2, par 186.3) and not meeting or discussing the claims with Benny’s: Annexure 2, pars 183, 184, 191 and 192.

###### Principles applicable to relief

1. These principles have been addressed in Section 2.3.1 and 2.3.2 above and are applicable in the Claims Proceeding.
2. In the Claims Proceeding, the prerequisites for the making of the declarations are satisfied:
3. The proposed declarations relate to conduct that contravenes the ACL and the matters in issue have been identified and particularised by the parties with precision;
4. The proposed declarations contain sufficient indication of how and why the relevant conduct is a contravention of the ACL;
5. It is in the public interest for the ACCC to seek to have the declarations made and for the declarations to be made;
6. There is a significant legal controversy in this case which is being resolved.
7. The ACCC, as a public regulator under the ACL, has a genuine interest in seeking the declaratory relief and Coles is a proper contradictor because it has contravened the ACL and is the subject of the declarations.
8. The declarations sought are appropriate because they serve to record the Court’s disapproval of the contravening conduct, vindicate the ACCC’s claim that Coles contravened the ACL, assist the ACCC to carry out the duties conferred upon it by the Act, including the ACL, in relation to other similar conduct, inform the public of the harm arising from Coles’ contravening conduct and deter other corporations from contravening the ACL.
9. Finally, the facts and admissions in Annexure 2 provide a sufficient factual foundation for the making of the declarations. For those reasons, declarations of contravention of s 22 of the ACL will be made recording Coles’ unconscionable conduct in relation to Austech ([152]-[156] and [161]-[162] above), Oates ([165]-[169] above), Colonial Farm ([173]-[175] above), Bayview ([180]-[184] above) and Benny’s ([189]-[193] above).

###### Analysis of Proposed Penalties

1. The principles relevant to the imposition of a pecuniary penalty have been addressed earlier: see Section 2.3.3. In applying those principles, the ACCC and Coles submitted that the proposed total penalty of $6.3 million is not inadequate or excessive, having regard to all relevant matters.

Nature, extent and duration of conduct and the circumstances in which conduct took place

Extent of the conduct

1. The conduct the subject of the admitted contraventions occurred from June 2011 to December 2011, and the circumstances relevant to the conduct occurred from about December 2010 to about January 2012: Annexure 2, par 3. It occurred during the course of Coles’ communications with the suppliers in the context of Coles acquiring grocery products for sale in its retail stores.

Background circumstances relating to the contravening conduct

1. Background circumstances relevant to this contravening conduct were addressed in Section 2.4.1.2.1 above in relation to the ARC Proceeding and are equally applicable in this proceeding: see Annexure 2, par 18.

Relationship of the background circumstances to specific instances of unconscionable conduct

1. Coles’ practices, demands and threats were deliberate, orchestrated and relentless and formed the circumstances in which the unconscionable conduct against the five specific suppliers occurred.

Nature of the conduct

1. The nature of the conduct is described in Annexure 2. The ACCC submits, and Coles accepts, that in broad terms Coles’ conduct in relation to each of the suppliers in the Claims Proceeding did not have a legitimate commercial basis, was inconsistent with acceptable business practice and took place in circumstances where Coles had substantial bargaining power and, by its conduct, took advantage of that bargaining position.
2. That conduct had common elements which are factors relevant to the determination of the appropriate penalty. The suppliers the subject of the admitted contraventions from whom Coles sought payments:
3. Were significantly smaller than Coles (and all had annual revenue of less than 0.5% of Coles annual revenue: Annexure 2, par 9);
4. Were highly dependent on their ongoing sales to Coles for their business to remain viable;
5. Would have experienced significant detriment if Coles had ceased, or substantially decreased, its trading with them;
6. Were provided with inadequate information by Coles as to the basis for the payments demanded, even after requests were made by the suppliers for such information;
7. Did not agree with, or could not understand the basis for the payments that Coles had demanded; and
8. Were pressured by Coles to agree to make the payments.
9. In seeking payments from these suppliers, Coles was motivated by profit, pressured the suppliers to make the payments, sought the payments despite not being entitled to them under the existing Trading Arrangements with the supplier, did not provide the supplier with adequate, or any, information about the basis for the payments, indicated that there would be commercial consequences if the supplier refused in order to obtain the supplier’s agreement and deducted money from payments owed to the supplier for products that it had already supplied to Coles. In addition to those common elements, each supplier was subjected to the particular threats of commercial consequences set out in Section 3.2.2 above.
10. The ACCC submitted, Coles accepts and the Court finds that the conduct outlined in Section 3.2.2 above, in all of the circumstances, was contrary to good conscience and involved serious contraventions of s 22 of the ACL. All of the conduct involved a claim for payments which were not provided for under Coles’ Trading Arrangements and which Coles had no reasonable basis to demand.
11. Further:
12. The profit gaps that were claimed against Austech and Oates arose from prior actions taken, or decisions made, by Coles rather than by those suppliers: Annexure 2, pars 34.4, 36.3, 36.4, 39.5 and 40 in relation to Austech and pars 85.3, 87.2 and 87.3 in relation to Oates;
13. The agreements demanded for future waste payments involved demanding payment for matters that could be beyond the control of the supplier, including Coles’ own negligence, in relation to loss of or damage to products in Coles’ stores. These payments were seen as a source of additional revenue: Annexure 2, pars 114-115; and
14. The penalties in relation to short or late deliveries were levied without regard to the reasons for the short or late delivery, or whether there was in fact any loss to Coles whatsoever. Coles took no account of the value of the goods and the penalties were levied even when the supplier disputed that there was a short or late delivery.
15. The matters raised in [206(3)] above were exemplified by Coles’ conduct in relation to Benny’s where the fine well exceeded Benny’s total profit on the goods delivered: Annexure 2, par 177.5. When Benny’s sought to demonstrate there had not even been short or late delivery, Coles refused to provide information or engage with Benny’s on the issue and kept the money it had taken: Annexure 2, pars 178, 179, 182-188.
16. Coles’ conduct which is the subject of the admitted contraventions was serious for the additional reasons set out in [102]-[103] above.
17. Coles accepted that in its dealings with the Claims Suppliers it treated them in a manner inconsistent with acceptable business practice, was not respectful of the suppliers’ needs for full and timely transparency, and did not properly respect the responsibility attached to Coles’ bargaining power. As noted earlier, the ACL provides for significant penalties.
18. The Claims Proceeding again raises the issue of the adequacy of the maximum penalty when a corporation with annual revenue in excess of $22 billion acts unconscionably.

Amount of loss caused and profit gained

1. Again, it is difficult to quantify with precision the financial impact on each supplier of Coles’ conduct. The conduct took place within the context of ongoing commercial relationships between Coles and each supplier. Demands for payments were often leveraged against each other and the exact quantum of amounts paid or rebates withheld is complicated or unknown (such as in the case of the waste agreements). In the case of Oates, monies were deducted without authorisation and were agreed to be repaid some months later in exchange for further payments from Oates.
2. At the very least, Annexure 2 records the following identifiable losses suffered by the Claims Suppliers:
3. In relation to Austech, a payment of $5,700 for retrospective waste and payments of the three rebates under the deferred deals for six months beyond that of the agreement between Coles and Austech, which can no longer be quantified;
4. In relation to Oates, an inability to use money that was unlawfully retained by Coles for more than five months;
5. In relation to Bayview, a payment of $30,500 for short or late deliveries; and
6. In relation to Benny’s, two payments totalling $1,639 for short or late deliveries.
7. As explained in Section 2.4.2 above, the inability to further quantify financial loss caused to the suppliers by the contraventions does not mean that no loss or harm has been suffered.
8. Coles accepts that the payments made pursuant to the contravening conduct were applied directly to Coles’ revenues. While the extent of any loss or damage caused to the Claims Suppliers by the contravening conduct has not been quantified with precision, it can be inferred that it had a detrimental effect on the Claims Suppliers.

Whether the respondent has engaged in similar prior conduct

1. This factor has been addressed in Section 2.4.3 above. It is necessary to add to that analysis the findings of contravention in relation to the ARC Proceeding in Section 2 above. They cannot be and should not be ignored.

Size of contravener, including market share, and its financial position

1. These matters have been addressed in Section 2.4.4 and apply equally to the Claims Proceeding.

The deliberateness of the contravening conduct

1. The conduct engaged in by Coles involved the intentional use of unfair tactics and undue pressure in dealings with suppliers in relation to whom it knew that it had substantial bargaining power: see Sections 3.1 and 3.2.2 above.

Involvement of senior employees or management

1. The contravening conduct in relation to the Claims Suppliers was committed by CMs and BCMs. As noted earlier, BCMs are considered by Coles to be Senior Managers: Annexure 2, par 12.
2. As with the ARC Proceeding, Coles does not admit that any other Coles senior management engaged in the conduct the subject of the contraventions. However, Coles admits that its GMs and BCMs (who are Coles’ Senior Managers) were aware of, and encouraged, the practice of seeking money from suppliers to meet profit targets and were aware of, and either encouraged, or did not discourage, the contravening conduct by CMs and BCMs.

Culture of compliance and corrective measures in response to contravention

1. These matters have been addressed in Section 2.4.7 and apply equally to the Claims Proceeding.
2. It is important to record that Coles has undertaken to the ACCC to have an independent arbiter review its conduct with the Claims Suppliers and assess their entitlement to refunds of any relevant payment. That review is the subject of paragraph 11 and following of the s 87B undertaking which is Annexure 3 to these reasons for judgment.

Co-operation

1. These matters have been addressed in Section 2.4.8 and apply equally to the Claims Proceeding: see also [221] above.

Maximum penalties and one transaction principle

1. These matters have been addressed in Section 2.4.9 and apply equally to the Claims Proceeding.
2. The ten admitted contraventions concern discrete but at times related conduct against five different suppliers. As is self-evident, much of the conduct against particular suppliers overlaps – claims or threats of claims of one type are used to leverage payments of another and suppliers are often confronted by numerous claims simultaneously. Indeed, some of the admitted conduct was consequent upon a refusal of a particular demand made by a Claims Supplier.
3. However, the unlawful retention of suppliers’ money, and the subsequent refusal to repay it when Coles was asked to do so, are separate acts. They were engaged in by different personnel of Coles over time and are not the same act. A failure to treat them as separate acts, especially in relation to Oates, would not sufficiently reflect the gravity and nature of Coles’ conduct.

Identifying the penalties for particular contraventions

1. Having regard to all of those factors, I accept that the following penalties for each contravention are appropriate and they are imposed:
2. Profit gap unconscionable conduct in relation to Austech: $650,000;
3. Retrospective waste unconscionable conduct in relation to Austech: $500,000;
4. Deferred deal unconscionable conduct in relation to Austech: $650,000;
5. Profit gap unconscionable conduct in relation to Oates: $650,000;
6. Unauthorised withholding and retention of money in relation to Oates: $900,000;
7. Waste and markdowns agreement unconscionable conduct in relation to Colonial Farm: $550,000;
8. Waste and markdowns agreement unconscionable conduct in relation to Bayview: $550,000;
9. Short or late deliveries unconscionable conduct in relation to Bayview: $650,000;
10. Short or late deliveries unconscionable conduct in relation to Benny’s: $600,000;
11. Unauthorised retention of monies in relation to Benny’s: $600,000.
12. These penalties provide a significant mark of disapproval for the wrongdoing associated with each course of conduct (when examined against the statutory maximum for a single breach). They also make appropriate allowance for the various mitigating features discussed above.

Totality principle

1. This principle has been addressed in Section 2.4.1.1 above and applies equally to the Claims Proceeding.

Conclusion on appropriate penalty

1. In all these circumstances, taking into account the factors relevant to setting a penalty as well as applying the totality principle, the total pecuniary penalties for Coles of $6,300,000 are appropriate for the contraventions admitted. That sum should be paid to the Commonwealth within 30 days.

###### Costs

1. Coles has agreed to pay $250,000 towards the ACCC’s costs of and incidental to the Claims Proceeding within 30 days of the Court’s order. That order will be made.

|  |
| --- |
| I certify that the preceding two hundred and thirty (230) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gordon. |

Associate:

Dated: 22 December 2014

**ANNEXURE 1 – VID 253 OF 2014**

**STATEMENT OF AGREED FACTS AND ADMISSIONS**

**PURSUANT TO s 191(3)(a) OF THE *EVIDENCE ACT 1995* (Cth)**

**PART I INTRODUCTION**

1. This Statement of Agreed Facts and Admissions (**SoAFA**) pursuant to s 191(3)(a) of the *Evidence* Act *1995* (Cth) (**Evidence Act**), is made jointly on behalf of:

1.1 the applicant, the Australian Competition and Consumer Commission (**ACCC**); and

1.2 the first respondent, Coles Supermarkets Australia Pty Ltd (**Coles Supermarkets**) and the second respondent, Grocery Holdings Pty Ltd (**GHPL**), together **Coles**.

2. This SoAFA details admissions by Coles that it contravened the then s 22 of the Australian Consumer Law (**ACL**) being Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**the Act**).

3. The admissions of Coles in this SoAFA are made by Coles for the purposes of this proceeding only and unless otherwise stated, relate to the period from about 1 April 2011 to about 31 December 2011 (the **relevant period).**

**PART II BACKGROUND**

**Coles**

4. Coles Supermarkets:

4.1 is and was at all material times a corporation within the meaning of section 4 of the CCA;

4.2 carries on, and at all material times carried on, business in trade or commerce as a supermarket retailer; and

4.3 supplies, and at all material times supplied, grocery products for retail sale to customers in Australia.

5. GHPL:

5.1 is and was at all material times a corporation within the meaning of section 4 of the CCA;

5.2 carries on, and at all material times carried on, business in trade or commerce as a supermarket wholesaler; and

5.3 acquires, and at all material times acquired, grocery products from manufacturers and other suppliers (collectively **Suppliers**) for retail sale by Coles Supermarkets to customers in Australia.

6. Coles engaged, and continues to engage, in a business of acquiring grocery products from Suppliers and selling those products to customers in Australia through Coles’ retail stores (the **Coles business**).

7. Coles referred, and continues to refer, to the steps and infrastructure involved in acquiring grocery products for retail sale from Suppliers and distributing them to Coles’ retail stores for display and sale as its **Supply Chain**.

8. Coles operated, and continues to operate, retail stores in every Australian State and mainland Territory.

9. During the relevant period, Coles supplied approximately 30% of the grocery products supplied for retail sale to customers in Australia. Together with Woolworths, Coles supplied approximately 60% to 70% of the grocery products supplied for retail sale to customers in Australia.

10. The Coles grocery business had revenue in the order of $22.1 billion for the financial year ending 30 June 2011 and in the order of $23.3 billion for the financial year ending 30 June 2012. Each of the Suppliers referred to in 0 below had revenue of less than 1% of Coles’ revenue for the financial year ending 30 June 2012.

**Coles’ business**

11. The Coles business was, and continues to be, structured by reference to groups of similar or related grocery products (**General Categories**).

12. During the relevant period:

12.1 each General Category was managed by a General Manager (**GM**);

12.2 within each General Category, the Coles business was managed by reference to smaller groups of similar or related grocery products (**Business Categories**);

12.3 each Business Category was managed by a Business Category Manager (**BCM**);

12.4 each BCM reported to a GM;

12.5 within each Business Category, the Coles business was managed by reference to smaller groups of similar or related products (**Categories**);

12.6 each Category was managed by a Category Manager (**CM**); and

12.7 each CM reported to a BCM.

13. The GMs and BCMs were Coles’ Senior Managers (**Senior Managers**), and together with the CMs acted on behalf of Coles in relation to the conduct admitted in this SoAFA.

**PART III CIRCUMSTANCES RELEVANT TO COLES’ CONDUCT**

**Coles’ trading arrangements with its Suppliers**

14. Coles acquired, and continues to acquire, grocery products for retail sale from Suppliers pursuant to arrangements negotiated between Coles and the Suppliers (**Trading Arrangements**).

15. Where Trading Arrangements were documented, the documentation could include one or more of the following documents produced by Coles:

15.1 a Trading Terms Letter;

15.2 a Consolidated Trading Terms Form (**Trading Terms**);

15.3 Standard Terms and Conditions.

16. In the case of each of the Suppliers who are referred to in 0 below, the Trading Arrangements required that the Supplier pay Coles rebates, when Coles acquired the Supplier’s grocery products, calculated as a percentage of the price Coles paid for the Supplier’s products.

17. During the relevant period, Coles:

17.1 determined the number of units of each grocery product that Coles would acquire from a Supplier;

17.2 determined the frequency with which Coles would place orders for a grocery product with a Supplier;

17.3 determined the time frame within which Suppliers were required to deliver grocery products that had been ordered by Coles;

17.4 determined the price at which Coles would sell each grocery product acquired from a Supplier;

17.5 determined ‘hurdle rates’ for grocery products acquired from a Supplier, being a rate of retail sales the product was expected to achieve;

17.6 determined whether Coles would continue to acquire grocery products from a Supplier;

17.7 determined whether Coles would substitute grocery products it was acquiring from one Supplier with products acquired from another Supplier;

17.8 conducted, through its CMs, a ‘range review’ process at regular intervals, during which consideration was given to whether a Supplier’s grocery products would be deleted from the range of products available for sale in Coles’ retail stores;

17.9 determined the amount and location of shelf space in each of Coles’ retail stores that would be allocated to grocery products acquired from a Supplier;

17.10 determined whether grocery products acquired from a Supplier would be the subject of promotion by Coles, for example by way of a markdown in the retail price, an entry in a Coles sales catalogue, or otherwise;

17.11 determined the timing, frequency, duration and financial terms of any promotions it decided to undertake for grocery products acquired from a Supplier, including the amount of any payment or other financial contribution Coles required a Supplier to make for the promotion; and

17.12 required any Supplier who wished to increase the price at which it sold any of its grocery products to Coles to make an application for approval of a price increase to Coles, which approval was at the discretion of Coles.

18. Coles was in a substantially stronger bargaining position relative to each of the Suppliers referred to in 0 below, in particular because Coles represented a significant proportion of the business of each Supplier.

**Coles’ business practices**

19. During the relevant period, Coles:

19.1 set sales and profit targets for its General Categories and Business Categories, and encouraged and/or required its CMs and BCMs to meet these sales and profit targets, including by implementing the Tier 3 ARC Plan (see Part IV below);

19.2 awarded prizes to its CMs and BCMs for meeting profit targets and securing the agreement of Suppliers to the incorporation of additional rebates into their Trading Arrangements with Coles, including the ARC rebate;

19.3 set aside days which were referred to within Coles as “Profit Day” or “Perfect Profit Day”, and set targets for Business Categories of money to be ‘secured’ by the Business Categories from Suppliers, including by way of the ARC and other rebates.

**The ARC Program**

20. Between 2004 and 2011 Coles made substantial investments in its Supply Chain, including its Distribution Centre network and its systems and processes for replenishing Coles’ stores and ordering stock from Suppliers.

21. In or around April 2011, Coles, together with the Boston Consulting Group (**BCG**), developed a strategy for Coles to increase its EBIT by identifying opportunities for the recovery from Suppliers of cost savings which Coles considered had been or would be achieved across its end to end supply chain.

22. The strategy was developed into a Coles business program called the Active Retail Collaboration program (the **ARC program**).

23. Coles considered that the changes Coles had made to its Supply Chain included:

23.1 benefits to both Coles and the Supplier from Coles changing its ordering patterns to order grocery products from the Supplier in more economically efficient ordering quantities (**EOQ ordering**);

23.2 benefits to both Coles and the Supplier from the introduction by Coles of data sharing on an internet-based ‘Supplier Portal’ and associated changes of:

23.2.1 35 day order plan;

23.2.2 nine week sales forecast;

23.2.3 six week promotional lock-down;

23.2.4 12 week notice for product deletion,

(**data sharing**).

**The ARC Program in relation to Tier 3 Suppliers**

***Tiered classification of Suppliers***

24. By about August 2011, Coles had created three categories of Suppliers, namely:

24.1 Tier 1 Suppliers;

24.2 Tier 2 Suppliers; and

24.3 Tier 3 Suppliers.

25. The Tier 1 Suppliers were identified by Coles as its largest Suppliers with the most complex supply chains, and included Nestle, General Mills and Procter & Gamble.

26. The Tier 2 Suppliers were identified by Coles as large Suppliers with ‘simple’ supply chains.

27. The Tier 3 Suppliers:

27.1 comprised approximately 220 Suppliers;

27.2 were identified by Coles as, and believed by Coles to be, its ‘smaller’ Suppliers in terms of the annual sum spent by Coles on acquiring the Supplier’s grocery products (or cost of goods sold (**COGS**)), as compared to the annual sum spent by Coles on acquiring grocery products from Tier 1 and Tier 2 Suppliers;

27.3 were suppliers whose COGS were generally greater than $3 million;

27.4 were Suppliers for whom Coles’ documents stated Coles represented a ‘very significant part’ of the Supplier’s business; and

27.5 included Austech Products Pty Ltd (**Austech**), E. D. Oates Pty Ltd (**Oates)**, Paton’s Macadamia Plantations Pty Ltd (**Patons**), Stuart Alexander & Co Pty Ltd (**Stuart Alexander**), and Tru Blu Beverages Pty Ltd (**Tru Blu**).

***ARC rebate***

28. By at least 23 August 2011, Coles had determined that the payments it would seek to obtain from Tier 3 Suppliers pursuant to the ARC program would take the form of an ongoing rebate recorded in the Trading Arrangements between Coles and the Tier 3 Supplier (the **ARC rebate**).

***Division of ARC rebate into two components***

29. By about 9 September 2011, Coles had determined that the ARC rebate would be divided into two components:

29.1 an amount said to be attributed by Coles to the value to the Supplier of EOQ ordering referred to in paragraph 23.1 above (the **EOQ component**); and

29.2 an amount said to be attributed by Coles to the value to the Supplier of data sharing (the **data sharing component**).

30. Between 9 September 2011 and 10 October 2011, the ARC rebate that Coles intended to obtain from its Tier 3 suppliers developed as follows:

30.1 by about 9 September 2011, Coles intended to obtain an ARC rebate of 1% of the price Coles paid for the Supplier’s grocery products, made up of 0.5% for the data sharing component and 0.5% for the EOQ component;

30.2 by about 15 September 2011, Coles had determined that the EOQ component would be either:

30.2.1 0.5% of the price Coles paid for the Supplier’s grocery products; or

30.2.2 if Coles attributed a value to a Supplier of EOQ ordering of more than 0.5%, at least that value;

30.3 by about 27 September 2011, Coles had determined that:

30.3.1 if Coles attributed a value to a Supplier of EOQ ordering of less than 0.2%, the total ARC rebate would be 0.7% of the price Coles paid for the Supplier’s grocery products (incorporating the data sharing and EOQ components);

30.3.2 if Coles attributed a value to a Supplier of EOQ ordering of more than 0.2%, the total ARC rebate would be 0.7% of the price Coles paid for the Supplier’s grocery products, plus the amount of the attributed value above 0.2%.

***ARC rebate for Tier 3 Suppliers***

31. By on or about 10 October 2011, Coles had determined that the ARC rebate to be paid by Tier 3 Suppliers would be the sum of:

31.1 a data sharing component of 0.7% of the price Coles paid for a Supplier’s grocery products; and

31.2 an EOQ component fixed at a percentage amount of the price Coles paid for a Supplier’s grocery products that equated to the value Coles attributed to the Supplier of EOQ ordering.

32. Coles calculated the rebate for EOQ by:

32.1 making a series of assumptions about Tier 3 Suppliers’ activities Tier 3 Suppliers engaged in when picking a pallet and delivering the pallet to Coles;

32.2 attributing costs to each of those activities based on Coles’ own costs; and

32.3 inserting data about those activities, historical ordering patterns and costs into a standard formula that was used for all Tier 3 Suppliers, regardless of each Supplier’s individual circumstances.

***Revenue target for ARC rebate payments by Tier 3 Suppliers***

33. By or on about 10 October 2011, Coles had set a target of $16 million for the amount of money that it would seek to obtain in ARC rebates from Tier 3 Suppliers in the financial year ending 30 June 2012.

***Plan for obtaining ARC rebate payments from Tier 3 Suppliers***

34. By on or about 14 October 2011, Coles had developed the ARC program as it was to apply to Tier 3 Suppliers into a plan (the **Tier 3 ARC Plan**) incorporating the following steps:

34.1 CMs would:

34.1.1 on or around 17 or 18 October 2011, seek the agreement of each Tier 3 Supplier to make ongoing payments to Coles by the incorporation of the ARC rebate into their Trading Arrangements with Coles (referred to by Coles, and in the remainder of this document, as ‘the **Ask’**);

34.1.2 deliver the Ask in accordance with a standardised script provided by Coles (the **Script**);

34.1.3 respond to questions from Tier 3 Suppliers about the benefits that were said to flow to them from data sharing and EOQ ordering using a set of prescribed answers;

34.1.4 at their discretion, provide the Supplier with a two-page document that was in a standardised form and purported to explain the basis on which the ARC rebate was calculated (the **Background Materials**);

34.1.5 at their discretion, provide Suppliers with a Supplier Portal information pack which explained some features of the portal;

34.1.6 record the agreement of Tier 3 Suppliers to the Ask in an executed amended version of the Supplier’s Trading Terms incorporating the ARC rebate on an ongoing basis (the **Revised Trading Terms**);

34.1.7 not have the authority to negotiate on the amount of the ARC rebate with the Tier 3 Supplier but could escalate the negotiation to a more senior person within Coles;

34.1.8 seek to have Tier 3 Suppliers agree to the Ask within a number of days;

34.1.9 if the CM could not obtain the agreement of a Tier 3 Supplier to the Ask, notify the Tier 3 Supplier that its position on the Ask would be ‘escalated’ to a BCM.

34.2 if a CM could not obtain the agreement of a Tier 3 Supplier to the Ask, responsibility for obtaining the Tier 3 Supplier’s agreement was to be ‘escalated’ from the CM to the BCM to whom the CM reported;

34.3 the BCM to whom responsibility for obtaining the Supplier’s agreement to the Ask had been ‘escalated’ had authority to accept agreement from the Tier 3 Supplier to the Ask in circumstances where the amount of the ARC rebate the Supplier agreed to pay was less than the amount originally sought from the Supplier;

34.4 if a BCM could not obtain the agreement of a Tier 3 Supplier, the BCM was to consider:

34.4.1 notifying the Supplier that its position on the Ask would be escalated within Coles, such as to the GM to whom the BCM reported;

34.4.2 escalating the Tier 3 Supplier’s position within Coles, such as to the GM to whom the BCM reported.

34.5 GMs had authority to accept an agreement by a Tier 3 Supplier in circumstances where the amount of the ARC rebate the Supplier agreed to pay was less than the amount originally sought from the Supplier;

34.6 ‘escalation’ of a Supplier’s refusal of the Ask involved the BCM or GM to whom the matter had been elevated making contact with the Tier 3 Supplier in an attempt to secure the Supplier’s agreement (**Escalation**).

35. Coles unilaterally commenced ordering in EOQs from Tier 3 Suppliers in around July 2011.

***Approval of Tier 3 ARC Plan by Senior Managers***

36. The Tier 3 ARC Plan was approved by Senior Managers.

***The Script and the Background Materials***

37. The Script contained statements to the effect that:

37.1 Coles had made changes to its Supply Chain;

37.2 the changes Coles had made to its Supply Chain would be of benefit to the Supplier identified in the Script; and

37.3 Coles had identified and calculated savings to that Supplier’s business in respect of data sharing and EOQ ordering.

38. The Background Materials contained statements to the effect that:

38.1 data sharing would lead to value to the Supplier of well over 0.7% of the price Coles paid for the Supplier’s grocery products; and

38.2 EOQ ordering (where applicable to the Supplier) would lead to value to the Supplier of at least a specified percentage of the price Coles paid for the Supplier’s grocery products.

39. In putting forward the Script and the Background Materials Coles had:

39.1 attributed a value to a data sharing benefit that it considered would apply to all Tier 3 Suppliers taken as a whole but had not identified or calculated any particular savings to any individual Tier 3 Supplier’s business; and

39.2 calculated the value of EOQ ordering by the method at paragraph 32 but had not taken any steps to establish whether its assumptions reflected the actual value of EOQ ordering to any individual Tier 3 Supplier’s business.

40. The Script and the Background Materials did not contain information that explained or justified the basis on which the data sharing or EOQ components of the ARC rebate had been determined by Coles.

***Instructions to CMs and BCMs to act in accordance with Tier 3 ARC Plan***

41. Between 10 October 2011 and 17 October 2011, the CMs and BCMs attended training sessions, which included presentations by Senior Managers, and were instructed to act in accordance with the Tier 3 ARC Plan.

42. The materials used at the training sessions contained slides which stated that:

42.1 this is not optional for suppliers;

42.2 Coles ‘needed’ the CMs to achieve its $16 million target and that this was Coles’ ‘one off chance’ to close [its profit] gap at scale’;

42.3 they would be given a Script to follow and provided with Background Materials and FAQs to be used in the Tier 3 ARC process;

42.4 they were to finalise trading terms with each Tier 3 supplier, incorporating an ARC rebate, within two to three days of making the Ask;

42.5 if a supplier did not agree to pay an ARC rebate within one to two days, the CM or BCM was to consider using commercial leverage;

42.6 various prizes would be awarded to CMs and BCMs who ‘landed’ suppliers.

***Provision of materials to CMs and BCMs***

43. By about 14 October 2011:

43.1 CMs had been provided with a list of the Tier 3 Suppliers to whom they were to deliver the Ask;

43.2 BCMs had been provided with a list of the Tier 3 Suppliers to whom the CMs that reported to them were to deliver the Ask;

43.3 CMs and BCMs had been given access to a version of the Script for use by each CM in relation to each of the Tier 3 Suppliers, each of which contained:

43.3.1 the statements referred to in paragraph 37 above;

43.3.2 on the front page, certain details concerning the Supplier, including the Supplier’s name, its Supplier ID number, the BCM responsible for the Supplier and the CM responsible for the Supplier; and

43.3.3 on the second page, the amount of the ARC rebate that was to be sought from the particular Supplier;

43.4 CMs and BCMs had been given access to a version of the Background Materials for use by each CM in relation to each of the Tier 3 Suppliers, each of which contained:

43.4.1 statements to the effect referred to in paragraph 38 above;

43.4.2 the name of the Supplier; and

43.4.3 the amount of the ARC rebate that was to be sought from the Supplier;

43.5 CMs had been given access to Revised Trading Terms for each Tier 3 Supplier to whom they were to deliver the Ask, which included the ongoing payments sought by way of the ARC rebate; and

43.6 BCMs had been given access to Revised Trading Terms for each Tier 3 Supplier to whom the CMs who reported to them were to deliver the Ask, which included the ongoing payments sought by way of the ARC rebate.

44 Between 14 and 17 October 2011, there were no further instructions to CMs or BCMs that materially altered those referred to in paragraphs 41 and 42 above.

45 As at 17 October 2011, when Coles commenced implementation of the Tier 3 ARC Plan referred to in paragraph 34 above:

45.1 Coles had not consulted with any Tier 3 Supplier regarding the actual value of data sharing to the Tier 3 Supplier or the actual value of EOQ ordering to the Tier 3 Supplier;

45.2 Coles had not identified or calculated any particular savings to any particular Tier 3 Supplier’s business in respect of data sharing;

45.3 Coles had not validated the assumptions it had made about the value of EOQ ordering to any particular Tier 3 Supplier with that Tier 3 Supplier; and

45.4 Coles had commenced negotiations with 18 of its Tier 1 and Tier 2 Suppliers about the amounts that those suppliers would pay to Coles in connection with the ARC program. Only five of the 18 Tier 1 and Tier 2 Suppliers had agreed to pay any ARC rebate, and all for amounts below 0.7%.

46 As a result of the matters referred to in paragraph 45 above, as at 17 October 2011:

46.1 Coles should not have asserted to any Tier 3 Supplier that a 0.7% data sharing component of the ARC rebate reflected the actual value to that Tier 3 Supplier of data sharing;

46.2 Coles should not have made an assertion to any Tier 3 Supplier about the actual value of EOQ ordering to that Tier 3 Supplier.

***Delivery of the Tier 3 Ask***

47 On and around 17 and 18 October 2011, the CMs, in accordance with the Tier 3 ARC Plan delivered the Ask to at least 200 Tier 3 Suppliers, including five of the suppliers referred to in 0 below.

**PART IV COLES’ CONDUCT IN RELATION TO INDIVIDUAL SUPPLIERS**

**Patons**

***Background***

48 Patons manufactures chocolate coated macadamia nuts and other chocolate coated confectionery for domestic and international customers.

49 Coles acquired six chocolate coated confectionery products from Patons for sale in Coles’ retail stores. Five of those products were private label products, which were acquired by Coles for sale under Coles’ own brands. The products were acquired from Patons for its Snacks and Beverages, or ‘Impulse’, Business Category (**Impulse Business Category**).

50 During the relevant period, Coles was in a substantially stronger bargaining position than Patons, in particular because:

50.1 Coles represented a significant proportion of the sales of Paton’s products;

50.2 Coles determined whether it would continue to acquire grocery products from Patons;

50.3 Coles determined whether it would substitute grocery products it was acquiring from Patons with products acquired from another Supplier; and

50.4 of the matters set out at paragraph 17 above.

***Implementation of the Tier 3 ARC Plan***

*Conduct prior to the Patons Ask*

51 On 10 October 2011, Coles invited Patons to attend a Coles Supply Chain Forum on 11 October 2011. The invitation indicated that attendance was compulsory.

52 On 11 October 2011, Coles delivered a presentation about changes it had made to its Supply Chain with particular focus on the Supplier Portal. Coles did not inform Patons that Coles required payment from Patons to use the Supplier Portal.

53 By about 14 October 2011, Coles:

53.1 had classified Patons as a Tier 3 Supplier;

53.2 had determined that it would seek the agreement of Patons to make ongoing payments to Coles by incorporation of an ARC rebate of 1.25%, which was made up of 0.7% for data sharing and 0.55% for EOQ ordering, into Patons’ Trading Arrangements with Coles (the **Patons Ask**);

53.3 had determined that a CM from its Impulse Business Category would deliver the Patons Ask;

53.4 had prepared a Script for use by the CM to deliver the Patons Ask (the **Patons Script**), and had instructed the CM to use the Patons Script;

53.5 had prepared Background Materials for use by the CM to facilitate the agreement of Patons to the Patons Ask (the **Patons Background Materials**), and had instructed the CM to use the Patons Background Materials if they considered it would facilitate the agreement;

53.6 had prepared an amended version of Patons’ Trading Terms incorporating the ARC rebate (the **Revised Patons Trading Terms**), and had made the Revised Patons Trading Terms available to the CM;

53.7 had determined to give Patons access to data sharing on 17 October 2011; and

53.8 had commenced ordering in EOQs from Patons.

54 The Patons Script used by the CM contained the statements referred to in paragraph 37, above, and also included the following statements:

54.1 “… we have identified a savings from your business based on your COGS [cost of goods sold] of:

* $33k/0.7% of COGS for … data sharing, and
* $27k/0.55% for Economic Ordering

We would like to move this savings into your Trading Terms effective 31/10/11, where we have created a separate line for this Supply Chain Allowance.”

54.2 “I’ll send you a short information pack and our amended trading terms for you to sign and return to us within 48 hours.”

*Patons Ask*

55 On 17 October 2011, in accordance with the Tier 3 ARC Plan, the CM delivered the Patons Ask in accordance with the Patons Script to Patons during a telephone conversation.

56 During the telephone conversation the CM:

56.1 sought the agreement of Patons to make ongoing payments to Coles by the incorporation of a rebate of 1.25% (the **Patons ARC rebate**) into Patons’ Trading Terms with Coles;

56.2 informed Patons that:

56.2.1 data sharing would save Patons approximately 0.7% of its cost of goods sold per annum;

56.2.2 EOQ ordering would save Patons approximately 0.5% of its cost of goods sold per annum;

56.2.3 Patons would save approximately $60,000 per annum from data sharing and EOQ ordering;

56.2.4 he wanted Patons to advise him later that day or the following day of Patons’ intentions as to whether it would agree to incorporate the Patons ARC rebate into Patons’ Trading Terms with Coles;

56.2.5 he would send Patons amended Trading Terms incorporating the Patons ARC rebate, which were to be returned to Coles by Patons within 48 hours; and

56.2.6 the amended Trading Terms were to be in place by 31 October 2011;

56.3 did not explain how Coles had calculated the 0.7% for data sharing or the 0.55% for EOQ ordering;

56.4 should not have asserted that the Patons ARC Rebate reflected the value to Patons of data sharing and EOQ ordering.

57 The representation that Coles had identified savings particular to Patons of the amounts referred to in paragraphs 54.1 and 56.2 above were, for the reasons outlined in paragraphs 39 and 45 above, incorrect.

*Response to Patons Ask*

58 On two occasions on 17 October 2011, after the CM had delivered the Patons Ask on behalf of Coles, Patons requested information from Coles about the Patons ARC rebate. In particular, Patons:

58.1 requested information from Coles about when Coles had implemented EOQ ordering in relation to products ordered from Patons; and

58.2 requested an explanation from Coles as to how the figure of $60,000 referred to in paragraph 56.2.3 above had been calculated.

59 On 17 October 2011, in response to the requests for information referred to in paragraph 58 above, the CM:

59.1 informed Patons that Coles had been using EOQ ordering for Patons for the previous three to five months;

59.2 in accordance with the Tier 3 ARC Plan, provided Patons with a copy of the Patons Background Materials;

59.3 did not explain how Coles had calculated the figure of $60,000 referred to in paragraph 56.2.3 above;

59.4 did not provide Patons with any information that was adequate to enable Patons to understand the basis on which the data sharing or EOQ ordering components of the Patons ARC rebate had been determined by Coles.

*Coles provides Revised Patons Trading Terms to Patons*

60 On 19 October 2011, in accordance with the Tier 3 ARC Plan, the CM provided Patons with an unsigned copy of the Revised Patons Trading Terms, which incorporated the Patons ARC rebate which had not been agreed to by Patons.

61 On 19 October 2011, after having received the Revised Patons Trading Terms, Patons informed Coles that:

61.1 Patons had not been able to identify any savings to Patons from EOQ ordering or data sharing;

61.2 Patons would review any further data that Coles could provide to support the savings Coles considered Patons would achieve from EOQ ordering or data sharing; and

61.3 at this point in time, Patons would not agree to a change to its Trading Terms with Coles.

62 On 20 and 21 October 2011, the CM from Coles contacted Patons by telephone and pressured Patons to agree to the Ask within a matter of days, including by:

62.1 informing Patons that Patons was required to sign the Revised Patons Trading Terms urgently;

62.2 informing Patons that the Patons ARC rebate was a cost of doing business; and

62.3 again requesting that Patons sign the Revised Patons Trading Terms,

in circumstances where Coles had not provided any further information to explain or justify the Revised Patons Trading Terms.

*Escalation of Patons Ask*

63 By 25 October 2011, Patons had not agreed to incorporate the Patons ARC rebate into its Trading Terms with Coles.

64 On 25 October 2011, in accordance with the Tier 3 ARC Plan, the responsibility for obtaining the agreement of Patons to the incorporation of the Patons ARC rebate into Patons’ Trading Terms with Coles was escalated to a BCM.

*Threat to Patons and agreement to Patons Ask*

65 On 26 October 2011, the BCM contacted Patons by telephone, and during the course of the telephone conversation with Patons, the BCM:

65.1 pressured Patons by informing Patons that:

65.1.1 Coles expected Patons to agree to the Patons Ask;

65.1.2 he wanted Patons to agree to the Patons Ask that day;

65.1.3 Coles would cease Patons’ access to the Supplier Portal;

65.2 threatened Patons with commercial consequences if it did not agree to the Patons Ask, including that:

65.2.1 Coles would not promote Patons’ grocery products;

65.2.2 Coles would not acquire any new grocery products from Patons; and

65.2.3 Coles would place orders with Patons based only on Patons’ sales history with Coles and would not provide Patons with any forecasting information; and

65.3 still did not explain how Coles had calculated the figure of 0.7% for data sharing, or the figure of 0.55% for EOQ ordering.

66 On or about 26 October 2011, Patons:

66.1 informed the BCM that, in light of the threats referred to in 0 above, Patons had no choice but to agree to the incorporation of the Patons ARC rebate into Patons’ Trading Terms with Coles; and

66.2 signed the Revised Patons Trading Terms and returned them to Coles.

67 In the circumstances outlined above, Coles:

67.1 did not provide Patons with any adequate explanation of how the Patons ARC rebate reflected the value to Patons of data sharing; and

67.2 did not conduct any informed negotiation with Patons about the value to Patons of data sharing or EOQ ordering,

and despite knowing that:

67.3 Patons had signed and return the Revised Patons Trading Terms in the circumstances outlined in paragraph 66 above;

67.4 Patons did not believe that the Patons ARC rebate represented any value being obtained by Patons from data sharing and EOQ ordering,

Coles commenced deducting the Patons ARC rebate from the amount it pays to Patons for goods Coles acquires from Patons. Patons continues to pay an ARC rebate to Coles.

**Stuart Alexander**

***Background***

68 Stuart Alexander imports, markets and distributes branded products including chocolate, confectionery, chewing gum, salty snacks, beverages, sauces, syrups and tobacco, which it primarily supplies to supermarkets.

69 Coles acquired goods for retail sale in Coles’ retail stores from Stuart Alexander for five different Categories, including confectionery products that were acquired by Coles for its Impulse Business Category. The confectionery products that Coles acquired from Stuart Alexander were imported branded confectionery products.

70 During the relevant period, Coles was in a substantially stronger bargaining position than Stuart Alexander, in particular because:

70.1 Coles represented a significant proportion of the sales of Stuart Alexander’s products;

70.2 Coles determined whether it would continue to acquire grocery products from Stuart Alexander;

70.3 Coles determined whether it would substitute grocery products it was acquiring from Stuart Alexander with products acquired from another Supplier; and

70.4 of the matters set out in paragraph 17 above.

***Implementation of the Tier 3 ARC Plan***

*Conduct Prior to the Stuart Alexander Ask*

71 On 10 October 2011, Coles invited Stuart Alexander to attend a Coles Supply Chain Forum on 12 October 2011. The invitation indicated that attendance was compulsory.

72 On 12 October 2011, Coles delivered a presentation about changes it had made to its Supply Chain with particular focus on the Supplier Portal. Coles did not inform Stuart Alexander that Coles required payment from Stuart Alexander to use the Supplier Portal.

73 By about 14 October 2011, Coles:

73.1 had classified Stuart Alexander as a Tier 3 Supplier;

73.2 had determined that it would seek the agreement of Stuart Alexander to make ongoing payments to Coles by incorporation of an ARC rebate of 1.01%, which was made up of 0.7% for data sharing and 0.31% for EOQ ordering, into Stuart Alexander’s Trading Arrangements with Coles with respect to confectionery (the **Stuart Alexander Ask**);

73.3 had determined that a CM from its Impulse Business Category would deliver the Stuart Alexander Ask;

73.4 had prepared a Script for use by the CM to deliver the Stuart Alexander Ask (the **Stuart Alexander Script**), and had instructed the CM to use the Stuart Alexander Script;

73.5 had prepared Background Material for use by the CM to facilitate the agreement of Stuart Alexander to the Stuart Alexander Ask (the **Stuart Alexander Background Materials**), and had instructed the CM to use the Stuart Alexander Background Materials if they considered it would facilitate the agreement; and

73.6 had prepared an amended version of Stuart Alexander’s Trading Terms with respect to confectionery incorporating the ARC rebate (the **Revised Stuart Alexander Confectionery Trading Terms**), and had made the Revised Stuart Alexander Confectionery Trading Terms available to the CM;

73.7 had determined to give Stuart Alexander access to data sharing on 17 October 2011; and

73.8 had commenced ordering in EOQs from Stuart Alexander.

74 The Stuart Alexander Script used by the CM contained the statements referred to in paragraph 37, above, and also included the following statements:

74.1 “… we have identified a savings from your business based on your cost of goods sold (**COGS**) of:

* $117k/0.7% of COGS for … data sharing, and
* $51k/0.31% for Economic Ordering

We would like to move this savings into your Trading Terms effective 31/10/11, where we have created a separate line for this Supply Chain Allowance.”

74.2 “I’ll send you a short information pack and our amended trading terms for you to sign and return to us within 48 hours.”

*Stuart Alexander Ask*

75 On 17 October 2011, in accordance with the Tier 3 ARC Plan, the CM delivered the Stuart Alexander Ask in accordance with the Stuart Alexander Script to Stuart Alexander during a conversation.

76 During the course of the conversation the CM:

76.1 sought the agreement of Stuart Alexander to make ongoing payments to Coles by the incorporation of a rebate of 1.01% (the **Stuart Alexander ARC rebate**) into Stuart Alexander’s Trading Terms with Coles with respect to confectionery (**Confectionery Trading Terms**);

76.2 informed Stuart Alexander that:

76.2.1 Coles was introducing new systems that would deliver savings for Stuart Alexander;

76.2.2 data sharing would save Stuart Alexander approximately 0.7% of its cost of goods sold per annum;

76.2.3 EOQ ordering would save Stuart Alexander approximately 0.31% of its cost of goods sold per annum; and

76.2.4 Coles wanted Stuart Alexander to agree to the Stuart Alexander ARC rebate within 48 hours;

76.3 did not explain how Coles had calculated the 0.7% for data sharing or the 0.31% for EOQ ordering;

76.4 should not have asserted that the Stuart Alexander ARC Rebate reflected the value to Stuart Alexander of data sharing and EOQ ordering.

77 The representations that Coles had identified savings particular to Stuart Alexander of the amounts referred to in paragraph 74.1 and 76.2 above were, for the reasons outlined in paragraphs 39 and 45 above, incorrect.

78 During the conversation referred to in paragraphs 75 and 76 above, Stuart Alexander asked for more time to consider the Stuart Alexander ARC Ask.

79 Later that day, in accordance with the Tier 3 ARC Plan, and despite the request referred to in paragraph 78 above, the CM provided Stuart Alexander with a copy of the Stuart Alexander Background Materials.

80 The Stuart Alexander Background Materials did not contain information that was adequate to enable Stuart Alexander to understand the basis on which the data sharing or EOQ ordering components of the Stuart Alexander ARC rebate had been determined by Coles.

*Escalation of Stuart Alexander Ask*

81 By 21 October 2011, Stuart Alexander had not agreed to incorporate the Stuart Alexander ARC rebate into its Trading Terms with Coles.

82 On 21 October 2011, in accordance with the Tier 3 ARC Plan, the responsibility for obtaining the agreement of Stuart Alexander to the incorporation of the Stuart Alexander ARC rebate into Stuart Alexander’s Confectionery Trading Terms was escalated to a BCM.

*Threat to Stuart Alexander*

83 On 21 October 2011, during the course of a meeting with Stuart Alexander, the BCM pressured Stuart Alexander and threatened it with commercial consequences if it did not agree to the Stuart Alexander Ask, including that:

83.1 Coles would not acquire any new grocery products from Stuart Alexander;

83.2 Coles would not discuss, or would delay discussing, new grocery product development with Stuart Alexander; and

83.3 Coles would not promote Stuart Alexander’s products.

84 The BCM:

84.1 did not explain how Coles had calculated the figure of 0.7% for data sharing, or the figure of 0.31% for EOQ ordering; and

84.2 did not provide Stuart Alexander with any information that was adequate to enable Stuart Alexander to understand the basis on which the data sharing or EOQ ordering components of the Stuart Alexander ARC rebate had been determined by Coles.

*Coles provides Revised Stuart Alexander Confectionery Trading Terms to Stuart Alexander*

85 On 21 October 2011, following the meeting referred to in paragraph 83 above:

85.1 in accordance with the Tier 3 ARC Plan, the CM provided Stuart Alexander with an unsigned copy of the Revised Stuart Alexander Confectionery Trading Terms, which incorporated the Stuart Alexander ARC rebate which had not been agreed to by Stuart Alexander; and

85.2 the BCM asked Stuart Alexander to agree to the Stuart Alexander Ask by requesting that Stuart Alexander “write back “approved” to the 1.01% ARC terms”.

86 On 22 October 2011, having received the Revised Stuart Alexander Confectionery Trading Terms and the request referred to in paragraph 85.2 above, Stuart Alexander informed Coles that:

86.1 Stuart Alexander could not agree to the Stuart Alexander ARC rebate;

86.2 Stuart Alexander did not consider that there would be any savings to Stuart Alexander from data sharing;

86.3 Stuart Alexander considered that it was difficult to confirm whether there was a benefit to Stuart Alexander from EOQ ordering;

86.4 Stuart Alexander understood that, as a result of Stuart Alexander not agreeing to the Stuart Alexander Ask:

86.4.1 responsibility for obtaining the agreement of Stuart Alexander would be further escalated;

86.4.2 Stuart Alexander would lose access to the Supplier Portal;

86.4.3 Coles would not promote Stuart Alexander’s products; and

86.4.4 Coles would not accept new lines of products from Stuart Alexander.

*Further Threats and Escalation of the Stuart Alexander Ask*

87 On 15 November 2011, Stuart Alexander:

87.1 informed Coles that:

87.1.1 as a distributor, Stuart Alexander would not benefit in savings of 0.7% from data sharing;

87.1.2 Stuart Alexander’s numbers showed a saving of 0.12% with respect to data sharing;

87.1.3 Stuart Alexander would agree to incorporate a rebate of 0.42% into its Confectionery Trading Terms with Coles, subject to Coles reinstating a promotion of one of its products; and

87.2 provided Coles with a hand annotated version of the Stuart Alexander Background Materials, to reflect Stuart Alexander’s reasons for considering that the savings to Stuart Alexander from data sharing and EOQ ordering would be 0.42%.

88 On 2 December 2011, the BCM pressured Stuart Alexander by further threatening Stuart Alexander with commercial consequences if it did not agree to the Stuart Alexander Ask, namely that Coles would not discuss any new product development with Stuart Alexander.

89 On 14 December 2011, Stuart Alexander informed Coles that Stuart Alexander would agree to incorporate a rebate of 0.42% into its Confectionery Trading Terms with Coles, without the need for Coles to reinstate the promotion referred to in paragraph 87.1.3 above.

90 On 17 December 2011, the BCM informed Stuart Alexander that:

90.1 Coles was unable to agree to Stuart Alexander’s position on the Stuart Alexander ARC rebate;

90.2 Coles would not offer forecast collaboration to Stuart Alexander;

90.3 Coles would cease Stuart Alexander’s access to the Supplier Portal;

90.4 Coles would cease EOQ ordering for Stuart Alexander; and

90.5 in accordance with the Tier 3 ARC Plan, informed Stuart Alexander that one of Coles’ GMs would like to discuss the Stuart Alexander ARC rebate with Stuart Alexander.

91 On 6 January 2012, Stuart Alexander informed Coles that Stuart Alexander would incorporate a rebate of 0.42% into its Confectionery Trading Terms with Coles, together with an amount of money that was the equivalent of 0.28% of its Confectionery Trading Terms with Coles. Coles agreed to this on 27 January 2012.

92 In the circumstances outlined above, Coles:

92.1 did not provide Stuart Alexander with any adequate explanation of how the Stuart Alexander ARC rebate reflected the value to Stuart Alexander of data sharing; and

92.2 did not conduct any informed negotiation with Stuart Alexander about the value to Stuart Alexander of data sharing or EOQ ordering,

and despite knowing that Stuart Alexander did not believe that the Stuart Alexander ARC rebate represented any value being obtained by Stuart Alexander from data sharing and EOQ ordering, Coles commenced deducting the Stuart Alexander ARC rebate from the amount it pays to Stuart Alexander for goods Coles acquires from Stuart Alexander. Stuart Alexander continues to pay an ARC rebate to Coles.

**Tru Blu Beverages Pty Ltd**

***Background***

93 Tru Blu manufactures, markets and supplies branded and private label carbonated (soft drink) beverages and cordials to retailers in Australia.

94 The majority of the products that Coles acquired from Tru Blu for sale in Coles’ retail stores were private label products, which Tru Blu manufactured for Coles and packaged under Coles-owned brands. These products were acquired by Coles from Tru Blu on an order-to-order basis without a fixed-term contract. The products were acquired from Tru Blu for Coles’ Impulse Business Category.

95 During the relevant period, Coles was in a substantially stronger bargaining position than Tru Blu, in particular because:

95.1 Coles represented a significant proportion of the sales of Tru Blu’s products;

95.2 Coles determined whether it would continue to acquire grocery products from Tru Blu;

95.3 Coles determined whether it would substitute grocery products it was acquiring from Tru Blu with products acquired from another Supplier; and

95.4 of the matters set out at paragraph 17 above.

***Implementation of the Tier 3 ARC Plan***

*Conduct prior to the Tru Blu Ask*

96 By about 17 October 2011, Coles:

96.1 had classified Tru Blu as a Tier 3 Supplier;

96.2 had determined that it would seek the agreement of Tru Blu to make ongoing payments to Coles by incorporation of an ARC rebate of 0.8%, which was made up of 0.7% for data sharing and 0.1% for EOQ ordering, into Tru Blu’s Trading Arrangements with Coles (the **Tru Blu Ask**);

96.3 had determined that a CM from its Impulse Business Category would deliver the Tru Blu Ask;

96.4 had prepared Background Material for use by the CM to facilitate the agreement of Tru Blu to the Tru Blu Ask (the **Tru Blu Background Materials**), and had instructed the CM to use the Tru Blu Background Materials if they considered it would facilitate the agreement;

96.5 had prepared an amended version of Tru Blu’s Trading Terms incorporating the ARC rebate (the **Revised Tru Blu Trading Terms**), and had made the Revised Tru Blu Trading Terms available to the CM;

96.6 had determined to give Tru Blu access to data sharing on 17 October 2011; and

96.7 had commenced ordering in EOQs from Tru Blu.

*Tru Blu Ask*

97 On 18 October 2011, in accordance with the Tier 3 ARC Plan, the CM delivered the Tru Blu Ask to Tru Blu during a telephone conversation.

98 During the telephone conversation the CM sought the agreement of Tru Blu to make ongoing payments to Coles by the incorporation of a rebate of 0.8% (the **Tru Blu ARC rebate**) into Tru Blu’s Trading Terms with Coles.

99 Subsequently on 18 October 2011, the CM, in accordance with the Tier 3 ARC Plan:

99.1 represented that Coles had identified savings to Tru Blu of:

99.1.1 “$402k/0.7% of COGS for … data sharing”; and

99.1.2 “59k/0.10% for Economic Ordering”;

99.2 provided Tru Blu with a copy of the Tru Blu Background Materials;

99.3 sought Tru Blu’s agreement to the Tru Blu Ask by midday on 19 October 2011;

99.4 did not explain how Coles had calculated the figure of 0.7% for data sharing or the figure of 0.1% for EOQ ordering; and

99.5 should not have asserted that the Tru Blu ARC Rebate reflected the value to Tru Blu of data sharing and EOQ ordering.

100 The representation that Coles had identified savings for Tru Blu of the amounts referred to in paragraph 99.1 above were, for the reasons outlined in paragraphs 39 and 45 above, incorrect.

101 The Tru Blu Background Materials did not contain information that was adequate to enable Tru Blu to understand the basis on which the data sharing or EOQ ordering components of the Tru Blu ARC rebate had been determined by Coles.

*Response to Tru Blu Ask*

102 On 19 October 2011, Tru Blu informed Coles that it would not participate in the ARC program.

*Threats to Tru Blu and action by Coles*

103 By at least 19 October 2011, Tru Blu had requested a meeting with Coles to discuss a proposal for a long-term contract with Coles for the supply of private label products.

104 On about 20 October 2011, at a meeting between Tru Blu and the CM:

104.1 the CM reiterated the Tru Blu Ask;

104.2 Tru Blu informed Coles that it would not agree to the Tru Blu Ask because ARC would add costs to Tru Blu’s business rather than delivering costs savings;

104.3 the CM pressured Tru Blu and threatened it with the commercial consequences that if it did not agree to the Tru Blu Ask Coles would not participate in any constructive discussions about a contract for the supply of private label products by Tru Blu or other matters in relation to Tru Blu’s business.

105 On 21 October 2011, the CM again pressured Tru Blu and threatened it with the commercial consequence that if it did not agree to the Tru Blu Ask Coles would not agree to any long term contract with Tru Blu for the supply of private label products.

106 On 14 November 2011, Coles informed Tru Blu that, as a result of Tru Blu failing to agree to the Tru Blu ARC rebate, Coles would no longer provide Tru Blu with three-month forecasts of Coles’ requirements for the private label products Coles acquired from Tru Blu, and instead Coles would provide only four week forecasts.

*Escalation of Tru Blu Ask*

107 By 15 November 2011, Tru Blu had not agreed to incorporate the Tru Blu ARC rebate into its Trading Terms with Coles and, in accordance with the Tier 3 ARC Plan, the responsibility for obtaining the agreement of Tru Blu to the incorporation of the Tru Blu ARC rebate into Tru Blu’s Trading Terms with Coles was escalated to a BCM.

*Further actions by Coles*

108 On 15 November 2011, in communications between Tru Blu and the BCM:

108.1 Tru Blu informed the BCM that Tru Blu had rejected the Tru Blu ARC rebate on the basis that it would add costs to Tru Blu’s business rather than delivering cost savings;

108.2 the BCM pressured Tru Blu and threatened it with the commercial consequences of:

108.2.1 refusing to meet with Tru Blu until Tru Blu had agreed over the telephone with the CM to the incorporation of the Tru Blu ARC rebate into its Trading Terms with Coles; and

108.2.2 refusing to consider a long-term contract between Coles and Tru Blu for the supply of private label products.

108.3 the BCM did not explain how Coles had calculated the figure of 0.7% for data sharing or the figure of 0.1% for EOQ ordering.

*Tru Blu’s response to Tru Blu Ask*

109 Tru Blu later agreed to incorporate an ARC rebate of 0.5% into Tru Blu’s Trading Terms with Coles, and Coles entered into a contract with Tru Blu for the acquisition of private label products by Coles from Tru Blu.

110 In the circumstances outlined above, Coles:

110.1 did not provide Tru Blu with any adequate explanation of how the Tru Blu ARC rebate reflected the value to Tru Blu of data sharing; and

110.2 did not conduct any informed negotiation with Tru Blu about the value to Tru Blu of data sharing or EOQ ordering,

and despite knowing that Tru Blu did not believe that the Tru Blu ARC rebate or the 0.5% ARC rebate represented any value being obtained by Tru Blu from data sharing and EOQ ordering, Coles commenced deducting the 0.5% ARC rebate from the amount it pays to Tru Blu for goods Coles acquires from Tru Blu. Tru Blu continues to pay an ARC rebate to Coles.

**Austech Products Pty Ltd**

***Background***

111 Austech manufactures a range of household consumer products under the Orange Power, Aware, Actizyme and Stain Magic brands, which it supplies primarily to supermarkets.

112 Coles acquired ten household consumer products from Austech for sale in Coles’ retail stores. Each of those products were sold by Coles under brands associated with Austech. The products acquired from Austech were part of the range acquired by Coles’ Homecare Business Category.

113 During the relevant period, Coles was in a substantially stronger bargaining position than Austech, in particular because:

113.1 Coles represented a significant proportion of the sales of Austech’s products;

113.2 Coles determined whether it would continue to acquire grocery products from Austech;

113.3 Coles determined whether it would substitute grocery products it was acquiring from Austech with products acquired from another Supplier; and

113.4 of the matters set out in paragraph 17 above.

***Implementation of the Tier 3 ARC Plan***

*Conduct prior to the Austech Ask*

114 By about 14 October 2011, Coles:

114.1 had classified Austech as a Tier 3 Supplier;

114.2 had determined that it would seek the agreement of Austech to make ongoing payments to Coles by incorporation of an ARC rebate of 1.2%, which was made up of 0.7% for data sharing and 0.5% for EOQ ordering, into Austech’s Trading Arrangements with Coles (the **Austech Ask**);

114.3 had determined that a CM from its Homecare Business Category would deliver the Austech Ask;

114.4 had prepared a Script for use by the CM to deliver the Austech Ask (the **Austech Script**), and had instructed the CM to use the Austech Script;

114.5 had prepared an amended version of Austech’s Trading Terms incorporating the ARC rebate (the **Revised Austech Trading Terms**), and had made the Revised Austech Trading Terms available to the CM;

114.6 had determined to give Austech access to data sharing on 17 October 2011; and

114.7 had commenced ordering in EOQs from Austech.

115 The Austech Script contained the statements referred to in paragraph 37, above, and also included the following statements:

115.1 “… based on your COGS we have identified savings in your business of:

* $17k/ 0.5% for Economic Ordering; and
* $26k/ 0.7% of COGS for … data sharing

… we would like to apportion the savings delivered by this investment and corresponding benefit to you with the introduction of a Supply Chain Allowance. We would like to work through this in discussion with you.”

*Austech Ask*

116 On 14 October 2011, in accordance with the Tier 3 ARC Plan, the CM delivered the Austech Ask in accordance with the Austech Script to Austech during a telephone conversation.

117 During the telephone conversation:

117.1 the CM sought the agreement of Austech to make ongoing payments to Coles by the incorporation of a rebate of 1.2% (the **Austech ARC rebate**) into Austech’s Trading Terms with Coles;

117.2 the CM informed Austech that:

117.2.1 Coles had invested in a ‘Supplier Portal’ which would improve the efficiency of Austech’s business;

117.2.2 data sharing would save Austech approximately 0.7% of its cost of goods sold per annum;

117.2.3 EOQ ordering would save Austech approximately 0.5% of its cost of goods sold per annum;

117.2.4 Austech was required to agree to incorporate the Austech ARC rebate into Austech’s Trading Terms with Coles;

117.3 the CM did not explain how Coles had calculated the figure of 0.7% for data sharing or the figure of 0.5% for EOQ ordering;

117.4 the CM should not have asserted that the Austech ARC Rebate reflected the value to Austech of data sharing and EOQ ordering; and

117.5 Austech told the CM:

117.5.1 supplying Coles with orders in full or part pallets meant that Austech might save about $900 only; and

117.5.2 Austech made a month’s worth of supply in a day and to do any less was not economically viable.

118 The representation that Coles had identified savings for Austech of the amounts referred to in paragraph 115.1 and 117.2 above were, for the reasons outlined in paragraphs 39 and 45 above, incorrect.

*Response to Austech Ask*

119 On 17 October 2011, Austech informed Coles that Austech saw little benefit to its business from EOQ ordering or data sharing.

*Threat to Austech and agreement to Austech Ask*

120 By 19 October 2011, Austech had not agreed to incorporate the Austech ARC rebate into its Trading Terms with Coles.

121 Despite being informed of the matters in paragraph 117.5 and 119 above, on 19 October 2011, the CM contacted Austech by telephone, and during the course of the telephone conversation the CM:

121.1 informed Austech that:

121.1.1 big companies like Nestle had agreed to pay an ARC rebate, and were paying more than Austech;

121.1.2 the Austech ARC rebate had been worked out for Austech’s size business;

121.1.3 if Austech ‘signed up’ that day, she would meet with Austech to discuss how Coles and Austech could drive Austech’s business, add new product lines and do promotions;

121.1.4 if Austech did not agree to the Austech ARC Ask, Coles would cease EOQ ordering from Austech and order from Austech in volumes that comprised part pallets;

121.2 pressured Austech and threatened it with the commercial consequence that if it did not agree to incorporate the Austech ARC rebate into its Trading Terms with Coles, Coles’ replenishers would give no support to Austech; and

121.3 again did not explain how Coles had calculated the figure of 0.7% for data sharing or the figure of 0.5% for EOQ ordering.

122 At the conclusion of the conversation referred to in paragraph 121 above, Austech informed Coles that Austech would agree to incorporate the Austech ARC rebate into its Trading Terms with Coles.

123 The statements referred to in paragraphs 121.1.1 and 121.1.2 above were incorrect.

124 On 19 October 2011, in the context of considering the ARC rebate, Austech informed Coles that the Board of Austech had requested that Coles provide certain information in relation to the ranging of Austech’s products.

125 In reply to this request, the CM informed Austech that the CM would be transparent and supply the information sought by Austech but only after Austech had agreed to the Austech Ask.

126 On 20 October 2011, as a result of being informed of the matters referred to in paragraph 121 above, including the threat in paragraph 121.2, and as a result of the agreement referred to in paragraph 122 above, Austech signed and returned the Revised Austech Trading Terms to Coles.

127 In the circumstances outlined above, Coles:

127.1 did not provide Austech with any adequate explanation of how the Austech ARC rebate reflected the value to Austech of data sharing; and

127.2 did not conduct any informed negotiation with Austech about the value to Austech of data sharing or EOQ ordering,

and despite knowing that:

127.3 Austech did not believe that the Austech ARC rebate represented any value being obtained by Austech from data sharing and EOQ ordering; and

127.4 Austech did not believe that the incorporation of the Austech ARC rebate into its Trading Terms, or the amount of the Austech ARC rebate, were matters that it could negotiate with Coles,

Coles commenced deducting the Austech ARC rebate from the amount it pays to Austech for goods Coles acquires from Austech. Austech continues to pay an ARC rebate to Coles.

**Oates**

***Background***

128 Oates supplies mostly imported janitorial cleaning products, including chemicals, brushware and mops to Australian retailers and wholesalers.

129 Coles acquired 35 products from Oates for sale in Coles’ retail stores. All of those products were sold under the Oates brand. The majority of the products Coles acquired from Oates were acquired for its Homecare Business Category.

130 During the relevant period, Coles was in a substantially stronger bargaining position than Oates, in particular because:

130.1 Coles represented a significant proportion of the sale of Oates’ products;

130.2 Coles determined whether it would continue to acquire grocery products from Oates;

130.3 Coles determined whether it would substitute grocery products it was acquiring from Oates with products acquired from another Supplier; and

130.4 of the matters set out at paragraph 17 above.

***Implementation of the Tier 3 ARC Plan***

*Conduct prior to the Oates Ask*

131 On 10 October 2011, Coles invited Oates to attend a Coles Supply Chain Forum on 11 October 2011. The invitation indicated that attendance was compulsory.

132 On 11 October 2011, Coles delivered a presentation about changes it had made to its Supply Chain with particular focus on the Supplier Portal. Coles did not inform Oates that Coles required payment from Oates to use the Supplier Portal.

133 By about 14 October 2011, Coles:

133.1 had classified Oates as a Tier 3 Supplier;

133.2 had determined that it would seek the agreement of Oates to make ongoing payments to Coles by incorporation of an ARC rebate of 1.14%, which was made up of 0.7% for data sharing and 0.44% for EOQ ordering, into Oates’ Trading Arrangements with Coles (the **Oates Ask**);

133.3 had determined that a CM from its Homecare Business Category would deliver the Oates Ask;

133.4 had prepared a Script for use by the CM to deliver the Oates Ask (the **Oates Script**), and had instructed the CM to use the Oates Script;

133.5 had prepared an amended version of Oates’ Trading Terms incorporating the ARC rebate (the **Revised Oates Trading Terms**), and had made the Revised Oates Trading Terms available to the CM;

133.6 had determined to give Oates access to data sharing on 17 October 2011; and

133.7 had commenced ordering in EOQs from Oates.

134 The Oates Script used by the CM contained the statements referred to in paragraph 37 above, and also included the following statements:

134.1 “… based on your COGS we have identified savings in your business of:

* $29k/0.4% for Economic Ordering; and
* $46k/0.7% of COGS for … data sharing

… we would like to apportion the savings delivered by this investment and corresponding benefit to you with the introduction of a Supply Chain Allowance. We would like to work through this in discussion with you.”

*Oates Ask*

135 On 17 October 2011, in accordance with the Tier 3 ARC Plan, the CM delivered the Oates Ask in accordance with the Oates Script to Oates during a meeting at Coles’ Head Office in Victoria.

136 During the course of the meeting the CM:

136.1 sought the agreement of Oates to make ongoing payments to Coles by the incorporation of a rebate of 1.14% (the **Oates ARC rebate**) into Oates’ Trading Terms with Coles;

136.2 informed Oates that:

136.2.1 the Oates ARC rebate reflected the value to Oates of the changes Coles had made to its supply chain;

136.2.2 data sharing would save Oates approximately 0.7% of its cost of goods sold per annum;

136.2.3 EOQ ordering would save Oates approximately 0.44% of its cost of goods sold per annum;

136.2.4 Coles had already introduced EOQ ordering in relation to the products it acquired from Oates;

136.2.5 the Oates ARC rebate was to be incorporated into Oates’ Trading Terms with Coles with effect from 31 October 2011;

136.2.6 he required Oates to provide feedback and an indication of whether Oates would agree to the incorporation of the Oates ARC rebate into Oates’ Trading Terms with Coles by 4pm that day;

136.2.7 Oates was required to agree to incorporate the Oates ARC rebate into Oates’ Trading Terms with Coles;

136.3 the CM did not explain how Coles had calculated the figure of 0.7% for data sharing or the figure of 0.44% for EOQ ordering; and

136.4 should not have asserted that the Oates ARC rebate reflected the value to Oates of data sharing and EOQ ordering.

137 The representations that Coles had identified savings for Oates of the amounts referred to in paragraphs 134.1, 136.2.2 and 136.2.3 above were, for the reasons outlined in paragraph 39 and 45 above, incorrect.

*Follow up to Oates Ask*

138 Subsequently on 17 October 2011, the CM:

138.1 reiterated that Coles wished to add the Oates ARC rebate to Oates’ Trading Terms with Coles, and that it comprised 0.7% for data sharing and 0.44% for EOQ ordering;

138.2 reiterated that the Oates ARC rebate would be added to Oates’ Trading Terms with Coles and would be effective from 31 October 2011; and

138.3 said that he wanted confirmation that Oates accepted the Oates ARC rebate by 4.00pm that day and would then forward Revised Oates Trading Terms.

139 On 20 October 2011, the CM:

139.1 again requested a response from Oates as to whether Oates agreed to incorporate the Oates ARC rebate into Oates’ Trading Terms with Coles;

139.2 in accordance with the Tier 3 ARC Plan, informed Oates that if Oates did not agree to incorporate the Oates ARC rebate into Oates’ Trading Terms with Coles, the matter would be escalated; and

139.3 informed Oates that 25% of Coles’ other Suppliers had already agreed to incorporate an ARC rebate into their Trading Terms with Coles.

140 Subsequently on 20 October 2011, the CM:

140.1 repeated his request for a response from Oates as to whether Oates agreed to incorporate the Oates ARC rebate into Oates’ Trading Terms with Coles; and

140.2 informed Oates that Coles would like the most senior person available at Oates to meet with Coles’ management team in relation to the Oates ARC rebate.

*Escalation of Oates Ask*

141 Subsequent to the repeated requests for a response to the Oates Ask referred to in paragraphs 136.1, 138, 139 and 140, Oates had still not agreed to incorporate the Oates ARC rebate into its Trading Terms with Coles.

142 Subsequently on 20 October 2011, in accordance with the Tier 3 ARC Plan, the responsibility for obtaining the agreement of Oates to the incorporation of the Oates ARC rebate into Oates’ Trading Terms was escalated to a BCM.

143 On numerous occasions on 20 October 2011 and 21 October 2011, the BCM pressured Oates to agree to the Oates Ask, by contacting several different representatives of Oates requesting, on each occasion, for Oates to advise whether or not it would agree to the Oates Ask. On at least one occasion on 21 October 2011, the BCM informed Oates that Coles had set a deadline of midday that day for Oates to provide an answer. Later on 21 October 2011 the BCM informed Oates that Coles expected Oates to advise of its position by 10.00am on Monday 24 October 2011.

144 In addition to the numerous requests for a response to the ARC Ask by the BCM referred to in paragraph 143 above, on 21 October 2011 the CM also pressured Oates by reiterating the ARC Ask to Oates, noting that it comprised 0.7% for data sharing and 0.44% for EOQ ordering. The CM also informed Oates that the Oates ARC rebate would be added to Oates’ Trading Terms with Coles and would be effective from 31 October 2011.

145 On 24 October 2011, Oates informed Coles that:

145.1 Oates could not identify savings to Oates that equated to an addition of 1.14% to its Trading Terms with Coles;

145.2 Oates did not agree to incorporate the Oates ARC rebate into its Trading Terms with Coles; and

145.3 there was still no official resolution to the unauthorised withholding by Coles of $246,400 due to Oates which had been deducted earlier in the year without the agreement or authority of Oates.

146 In response to being informed of the matters referred to in paragraph 145 above, the BCM informed Oates that Coles needed Oates’ support with the ‘Supplier Portal’ and wanted to meet with Oates to discuss Oates’ position on the Oates ARC rebate.

*Threat to Oates*

147 On 24 October 2011, during the course of a telephone conversation with Oates, the CM:

147.1 expressed surprise and disappointment that Oates had not agreed to the Oates ARC rebate;

147.2 pressured Oates, and threatened it with commercial consequences if it did not agree to the Oates Ask, including:

147.2.1 if Oates did not sign up to ARC this may impact on Coles’ decisions about ranging Oates’ products relative to other Suppliers;

147.2.2 if Oates did not sign up to ARC, there may be risks to promotional activity for Oates’ products; and

147.2.3 Oates would be classified as a ‘transactional’ Supplier, which may have implications for ranging;

147.3 informed Oates that some of Oates’ competitors were trying to have their products added to the Coles range of products.

148 On 25 October 2011, during the course of a meeting with Oates, the CM and the BCM further pressured Oates and threatened it with commercial consequences if Oates did not agree to the Oates Ask by using words to the effect that failing to agree to the Oates ARC rebate would:

148.1 be seen by Coles as a lack of support for Coles; and

148.2 might affect Oates’ continued relationship with Coles.

149 On 27 October 2011, the CM:

149.1 informed Oates that if it did not agree to the Oates Ask:

149.1.1 Oates would not have access to the ‘Supplier Portal’;

149.1.2 Coles would cease EOQ ordering from Oates; and

149.1.3 in accordance with the Tier 3 ARC Plan, Oates’ position on the Oates ARC rebate would be escalated to a GM.

149.2 again threatened Oates that if it did not agree to the Oates Ask Coles would only maintain a ‘transactional’ relationship with Oates;

149.3 expressed concern that Oates’ supply may be adversely affected by it not agreeing to pay Coles the ARC rebate;

149.4 advised Oates that Coles would pay Oates the $246,400 that it had withheld from Oates in relation to the claim referred to in paragraph 145.3 above.

*Agreement to Oates Ask*

150 On or about 18 November 2011, Oates offered to make monthly payments to the total of $365,200 (inclusive of GST), which included a $70,000 lump sum that was the approximate equivalent of the Oates ARC rebate for the 2012 financial year.

151 In the circumstances outlined above, Coles:

151.1 did not provide Oates with any adequate explanation, of how the Oates ARC rebate reflected the value to Oates of data sharing; and

151.2 did not conduct any informed negotiation with Oates about the value to Oates of data sharing or EOQ ordering,

and, despite knowing that Oates did not believe that the Oates ARC rebate represented value being obtained by Oates from data sharing and EOQ ordering, Coles accepted the offer outlined in paragraph 150 above. At the conclusion of the period referred to above, Coles requested that Oates continue making payments such that it continues to pay for ARC.

**Conclusion**

152. Coles admits each of the contraventions in the proposed declarations which are Annexure A to the joint submissions filed in these proceedings.

**ANNEXURE 2 – VID 609 OF 2014**

**STATEMENT OF AGREED FACTS AND ADMISSIONS PURSUANT TO s 191(3)(a) OF THE *EVIDENCE ACT 1995* (CTH)**

**PART I INTRODUCTION**

1 This Statement of Agreed Facts and Admissions (**SoAFA**) pursuant to s 191(3)(a) of the *Evidence Act 1995* (Cth) (**Evidence Act**), is made jointly on behalf of:

1.1 the applicant, the Australian Competition and Consumer Commission (**ACCC**); and

1.2 the first respondent, Coles Supermarkets Australia Pty Ltd (**Coles Supermarkets**) and the second respondent, Grocery Holdings Pty Ltd (**GHPL**), together **Coles**.

2 This SoAFA details admissions by Coles that it contravened the then s 22 of the Australian Consumer Law (**ACL**) being Schedule 2 to the Competition and Consumer Act 2010 (Cth) (the **Act**).

3 The admissions of Coles in this SoAFA are made by Coles for the purposes of this proceeding only and unless otherwise stated, relate to the period from about December 2010 to about 31 December 2011 (the **relevant period**).

**PART II BACKGROUND**

**Coles**

4 Coles Supermarkets:

4.1 is and was at all material times a corporation within the meaning of section 4 of the CCA;

4.2 carries on, and at all material times carried on, business in trade or commerce as a supermarket retailer; and

4.3 supplies, and at all material times supplied, grocery products for retail sale to customers in Australia.

5 GHPL:

5.1 is and was at all material times a corporation within the meaning of section 4 of the CCA;

5.2 carries on, and at all material times carried on, business in trade or commerce as a supermarket wholesaler; and

5.3 acquires, and at all material times acquired, grocery products from manufacturers and other suppliers (collectively **Suppliers**) for retail sale by Coles Supermarkets to customers in Australia.

6 Coles engaged, and continues to engage, in a business of acquiring grocery products from Suppliers and selling those products to customers in Australia through Coles’ retail stores (the **Coles business**).

7 Coles operated, and continues to operate, retail stores in every Australian State and mainland Territory.

8 During the relevant period, Coles supplied approximately 30% of the grocery products supplied for retail sale to customers in Australia. Together with Woolworths, Coles supplied approximately 60% to 70% of the grocery products supplied for retail sale to customers in Australia.

9 The Coles grocery business had revenue in the order of $22.1 billion for the financial year ending 30 June 2011 and in the order of $23.3 billion for the financial year ending 30 June 2012. Each of the Suppliers referred to in 0 below had revenue of less than 0.50% of Coles’ revenue for the financial year ending 30 June 2012.

**Coles’ business**

10 The Coles business was, and continues to be, structured by reference to groups of similar or related grocery products (**General Categories**).

11 During the relevant period:

11.1 each General Category was managed by a General Manager (**GM**);

11.2 within each General Category, the Coles business was managed by reference to smaller groups of similar or related grocery products (**Business Categories**);

11.3 each Business Category was managed by a Business Category Manager (**BCM**);

11.4 each BCM reported to a GM;

11.5 within each Business Category, the Coles business was managed by reference to smaller groups of similar or related products (**Categories**);

11.6 each Category was managed by a Category Manager (**CM**); and

11.7 each CM reported to a BCM.

12 The GMs and BCMs were Coles’ Senior Managers (**Senior Managers**), and together with the CMs acted on behalf of Coles in relation to the conduct admitted in this SoAFA.

**PART III CIRCUMSTANCES RELEVANT TO COLES’ CONDUCT**

**Coles’ trading arrangements with its Suppliers**

13 Coles acquired, and continues to acquire, grocery products for retail sale from Suppliers pursuant to arrangements negotiated between Coles and the Suppliers (**Trading Arrangements**).

14 Where Trading Arrangements were documented, the documentation could include one or more of the following documents produced by Coles:

14.1 a Trading Terms Letter;

14.2 a Consolidated Trading Terms Form (**Trading Terms**);

14.3 Standard Terms and Conditions.

15 In the case of each of the Suppliers who are referred to in 0 below, the Trading Arrangements required that the Supplier pay Coles rebates, when Coles acquired the Supplier’s grocery products, calculated as a percentage of the price Coles paid for the Supplier’s products.

16 During the relevant period, Coles:

16.1 determined the number of units of each grocery product that Coles would acquire from a Supplier;

16.2 determined the frequency with which Coles would place orders for a grocery product with a Supplier;

16.3 determined the time frame within which Suppliers were required to deliver grocery products that had been ordered by Coles;

16.4 determined the price at which Coles would sell each grocery product acquired from a Supplier;

16.5 determined ‘hurdle rates’ for grocery products acquired from a Supplier, being a rate of retail sales the product was expected to achieve;

16.6 determined whether Coles would continue to acquire grocery products from a Supplier;

16.7 determined whether Coles would substitute grocery products it was acquiring from one Supplier with products acquired from another Supplier;

16.8 conducted, through its CMs, a ‘range review’ process at regular intervals, during which consideration was given to whether a Supplier’s grocery products would be deleted from the range of products available for sale in Coles’ retail stores;

16.9 determined the amount and location of shelf space in each of Coles’ retail stores that would be allocated to grocery products acquired from a Supplier;

16.10 determined whether grocery products acquired from a Supplier would be the subject of promotion by Coles, for example by way of a markdown in the retail price, an entry in a Coles sales catalogue, or otherwise;

16.11 determined the timing, frequency, duration and financial terms of any promotions it decided to undertake for grocery products acquired from a Supplier, including the amount of any payment or other financial contribution Coles required a Supplier to make for the promotion; and

16.12 required any Supplier who wished to increase the price at which it sold any of its grocery products to Coles to make an application for approval of a price increase to Coles, which approval was at the discretion of Coles.

17 Coles was in a substantially stronger bargaining position relative to each of the Suppliers referred to in 0 below, in particular because Coles represented a significant proportion of the business of each Supplier.

**Coles’ business practices**

18 During the relevant period, Coles:

18.1 set sales and profit targets for its General Categories and Business Categories, and encouraged and/or required its CMs and BCMs to meet these profit targets, including by engaging in the practices outlined in paragraphs 19 to 26 below;

18.2 awarded prizes to its CMs and BCMs for meeting profit targets;

18.3 set aside days which were referred to within Coles as “Profit Day” or “Perfect Profit Day”, and set targets for Business Categories of money to be ‘secured’ by the Business Categories from Suppliers, including for profit gaps, waste and markdown and penalties for late and short deliveries.

***Profit Gaps***

19 Coles expected its profit in respect of a Supplier’s products to increase in line with the Supplier’s sales growth. If Coles’ profit on a Suppliers product was growing behind the Supplier’s sales to Coles, Coles referred to the difference between the Supplier’s sales growth and Coles’ profit growth as a **profit gap**.

20 Coles knew that profit gaps in respect of any particular product could be caused by Coles' own acts and omissions and by other matters which were largely or entirely outside the control of Suppliers.

21 During the relevant period, Coles encouraged and/or required its CMs and BCMs to seek payments or other funding from Suppliers in order to make up purported profit gaps.

***Waste***

22 During the relevant period, Coles recorded what it claimed to be the cost to it of:

22.1 products that Coles acquired from a Supplier that were identified as lost, damaged or unfit for sale while in Coles’ retail stores (**waste**); and

22.2 Coles’ employees or agents reducing, or marking down, the price in Coles’ retail stores of products Coles acquired from a Supplier (**markdowns**).

23 Coles knew that waste and markdowns in respect of any particular product could be caused by its own acts or omissions rather than any act or omission by the Supplier of that product.

24 Coles encouraged and/or required its CMs and BCMs to seek payments from Suppliers on the premise that Coles had recorded waste or markdowns for the Supplier’s products.

***Late or Short Deliveries***

25 During the relevant period, Coles determined that it would impose ‘penalties’ or ‘fines’, in the form of monetary penalties, on Suppliers in some or all of the Business Categories in the Grocery and Frozen General Category, that Coles had recorded as not delivering the products that Coles ordered from them on time and in full in accordance with the order placed by Coles (**late or short deliveries**).

26 Coles encouraged and/or required its CMs and BCMs to seek the monetary penalties referred to in paragraph 25 in circumstances where:

26.1 the monetary penalties were not calculated by reference to any assessment by Coles of the likely cost to Coles, if any, of the late or short delivery; and

26.2 late or short deliveries may not lead to any loss to Coles.

**PART IV COLES’ CONDUCT IN RELATION TO INDIVIDUAL SUPPLIERS**

**Austech Products Pty Ltd (Austech)**

***Background***

27 Austech manufactures a range of household consumer products under the Orange Power, Aware, Actizyme and Stain Magic brands, which it supplies primarily to supermarkets.

28 Coles acquired ten household consumer products from Austech for sale in Coles’ retail stores. Each of those products were sold by Coles under brands associated with Austech. The products acquired from Austech were part of the range acquired by Coles’ Homecare Business Category.

29 During the relevant period, Coles was in a substantially stronger bargaining position than Austech, in particular because:

29.1 Coles represented a significant proportion of the sales of Austech’s products;

29.2 Coles determined whether it would continue to acquire grocery products from Austech;

29.3 Coles determined whether it would substitute grocery products it was acquiring from Austech with products acquired from another Supplier; and

29.4 of the matters set out in paragraph 16 above.

***Purported Profit Gap Claims***

30 The Trading Arrangements between Coles and Austech did not include a term that entitled Coles to payments for purported “profit gaps”.

31 On 7 December 2010, Coles:

31.1 informed Austech that Coles had a purported profit gap of $25,845 on selling Austech’s products in the first five months of the 2011 Financial Year (the **first Austech purported profit gap**);

31.2 made a request that Austech advise what payment of $25,845 it would make to Coles to pay the first Austech purported profit gap within three days;

31.3 did not provide Austech with details of the cause or causes of the first Austech purported profit gap.

32 Coles made the request for Austech to make a payment for the first Austech purported profit gap despite the fact that:

32.1 it had not identified the cause or causes of the first Austech purported profit gap; and

32.2 it had not identified any conduct or omission by Austech that had resulted in the first Austech purported profit gap.

33 At no time did Coles have a reasonable basis to believe that it was entitled to seek the payment from Austech for the first Austech purported profit gap.

34 On 10 December 2010, Austech informed Coles that:

34.1 it was mystified as to why the first Austech purported profit gap had arisen;

34.2 over the preceding two years Coles had increased the retail price of Austech’s products, even though Austech had not increased the prices it charged Coles for those products;

34.3 Austech would like a more detailed report showing each of Austech’s lines individually because the first Austech purported profit gap might relate to a product branded as **Actizyme**;

34.4 the Actizyme line had been purchased by Austech in March 2010.

35 On 13 December 2010, Coles:

35.1 informed Austech that Coles could not provide Austech with the information sought by Austech;

35.2 recommended that Austech review its own records to determine the cause of the first Austech purported profit gap; and

35.3 indicated that it was urgent that Austech make a payment in respect of the first Austech purported profit gap.

36 On 13 December 2010, Austech informed Coles that:

36.1 Austech could not identify any cause of the first Austech purported profit gap for which Austech was responsible;

36.2 Austech believed the first Austech purported profit gap must have been caused by an issue with Actizyme;

36.3 Actizyme had only been transferred to Austech's account with Coles in March 2010;

36.4 Austech had no way of knowing what promotions Coles had undertaken, or margins Coles was receiving, on Actizyme in the preceding year;

36.5 Austech would like Coles to investigate the Actizyme line to confirm that it was the cause of the first Austech purported profit gap; and

36.6 Austech may be willing to offer to pay something in relation to the first Austech purported profit gap.

37 By 17 December 2010, Austech had not received a response from Coles in relation to the matters raised in paragraph 36 above.

38 On 17 December 2010 Austech advised Coles of the fact that it had not received a response, and informed Coles that;

38.1 Austech would like to find out whether the first Austech purported profit gap was caused by Actizyme;

38.2 Austech understood that Coles wanted a resolution sooner rather than later;

38.3 to secure the Actizyme line in the short term, Coles was given authority to raise a claim for the amount of the first Austech purported profit gap sought by Coles.

39 On 22 June 2011, Coles informed Austech that:

39.1 Coles had, by oversight, not withheld the money that Austech had agreed to pay to Coles in relation to the first Austech purported profit gap;

39.2 the first Austech purported profit gap was caused by the Actizyme product;

39.3 despite the fact referred to in paragraph 39.2, Coles would process the claim for the first Austech purported profit gap that week so as to withhold $25,845 from money due to Austech;

39.4 Coles’ profits on selling Actizyme in the periods from 1 April 2010 to 30 June 2010 and 6 December 2010 to 11 April 2011 were $15,516.74 less than Coles wanted them to have been (the **second Austech purported profit gap**);

39.5 the second Austech purported profit gap had arisen because the cost to Coles of acquiring Actizyme was $0.62 more expensive per unit than it had been before 1 April 2010;

39.6 Coles wanted Austech to review and confirm that it would make a payment to Coles of $15,516.74 in respect of the second Austech purported profit gap; and

39.7 Coles wanted Austech to agree to make the payment in respect of the second Austech purported profit gap by midday of the following day.

40 Coles made the request that Austech confirm that it would make a payment to Coles of $15,516.74 in respect of the second Austech purported profit gap by midday on 23 June 2011, despite the fact that Coles:

40.1 knew that the second Austech purported profit gap had arisen because the effect of an agreement that Coles had made at some earlier time with the previous owner of Actizyme was that the cost to Coles per unit of Actizyme was greater after 1 April 2010 than it was before 1 April 2010; and

40.2 had not identified any conduct or omission by Austech that had resulted in the second Austech purported profit gap (for example, Austech could not increase the price that it charged Coles for its products without the agreement of Coles).

41 At no time did Coles have a reasonable basis to believe that it was entitled to seek a payment from Austech for the second Austech purported profit gap.

42 On 23 June 2011, Austech informed Coles that:

42.1 Austech had matched the price to Coles for Actizyme that was being charged by the previous owner of Actizyme;

42.2 Austech had still not received the detailed information it had sought in relation to the first Austech purported profit gap;

42.3 there had been no other price increases from Austech to Coles for more than 3 years.

43 On 23 June 2011, Coles:

43.1 reiterated its demand upon Austech for a payment for the amount of the first Austech purported profit gap;

43.2 continued to ignore Austech’s requests for the information about the first Austech purported profit gap;

43.3 informed Austech that Coles had identified a net purported profit gap of $168,186 on selling Austech’s products in the 2011 Financial Year (the **Austech net purported profit gap**);

43.4 inquired as to whether Austech would prefer that Coles raise one claim of $168,186 in relation to the Austech net purported profit gap; and

43.5 asked Austech to confirm that same day that it agreed to make payments for the first Austech purported profit gap and the second Austech purported profit gap.

44 Coles engaged in the conduct referred to in paragraph 43.3 and 43.4 above, despite the fact that Coles:

44.1 had not identified any conduct or omission by Austech that had resulted in the Austech net purported profit gap; and

44.2 had no reasonable basis to believe that it was entitled to seek a payment from Austech for the Austech net purported profit gap.

45 By engaging in the conduct referred to in paragraph 44 above, Coles conveyed, and intended to convey, to Austech that if Austech did not agree to make payments for the first Austech purported profit gap and the second Austech purported profit gap, Coles would pursue Austech for the Austech net purported profit gap. Coles engaged in that conduct in order to pressure Austech into agreeing to make the payments for the first and second Austech purported profit gaps, despite them having been attributable to issues that arose prior to Austech owning the Actizyme product.

46 On 23 June 2011, Austech informed Coles that:

46.1 in light of Coles’ assertion of the Austech net purported profit gap, Austech would need to confirm acceptance of the first Austech purported profit gap and the second Austech purported profit gap;

46.2 it did not understand how Coles could claim payments for profit gaps based on the information that Coles had provided;

46.3 it proposed using an upcoming meeting to discuss how Coles reached the figures for the profit gaps as Austech had charged no price increases to Coles for over 3 years and one of Austech’s product lines had been deleted;

46.4 it would like to know if it would be possible, to help Austech’s cash flow, to split Coles’ claims for payments for the first Austech purported profit gap and the second Austech purported profit gap over the next two payments due from Coles to Austech.

47 On 23 June 2011, Coles informed Austech that:

47.1 Coles required payments before the end of the 2011 financial year for the first Austech purported profit gap and the second Austech purported profit gap; and

47.2 Coles was going to process claims against Austech for payments for the first Austech purported profit gap and the second Austech purported profit gap within 7 days.

48 Coles subsequently withheld amounts equivalent to the first and second Austech purported profit gaps from payments due to Austech prior to the end of the 2011 financial year.

***Claims for retrospective waste payment***

49 On or about 21 June 2011, Coles informed Austech that there had been waste on one of Austech’s product lines during the 2011 Financial Year.

50 On 23 June 2011, at the same time that Austech was dealing with the claims Coles was making for payments in respect of the first and second Austech purported profit gap, Coles:

50.1 informed Austech that Coles was looking for a payment of $5,700 from Austech for the waste referred to in paragraph 49 above;

50.2 indicated that there was a purported profit gap on selling Austech’s laundry product lines in the 2011 Financial Year, which would also be covered by making the payment referred to in paragraph 50.1, above;

50.3 sought a response to the matter referred to in paragraph 50.1, above, within 3 hours.

51 Coles requested that Austech agree to make the Austech waste payment within 3 hours of the payment being sought, despite:

51.1 Coles having not identified:

51.1.1 the cause of the waste referred to in paragraph 49 above;

51.1.2 any conduct or omission by Austech that had contributed to the causes of the waste referred to in paragraph 49 above.

51.2 the Trading Arrangements between Austech and Coles not including a term that required Austech to make a payment to Coles for waste or markdowns.

52 At no time did Coles have a reasonable basis to believe that it was entitled to seek the payment for waste from Austech.

53 On 23 June 2011, Austech:

53.1 advised Coles that it did not understand what Coles meant by ‘waste’;

53.2 informed Coles that Austech already paid Coles a rebate for ullage;

53.3 sought further information in relation to the payment for waste being sought by Coles and the causes of the waste;

53.4 referred to a report that Coles had provided to Austech, which indicated that there had been a reduction in waste from the previous year; and

53.5 offered to pay Coles half of the amount that Coles had sought for waste.

54 On 23 June 2011, Coles did not accept the offer referred to in paragraph 53 above. Instead, Coles informed Austech that Coles required a payment of a higher sum of $8,046.98. That higher sum was made up of:

54.1 the Austech waste payment, which was reduced to $3,186 to take into account that Austech already made payments to Coles for ullage; and

54.2 a payment of $4,860.98 for a purported profit gap on selling Austech’s laundry product lines in the 2011 Financial Year (the **Austech laundry purported profit gap**).

55 Prior to engaging in the conduct referred to in paragraph 54 above, Coles had not identified:

55.1 the cause or causes of the Austech laundry purported profit gap;

55.2 any conduct or omission by Austech that had resulted in that purported profit gap.

56 At no time did Coles have a reasonable basis to believe that it was entitled to seek the payment from Austech for the Austech laundry purported profit gap.

57 By engaging in the conduct referred to in paragraph 54 above, Coles conveyed, and intended to convey, to Austech that if Austech did not agree to the Austech waste payment, Coles would pursue Austech for the Austech laundry purported profit gap. Coles engaged in that conduct in order to pressure Austech into agreeing to make the Austech waste payment, despite:

57.1 there being no prior agreement from Austech that it would make such payments;

57.2 Coles having provided insufficient information to enable Austech to understand:

57.2.1 the causes of waste;

57.2.2 what contribution, if any, Austech had made to the causes of waste;

57.2.3 the basis upon which the Austech waste payment was sought;

57.2.4 how the Austech waste payment was calculated.

58 On 23 June 2011, Austech indicated that it would make the Austech waste payment of $5,700 in lieu of the higher sum sought by Coles, noting that Austech still did not understand how the purported profit gaps that Coles had been claiming had arisen.

***Agreeing to deferred deal***

59 In around late July and early August 2011, Coles conducted a range review in relation to the household cleaning products that it acquired from its Suppliers for sale in Coles’ retail stores (the **Household Range Review**).

60 On 12 August 2011 Coles informed Austech that:

60.1 following the Household Range Review, Coles were deleting two of the products lines that it acquired from Austech for sale in Coles’ retail stores; and

60.2 Coles required Austech to fully fund the markdowns of those product lines.

61 One of the product lines referred to in paragraph 60 above was Austech’s Orange Power Shower, Bath and Tile Trigger 750 ml (**Shower Cleaner**).

62 As at August 2011, Shower Cleaner was one of Austech’s largest selling product lines in terms of volume of sales and a significant percentage of Austech’s production volume of Shower Cleaner was acquired by Coles.

63 On 12 August 2011, Austech responded to the matters in paragraph 60 above and:

63.1 stated that Coles had not informed Austech, during the recent Household Range Review, that the Shower Cleaner product line might be deleted;

63.2 informed Coles:

63.2.1 of the matters in paragraphs 62 above;

63.2.2 that Austech had invested a significant amount of money in a promotional campaign to be launched in October 2011, which was demonstrated to Coles during the Household Range Review, in which Shower Cleaner featured heavily;

63.2.3 having regard to the financial consequences of Coles’ decision to delete the Shower Cleaner product line, Austech wanted to discuss the decision with Coles.

64 On 15 August 2011, Austech made a further request to Coles to discuss Coles’ decision.

65 Between 15 August 2011 and 25 August 2011, Coles:

65.1 agreed not to delete Shower Cleaner from Coles’ retail stores;

65.2 informed Austech that, in order to continue to acquire products from Austech for sale in Coles’ retail stores, Coles needed to improve its profit margin on those products, and required a “deferred rebate” from Austech.

66 Coles used the term “**deferred rebate**” to refer to a rebate paid by a Supplier to Coles that was calculated per unit of a Supplier’s product and would be in effect for a certain period of time or would apply to a certain number of units of a Supplier’s product.

67 On 25 August 2011, Austech indicated to Coles that it was financially difficult for Austech to make changes to improve Coles’ profit margin, partly because Austech had not increased its price to Coles for a number of years, despite an increase in the costs of essential raw materials. Notwithstanding that difficulty, after informing Coles that Austech considered that it was necessary for Austech to have its products available for sale in Coles’ retail stores, Austech agreed to offer temporary deferred rebates on three of its product lines to improve Coles’ profit margin (the **Austech deferred deal**).

68 On 30 August 2011, Austech informed Coles that the Austech deferred deal would apply until further notice.

69 On 31 August 2011, Coles informed Austech that the Austech deferred deal had been processed to apply for the period from 5 September 2011 to 27 November 2011 and, if required, Coles would request an extension to the Austech deferred deal closer to the end of that period.

70 On 17 October 2011, a Coles CM sought the agreement of Austech to make ongoing payments to Coles by the incorporation of a rebate of 1.2% (the **Austech ARC rebate**) into Austech’s Trading Terms with Coles.

71 On 19 October 2011, in the context of considering the ARC rebate, Austech requested that Coles provide an assurance that the Austech deferred deal would conclude on 27 November 2011.

72 Later that day, Coles informed Austech that the Austech deterred deal would conclude on the agreed date unless Austech and Coles agreed to extend it.

***Refusing to end deferred deal***

73 On 15 November 2011, Coles requested that Austech agree to an extension of the Austech deferred deal for a further 12 months.

74 On 16 November 2011, Austech informed Coles that Austech did not agree to extend the Austech deferred deal and that Coles had previously agreed that the Austech deferred deal would end on the agreed date.

75 On 17 November 2011, despite the matters in paragraph 67, 68, 71, 72 and 74 above, Coles informed Austech that Coles was not willing to remove the Austech deferred deal.

76 The effect of Coles’ refusal to remove the Austech deferred deal was that the three rebates constituting the Austech deferred deal would continue to be deducted by Coles from the amounts that Coles was obliged to pay to Austech for products purchased from Austech.

77 On 21 November 2011, Austech:

77.1 again informed Coles that Austech considered that it was necessary for Austech to have its products available for sale in Coles’ retail stores;

77.2 informed Coles that Austech wanted to meet Coles’ requirements;

77.3 referred to the financial difficulties involved in continuing the Austech deferred deal; and

77.4 offered, as a compromise, to extend the Austech deferred deal for a further 6 months.

78 Despite the matters in paragraphs 74 and 77.3 above, Coles continued to reduce the amount it paid to Austech for goods Coles acquired from Austech by the amount of the three rebates constituting the Austech deferred deal for a further 6 months.

**E. D. Oates Pty Ltd (Oates)**

***Background***

79 Oates supplies mostly imported janitorial cleaning products, including chemicals, brushware and mops to Australian retailers and wholesalers.

80 Coles acquired 35 products from Oates for sale in Coles’ retail stores. All of those products were sold under the Oates brand. The majority of the products Coles acquired from Oates were acquired for its Homecare Business Category.

81 During the relevant period, Coles was in a substantially stronger bargaining position than Oates, in particular because:

81.1 Coles represented a significant proportion of the sale of Oates’ products;

81.2 Coles determined whether it would continue to acquire grocery products from Oates;

81.3 Coles determined whether it would substitute grocery products it was acquiring from Oates with products acquired from another Supplier; and

81.4 of the matters set out at paragraph 16 above.

***Purported Profit Gap Claim***

82 The Trading Arrangements between Coles and Oates did not include a term that entitled Coles to payments for a purported “profit gap”.

83 On 21 June 2011, at a meeting between Oates and Coles, Coles:

83.1 informed Oates to the effect that Coles had a purported profit gap of $326,590 on selling Oates’ products in the 2011 financial year (**Oates purported profit gap**);

83.2 required a payment from Oates of $326,590 due to the Oates purported profit gap; and

83.3 did not provide Oates with:

83.3.1 details of the cause or causes of the Oates purported profit gap; or

83.3.2 information about how Coles had calculated the Oates purported profit gap.

84 During the evening of 21 June 2011, Coles:

84.1 confirmed the requirement that Oates make a payment of $326,590 for the Oates purported profit gap; and

84.2 sought that Oates confirm by “first thing” the following morning that it would make the payment referred to in paragraph 84.1 above.

85 Coles made the requests for Oates to make a payment of $326,590 for the Oates purported profit gap despite the fact that:

85.1 it had not identified the cause or causes of the Oates purported profit gap;

85.2 it had not identified any conduct or omission by Oates that had resulted in the Oates purported profit gap; and

85.3 a substantial cause of the Oates purported profit gap were unilateral actions taken by Coles during the 2011 financial year, without the agreement of Oates, to conduct a promotion on Oates’ products by selling those products at a price below Coles’ cost.

86 At no time did Coles have a reasonable basis to believe that it was entitled to seek the payment from Oates for the Oates purported profit gap.

87 On 22 June 2011, Oates informed Coles that it would not make a payment to Coles of $326,590 for the Oates purported profit gap because, among other things:

87.1 making the payment of $326,590 to Coles would mean paying to Coles a very significant proportion of the earnings before interest and tax that Oates would otherwise have made on sales to Coles for the 2011 financial year;

87.2 the price to Coles of Oates’ products had remained unchanged for 2 years and Oates had absorbed increased costs in raw materials throughout this time, without increasing the prices it charged to Coles; and

87.3 the actions of Coles referred to in paragraph 85.3 above, had, by Oates’ estimate, eroded over $200,000 of Coles’ profit.

88 On 23 June 2011, Oates requested that Coles provide Oates with detail as to how Coles had arrived at the amount of $326,590 as the Oates purported profit gap.

89 On 24 June 2011, Coles:

89.1 informed Oates that Coles expected that Coles’ profit would grow in line with any growth in the net cost to Coles of Oates’ products and Coles’ net profit on the sale of Oates’ products needed to improve by $326,909;

89.2 informed Oates that Coles was not prepared to work collaboratively with Oates for the next year to step change the Oates and Coles businesses if Oates did not rectify the Oates purported profit gap;

89.3 provided the figures for the percentage growth in Coles’ sales growth, Coles’ net profit and the net cost to Coles of acquiring Oates’ products in the 2011 financial year compared with the preceding financial year; and

89.4 sought a response from Oates in relation to this issue that day.

90 On 24 June 2011, Oates informed Coles that the figures referred to in paragraph 89.3 above were not sufficient, and Oates required greater detail from Coles as to the Oates purported profit gap.

91 Despite the request referred to in paragraph 88 above and the matters referred to in paragraph 90 above, Coles did not provide Oates with the details of:

91.1 how the figures used to determine the Oates purported profit gap of $326,590 were calculated;

91.2 the cause or causes of the Oates purported profit gap; or

91.3 any basis for any entitlement on the part of Coles to payment from Oates for the Oates purported profit gap.

92 On 24 June 2011, Oates informed Coles that:

92.1 Oates could not identify any cause of the Oates purported profit gap for which it was responsible; and

92.2 given the importance of its relationship with Coles, Oates offered to provide Coles with:

92.2.1 a cash payment of $50,000, referred to as “straight monies”; and

92.2.2 discounts on the price of products Coles acquired from Oates in June and July 2011 to the total value of $174,000.

93 On 8 July 2011, Coles informed Oates that Coles agreed to Oates’ proposal in paragraph 92 above, except that Coles would that day raise a claim for a cash payment, referred to as a “straight claim”, of $224,000 (exclusive of GST).

***Unauthorised withholding and retention of money due to Oates***

94 On 8 July 2011, Coles internally raised and processed a claim for $246,400 (inclusive of GST) against Oates, with the consequence that Coles would deduct $246,400 from the next payment due from Coles to Oates for products acquired by Coles from Oates. Coles raised and processed the claim for $246,400 (inclusive of GST) despite not having the authority or agreement from Oates to do so.

95 On 11 July 2011, Oates informed Coles that a claim for the immediate payment of $224,000 (exclusive of GST) to Coles was unacceptable to Oates. Oates offered to provide Coles with payments totalling $224,000 over six weeks, comprised of:

95.1 discounts on the price of products Coles acquired from Oates in July and August 2011 to the total value of $174,000; and

95.2 a payment of $50,000, which could be claimed by Coles immediately upon acceptance of the discounts that had been offered.

96 On or about 14 July 2011, without the authority or agreement of Oates, Coles deducted the amount of $246,400 (inclusive of GST) from a payment due from Coles to Oates.

97 On 21 July 2011, Oates referred to the unauthorised deduction specified in paragraph 96 above and informed Coles that:

97.1 the deduction had not been authorised, or agreed to, by Oates;

97.2 the claim for $246,400 had been rejected; and

97.3 the deduction needed to be reversed by Coles as a matter of urgency.

98 On 25 July 2011, Oates reiterated that it wanted the unauthorised deduction of $246,400 by Coles to be reversed.

99 On 29 July 2011, Oates informed Coles that:

99.1 there was an urgent need to resolve the unauthorised retention of money due to Oates by Coles;

99.2 Coles could not withhold money due to Oates without agreement from Oates; and

99.3 Coles had not provided any substantiating detail for the claim in respect of the Oates purported profit gap.

100 On 29 July 2011, Coles agreed that there was a need to resolve the retention of money due to Oates by Coles so that Coles and Oates could continue their commercial relationship.

101 On 9 August 2011, Oates, by email, provided Coles with three proposals for resolving Coles’ unauthorised retention of the $246,400, including:

101.1 two proposals of a similar nature to the proposals outlined in paragraphs 92.2 and 95 above, both of which involved the immediate payment by Coles to Oates of the $246,400; and

101.2 a third proposal, which involved Coles retaining the $246,400 if Coles agreed to acquire certain product lines from Oates on the terms outlined in the email.

102 By 15 August 2011, Coles:

102.1 had reviewed the circumstances in which it came to engage in the conduct specified in paragraph 96 above;

102.2 having reviewed the matter, had decided that the $246,400 that it had withheld from money due to Oates on or about 14 July 2011 was an unauthorised deduction; and

102.3 determined that instead of paying the $246,400 that was due to Oates in one lump sum, Coles would pay the amount over time by deducting it from monies that became due to Coles from Oates from time to time.

103 On 15 August 2011, Coles met with Oates to discuss the proposal referred to in paragraph 101.2 above in order to resolve the unauthorised withholding by Coles of the $246,400 due to Oates.

104 Following that meeting, on 17 August 2011, Oates provided a written offer to Coles in similar terms to the proposal summarised in paragraph 101.2 above.

105 On 24 October 2011, Oates informed Coles that there was still no official resolution to the unauthorised withholding by Coles of $246,400 due to Oates.

106 On 27 October 2011, Coles advised Oates that Coles would pay Oates the $246,000 that it had withheld from Oates.

107 As at 18 November 2011, Coles had not paid Oates the $246,400 that it had withheld from Oates without the agreement or authority of Oates.

108 On or about 18 November 2011, Oates offered to make monthly payments to the total of $365,200 (inclusive of GST), which included an amount of $295,200, representing a sum to address the Oates purported profit gap and paid in exchange for Coles providing Oates with a number of catalogue spots and product trials.

***Resolution to the unauthorised withholding and retention of money due to Oates***

109 Despite knowing that there was no basis for any entitlement on the part of Coles to payment from Oates for the Oates purported profit gap, on or about 28 November 2011, Coles accepted the offer outlined in paragraph 108 above.

110 On 3 January 2012, Coles returned the $246,400 that it had, without authority or agreement, withheld from money due to Oates on or about 14 July 2011 to Oates.

**Colonial Farm (Aust) Pty Ltd (Colonial Farm)**

***Background***

111 Colonial Farm manufactures ‘value-added’ protein products such as meatballs or chicken kievs, which it supplies to retailers and other customers.

112 Coles acquired approximately eleven frozen processed food products from Colonial Farm for sale in Coles’ retail stores. Three of those products were private label products, which were acquired by Coles for sale under Coles’ own brands. The products that Coles acquired from Colonial Farm were acquired by Coles for its Frozen Business Category and were supplied by Colonial Farm to Coles with a minimum shelf life of at least 12 months.

113 During the relevant period, Coles was in a substantially stronger bargaining position than Colonial Farm, in particular because:

113.1 Coles represented a significant proportion of the sale of Colonial Farm’s products;

113.2 Coles determined whether it would continue to acquire grocery products from Colonial Farm;

113.3 Coles determined whether it would substitute grocery products it was acquiring from Colonial Farm with products acquired from another Supplier; and

113.4 of the matters set out at paragraph 16 above.

***Claims for retrospective waste payment and requiring a 100% waste agreement***

114 On 16 September 2011, Coles decided that:

114.1 its Frozen Business Category was not meeting its budget targets for the financial year ending 30 June 2012 (**2012 financial year**);

114.2 a way to enable Coles to meet its budget targets in the Frozen Business Category for the 2012 financial year was to enter agreements with Suppliers pursuant to which those Suppliers would make payments to Coles that were equivalent to 100% of the purported costs to Coles of waste and markdowns on the products Coles acquired from those Suppliers (**100% waste agreement**).

115 The effect of a 100% waste agreement was that a Supplier indemnified Coles against all of the purported costs to Coles of waste or markdowns, including waste or markdowns that were caused by Coles and were outside the control of the Supplier.

116 On 19 September 2011, Coles:

116.1 provided its CMs in the Frozen Business Category with a report (the **waste report**) containing information about the purported costs to Coles of waste and markdowns that occurred in relation to products Coles acquired from the Suppliers listed in the report for its Frozen Business Category; and

116.2 instructed the CMs to seek to obtain waste payments and 100% waste agreements from the Suppliers listed in the waste report, in order to enable Coles to meet its budget targets in that Business Category for the 2012 financial year.

117 The waste report did not contain information about:

117.1 the causes of waste and markdowns listed in the report; or

117.2 what, if any, contribution each of the Suppliers listed in the report had made to the causes of the waste and markdowns associated with their products in the report.

118 One of the Suppliers listed in the waste report was Colonial Farm.

119 As at 27 September 2011, the Trading Arrangements between Colonial Farm and Coles did not include a term that required Colonial Farm to make a payment to Coles for waste or markdowns.

120 On 27 September 2011, Coles requested that Colonial Farm enter into a 100% waste agreement with Coles.

121 On 28 September 2011, Colonial Farm informed Coles that:

121.1 there was no agreement between Colonial Farm and Coles pursuant to which Coles was entitled to a payment for waste from Colonial Farm;

121.2 Colonial Farm was not in a financial position to make a payment for waste or enter a 100% waste agreement with Coles;

121.3 Colonial Farm had just renegotiated its Trading Terms with Coles; and

121.4 the rebates paid by Colonial Farm to Coles on products that Coles acquired from Colonial Farm had increased very substantially over the preceding 12 months.

122 On 28 September 2011, Coles:

122.1 informed Colonial Farm that Coles required Colonial Farm to agree to a 100% waste agreement; and

122.2 inferred that the development of further business between Coles and Colonial Farm depended upon Colonial Farm agreeing to a 100% waste agreement.

123 On 28 September 2011, Colonial Farm:

123.1 requested details about the level of waste per store that Coles claimed it had been incurring on the products it acquired from Colonial Farm;

123.2 stated that:

123.2.1 given that Colonial Farm supplied products to Coles’ warehouses with a minimum shelf life of 12 months, Colonial Farm did not understand how it could be creating waste in Coles’ stores; and

123.2.2 if Coles could establish for Colonial Farm how waste was being caused, Colonial Farm could work with Coles to address the issue, rather than paying for waste that seemingly would continue.

124 On 5 October 2011, Coles sought an update from its Frozen Business Category CMs as to how many of Coles’ Suppliers the CMs had secured a 100% waste agreement with.

125 Subsequent to the matter in paragraph 124 above, on 5 October 2011, Coles:

125.1 provided Colonial Farm with a report purporting to show the waste and markdowns that Coles claimed had occurred in relation to the products that Coles had acquired from Colonial Farm in the previous year;

125.2 again informed Colonial Farm that Coles required Colonial Farm to agree to a 100% waste agreement with Coles;

125.3 again inferred that the development of further business between Coles and Colonial Farm depended upon Colonial Farm agreeing to a 100% waste agreement; and

125.4 requested a response within two days.

126 The report referred to in paragraph 125.1 did not contain the details that Colonial Farm had requested in the email referred to in paragraph 123.1 above.

127 Subsequently on 5 October 2011, Colonial Farm:

127.1 repeated its request for the details referred to in paragraph 123.1 above; and

127.2 informed Coles that the decision maker for Colonial Farm would not be available until 10 October 2011.

128 Later on 5 October 2011, Coles:

128.1 indicated that Coles would attempt to provide the information requested by Colonial Farm; and

128.2 requested that the 100% waste agreement be finalised on 10 October 2011.

129 On 6 October 2011, Coles, by email to Colonial Farm:

129.1 provided Colonial Farm with another report purporting to show the waste and markdowns that Coles claimed had occurred in relation to the products that Coles had acquired from Colonial Farm in the preceding 15 months;

129.2 indicated that it would be difficult for Coles to provide Colonial Farm with the details requested by Colonial Farm;

129.3 stated that Coles required Colonial Farm to agree to a 100% waste agreement with Coles; and

129.4 stated that Colonial Farm was required to confirm its agreement by 10 October 2011.

130 On 7 October 2011, Colonial Farm informed Coles that:

130.1 the report referred to in paragraph 129.1 above did not enable Colonial Farm to identify any contribution Colonial Farm had made, if any, to the causes of the waste and markdowns associated with their products in the report;

130.2 Colonial Farm could not identify any causes of waste and markdowns that were attributable to Colonial Farm; and

130.3 the 100% waste agreement sought by Coles meant that Coles had no responsibility for any action by Coles that resulted in waste and markdowns on the products Coles acquired from Colonial Farm.

131 By 10 October 2011, Colonial Farm considered that it was required to agree to a waste agreement.

132 On 10 October 2011, Colonial Farm informed Coles that:

132.1 Colonial Farm would agree to make a payment to Coles that is equivalent to 50% of the purported costs to Coles of the waste and markdowns that Coles claimed had occurred in relation to the products Coles acquired from Colonial Farm in the previous 12 months;

132.2 Colonial Farm would agree to make payments to Coles that are equivalent to 50% of the purported costs to Coles of the waste and markdowns that Coles claims occurs in relation to the products Coles acquires from Colonial Farm in the future on an ongoing basis (the **50% waste agreement**);

132.3 Colonial Farm did not consider that it was responsible for, or could control, all waste and markdowns;

132.4 in agreeing to the matters in paragraphs 132.1 and 132.2 above, Colonial Farm:

132.4.1 wanted to work with Coles to identify the causes of waste and markdowns with a view to reducing waste and markdowns; and

132.4.2 would rely on monthly reporting of waste and markdowns by Coles to Colonial Farm.

133 Subsequently, on 10 October 2011, Coles telephoned Colonial Farm and informed Colonial Farm that:

133.1 the offer referred to in paragraph 132 above was not acceptable to Coles; and

133.2 Coles required Colonial Farm to agree to a 100% waste agreement with Coles.

134 Later on 10 October 2011, in response to Coles’ telephone call, Colonial Farm informed Coles that:

134.1 Colonial Farm would agree to make a payment to Coles that was equivalent to 60% of the purported costs to Coles of the waste and markdowns that Coles claimed had occurred in relation to the products Coles acquired from Colonial Farm in the previous 12 months; and

134.2 Colonial Farm would agree to make payments to Coles that were equivalent to 60% of the purported costs to Coles of the waste and markdowns that Coles claims occurs in relation to the products Coles acquires from Colonial Farm in the future on an ongoing basis (the **Colonial Farm waste agreement**);

134.3 Colonial Farm made this proposal because it thought this would improve its future relationship with Coles.

135 The CM who had received the instruction referred to in paragraph 116.2 above and the email referred to in paragraph 124 above, reported internally within Coles that:

135.1 he had sought 100% waste agreements from each of the Suppliers for whom he was responsible; and

135.2 he had obtained the agreements referred to in paragraphs 134.1 and 134.2 above from Colonial Farm, which he described as a “good win”.

136 On 12 October 2011, Coles, by email to Colonial Farm, agreed to the offer referred to in paragraph 134 above, but indicated that Coles also required Colonial Farm to agree to pay another unrelated rebate, an ARC rebate, to Coles by Wednesday of the following week.

137 On 13 October 2011, Colonial Farm requested, by email, an explanation in relation to how Coles would claim payments for waste and markdowns from Colonial Farm.

138 Coles did not provide the information sought by Colonial Farm that is referred to in paragraph 137 above.

**Bayview Seafoods Pty Ltd (Bayview)**

***Background***

139 Bayview manufactures and supplies ‘value-added’ gluten free and fish protein products to retailers and other customers.

140 The goods Coles acquired from Bayview were frozen food products, with a long shelf life. They were acquired by Coles for its Frozen Business Category.

141 During the relevant period, Coles was in a substantially stronger bargaining position than Bayview, in particular because:

141.1 Coles represented a significant proportion of the sale of Bayview’s products;

141.2 Coles determined whether it would continue to acquire grocery products from Bayview;

141.3 Coles determined whether it would substitute grocery products it was acquiring from Bayview with products acquired from another Supplier; and

141.4 of the matters set out at paragraph 16 above.

142 By October 2011, Coles was aware that Bayview was suffering financial hardship, partly as a result of the terms of its trading relationship with Coles.

***Requiring a 100% waste agreement***

143 One of the Suppliers listed in the waste report referred to in paragraph 116.1 above was Bayview.

144 As at 6 October 2011, the Trading Arrangements between Bayview and Coles:

144.1 included a term that required Bayview to pay an ongoing rebate for ullage, regardless of whether or not ullage occurred in relation to products that Coles acquired from Bayview; and

144.2 did not include a term that required Bayview to make a payment to Coles for waste or markdowns.

145 On 6 October 2011, Coles, by email to Bayview:

145.1 provided Bayview with a report purporting to show the waste and markdowns that Coles claimed had occurred in relation to the products that Coles had acquired from Bayview in the preceding 15 months;

145.2 stated that Coles could not bear the purported costs of waste and markdowns;

145.3 informed Bayview that Coles required Bayview to agree to a 100% waste agreement with effect from 1 July 2011;

145.4 informed Bayview that waste dilutes the margins on individual products which impacts on the viability of ranging products; and

145.5 sought a response from Bayview by Tuesday, 11 October 2011.

146 On 10 October 2011, Bayview, by email to Coles:

146.1 expressed concern about the claimed waste and stated that Bayview’s products were frozen products with very good shelf life and therefore Bayview could not imagine what justification there was for the waste and markdowns listed in the report referred to in paragraph 145.1 above;

146.2 stated that Bayview deserved more detail about the waste and markdowns listed in the report referred to in paragraph 145.1, including the causes of the waste and markdowns; and

146.3 sought an explanation from Coles as to what the ullage payments referred to in paragraph 144.1 above covered.

147 On or about 12 October 2011, during a telephone conversation between Coles and Bayview:

147.1 Coles informed Bayview that:

147.1.1 the ullage rebate payments made by Bayview to Coles, in accordance with the Trading Arrangements referred to in paragraph 144 above, only covered waste occurring in Coles’ distribution centres;

147.1.2 Coles required Bayview to agree to the 100% waste agreement referred to in paragraph 145.3 above;

147.2 Bayview agreed to enter into a 100% waste agreement with effect from about 27 June 2011.

148 During the telephone conversation outlined in paragraph 147, above, Coles did not provide Bayview with information about:

148.1 the causes of the waste and markdowns on the products Coles acquired from Bayview; or

148.2 how the purported costs of waste and markdowns, set out in the report referred to in paragraph 145.1 above, were calculated.

149 On 12 October 2011, Coles requested that Bayview confirm, in writing, the 100% waste agreement referred to in paragraph 147.2 above.

150 On 12 October 2011, Bayview informed Coles, in writing, that:

150.1 it agreed to a 100% waste agreement “moving forward”; and

150.2 Bayview would work with Coles to determine the causes of any waste or markdowns that occurred in relation to the products that Coles acquired from Bayview, and to identify a remedy.

151 On 12 October 2011, Coles indicated that it would claim money from Bayview in accordance with the 100% waste and markdown agreement, referred to in paragraph 150 above, for purported waste and markdowns from 27 June 2011.

152 By the communications to Bayview that are outlined in paragraphs 145 and 147, above, Coles:

152.1 conveyed to Bayview that it was necessary for Bayview to enter into the 100% waste agreement referred to in paragraph 145.3, above, in order to maintain a trading relationship with Coles; and

152.2 intended to convey to Bayview that it was necessary for Bayview to enter into the 100% waste agreement referred to in paragraph 145.3, above, in order to maintain a trading relationship with Coles.

***Penalty for late deliveries***

153 On 21 October 2011, Coles informed some of its Suppliers, including Bayview, that, amongst other things, for deliveries from 20 October 2011 Coles:

153.1 would impose a five dollar per carton penalty on Suppliers who did not deliver stock in full and as scheduled (the **Frozen Business Category Penalty**); and

153.2 the Frozen Business Category Penalty would not apply to the first 200 cartons delivered per day per category for each Supplier.

154 The amount of the Frozen Business Category Penalty was not calculated by reference to any assessment by Coles of the likely cost to Coles, if any, of the Suppliers who were informed of the matters in paragraph 153 above, not delivering in full and as scheduled.

155 The Trading Arrangements between Bayview and Coles did not contain a term pursuant to which:

155.1 Bayview was required to pay an amount to Coles for not delivering stock in full and as scheduled; and

155.2 Coles could impose the Frozen Business Category Penalty referred to in paragraph 153.1 above.

156 As at 21 October 2011, the margin that Bayview received from the sale of a carton of its products to Coles was less than the value of the Frozen Business Category Penalty.

157 In October 2011, Bayview delivered 7,458 cartons of its products to Coles:

157.1 to be sold by Coles as part of a scheduled promotion;

157.2 but not in full on time (**Bayview late delivery**).

158 On 31 October 2011, during a telephone conversation between Coles and Bayview, Coles said that Bayview should:

158.1 pay a penalty, calculated by reference to the Frozen Business Category Penalty, in relation to the Bayview late delivery; and

158.2 make a payment to Coles for the difference between the revenue that Coles had previously forecast that it would derive from the scheduled promotion, as part of which the 7,458 cartons were to be sold, as compared with the revenue that it was now estimating that it would derive from the scheduled promotion.

159 On 31 October 2011, following the conversation referred to in paragraph 158 above, Coles:

159.1 informed Bayview that:

159.1.1 Coles considered there to have been 7,458 late and missed cartons, which was relied on for the purposes of calculating the Frozen Business Category Penalty; and

159.1.2 Coles had previously forecast that it would have revenue of $123,244 from the promotion whereas it now estimated that it would have revenue of $65,319 from the promotion;

159.2 requested that Bayview respond to the request referred to in paragraph 158 above by 10am on Thursday, 3 November 2011.

160 By about 31 October 2011, Coles had determined a profit target for its Frozen Business Category for the week commencing 31 October 2011.

161 On 3 November 2011, Bayview informed Coles that:

161.1 Bayview did not believe that the Bayview late delivery caused Coles’ retail stores to run out of stock;

161.2 Bayview was only informed about the Frozen Business Category Penalty a week before the Bayview late delivery occurred;

161.3 Bayview believed that a penalty for the Bayview late delivery would be unreasonable;

161.4 Bayview could not underwrite Coles' sales expectations;

161.5 Bayview believed the major reason why Coles did not meet the forecast sales targets was because Coles did not discount the product as much as it had intended to when it determined the forecast sales;

161.6 Bayview required further information to determine whether the Bayview late delivery resulted in lost sales to Coles; and

161.7 Bayview believed that, whilst Bayview had suffered substantial losses in relation to the promotion, Coles did not.

162 On 3 November 2011, during one or more telephone conversations between Coles and Bayview, Coles informed Bayview that:

162.1 Coles was disappointed by Bayview’s response referred to in paragraph 161;

162.2 Coles wanted Bayview to make the payments referred to in paragraph 158 above; and

162.3 there may be negative consequences for Bayview’s trading relationship with Coles if Bayview did not make the payments referred to in paragraph 158 above to Coles.

163 During the conversation or conversations referred to in paragraph 162, above, Coles did not provide Bayview with the further information sought by Bayview.

164 On 4 November 2011, Coles, by email to its CMs in its Frozen Business Category, made a request that they internally report any money they were expecting to receive from Coles’ Suppliers towards the profit target referred to in paragraph 160 above.

165 On 4 November 2011, the CM dealing with Bayview, internally reported that he was still trying to “land Bayview money” for the Bayview late delivery.

166 On 4 November 2011, Coles, by email to the CM dealing with Bayview:

166.1 informed him that Coles required $42,000 to meet the profit target referred to in paragraph 160 above; and

166.2 asked him how much money Coles would receive from Bayview.

167 On 4 November 2011, the CM dealing with Bayview replied to the email referred to in paragraph 166 above, and reported that he hoped the money Coles would receive from Bayview was close to $42,000.

168 On 4 November 2011, Coles by email to the CM dealing with Bayview, made a request that he respond as to how much money Coles would receive from Bayview.

169 By about 10 November 2011, Bayview:

169.1 had agreed to make payments to Coles to the total value of approximately $30,500 in relation to the Bayview late delivery; and

169.2 commenced making the payments referred to in paragraph 169.1 above.

**Benny’s Confectionery Pty Ltd (Benny’s)**

***Background***

170 Benny’s manufactures and supplies hard boiled lollies to supermarkets in Australia.

171 Coles acquired a hard boiled confectionery product from Benny’s for sale in Coles’ retail stores. The product was acquired from Benny’s by Coles for Coles’ Impulse Business Category.

172 During the relevant period, Coles was in a substantially stronger bargaining position than Benny’s, in particular because:

172.1 Coles represented a significant proportion of the sale of Benny’s products;

172.2 Coles determined whether it would continue to acquire grocery products from Benny’s;

172.3 Coles determined whether it would substitute grocery products it was acquiring from Benny’s with products acquired from another Supplier; and

172.4 of the matters set out at paragraph 16 above.

173 During the relevant period, the Trading Arrangements between Benny’s and Coles did not include a term that required Benny’s to make a payment to Coles for late or short deliveries.

***Penalty for short deliveries***

174 On 2 August 2011, Coles informed some of its Suppliers in its Confectionery Category that, amongst other things, for any product line that Coles acquired from the Suppliers who received the email that was out of stock in Coles’ distribution centres for over a week, Coles would:

174.1 delete the product line, meaning that Coles would no longer acquire the product from the Supplier for sale in Coles’ retail stores; or

174.2 maintain the product line in the range available for sale at Coles’ retail stores, but claim $10 per unsupplied carton and delete the product line if it was not supplied to Coles’ Distribution Centres for three weeks.

175 On 15 September 2011, Coles informed Benny’s, by email, that:

175.1 Benny’s had not supplied 95 cartons to Coles;

175.2 Coles would impose a standard rate fine of $10 per carton for each carton that Benny’s did not supply to Coles; and

175.3 Coles would raise a claim for $950 from Benny’s.

176 The email included a table, which contained, amongst other things, the following information:

176.1 the number of cartons that were meant to be included in the order;

176.2 the order number;

176.3 the date the deliveries referred to in the table were to be made; and

176.4 the number of alleged unsupplied cartons.

177 On 15 September 2011, Benny’s informed Coles that:

177.1 Benny’s had supplied stock as required by Coles;

177.2 Benny’s had not previously been advised of, or agreed to, fines for unsupplied cartons;

177.3 Benny’s believed that there were errors in the information that Coles was relying on in support of its claim to impose fines for unsupplied cartons;

177.4 Benny’s would not accept the claim; and

177.5 the per carton fine Coles sought to impose exceeded the margin that Benny’s made on each carton of the product Coles acquired from Benny’s.

178 Despite this response from Benny’s, on 16 September 2011 Coles issued Benny’s with a ‘Credit Advice Tax Invoice’ for the amount of $1,045 (GST inclusive), which is $950 (excluding GST).

179 On 21 September 2011, without the authority or agreement of Benny’s, Coles deducted $1,045 (GST inclusive) from a remittance due to Benny’s for products that Coles had purchased from Benny’s.

180 On 22 September 2011, Coles informed Benny’s that:

180.1 Benny’s had not supplied 54 cartons to Coles;

180.2 Coles would raise claims for all unsupplied cartons at the rate of $10 per carton; and

180.3 Coles would raise a claim for $540 from Benny’s.

181 On 22 September 2011, Benny’s:

181.1 again informed Coles that Benny’s had not previously been advised of, or agreed to, fines for unsupplied cartons;

181.2 advised Coles that Benny’s would not accept the claims, particularly having regard to the cost price of Benny’s products to Coles;

181.3 again informed Coles that Benny’s believed there were significant errors in the information that Coles was relying on in support of the claims;

181.4 told Coles that the standard rate fine of $10 per carton for all Suppliers was unfair and unreasonable; and

181.5 indicated to Coles that Benny’s wanted to meet with Coles to discuss the claims and other matters.

182 On 22 September 2011, Coles, by email to Benny’s, stated that the claim referred to in paragraph 180 above, would stand.

183 Despite Benny’s request for a meeting with Coles, as referred to in paragraph 181.5 above, Coles did not meet with Benny’s to discuss the claims.

184 Between 22 and 27 September 2011, Benny’s made several unsuccessful attempts to contact Coles to discuss the claims for unsupplied cartons.

185 On 27 September 2011, Benny’s, by email to Coles, referred to the attempts that Benny’s had made to contact Coles, and informed Coles that:

185.1 Benny’s had not previously been advised of, or agreed to, fines for unsupplied cartons;

185.2 there were errors in the information that Coles was relying on in support of the claims; and

185.3 Benny’s considered the standard rate fine of $10 per carton to be unjustifiable, having regard to the price Coles pays to Benny’s to acquire products from Benny’s.

186 On 29 September 2011, Coles told Benny’s that:

186.1 the standard rate fine of $10 per carton for all Suppliers applies regardless of the cost of the product to Coles;

186.2 the claims raised against Benny’s would stand; and

186.3 Coles would continue to raise claims for unsupplied cartons against Benny’s.

187 Despite the various responses from Benny’s, on or about 29 September 2011, without the authority or agreement of Benny’s, Coles deducted $594 (GST inclusive) in relation to the claim referred to in paragraph 180 above, from a remittance due to Benny’s for products that Coles had purchased from Benny’s.

188 By 11 November 2011, Coles had not provided Benny’s with any further information to substantiate or explain the claims for unsupplied cartons.

189 On 11 November 2011, Benny’s requested further information in relation to the claim referred to in paragraph 180 above.

190 On 23 November 2011, Coles advised Benny’s that the claim Benny’s had sought further information about was for unsupplied cartons and offered to discuss the matter further with Benny’s.

191 On 23 November 2011, Benny’s advised Coles that Benny’s:

191.1 wished to discuss the claim referred to in paragraphs 189 and 190 above with Coles; and

191.2 required further information about the claim.

192 Coles did not respond to these requests.

193 Coles retained the money that it had deducted from remittances due to Benny’s in relation to the claims for unsupplied cartons without the authority or agreement of Benny’s.

**Conclusion**

194 Coles admits each of the contraventions in the proposed declarations which are Annexure A to the joint submissions filed in these proceedings.

**ANNEXURE 3 – s 87B UNDERTAKING IN VID 253 OF 2014 AND 609 OF 2014**

**Persons giving this undertaking**

This undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Coles Supermarkets Australia Pty Ltd ACN 004 189 708 (**Coles**) and Grocery Holdings Pty Ltd (ACN 007 427 581) (**GHPL**) of 800-838 Toorak Road, Hawthorn East in the State of Victoria, for the purposes of s 87B of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

**Background**

1. Coles carries on business in trade or commerce as a supermarket retailer and supplies grocery products for retail sale to customers in Australia.
2. Coles engages in the business of acquiring grocery products from manufacturers and other suppliers, and selling those products to customers in Australia through Coles’ retail stores.
3. Coles operates retail stores in every Australian State and mainland Territory.
4. The ACCC is currently engaged in two litigation proceedings: VID253/2014 (**ARC proceedings**) and VID609/2014 (**second proceedings**) (together ‘**the proceedings**’) against Coles and GHPL in the Federal Court of Australia in relation to, in broad terms, Coles’ dealings with some of its suppliers in the period December 2010 to December 2011.
5. In the ARC proceedings, the ACCC alleged that Coles engaged in unconscionable conduct in its dealings with certain smaller suppliers (described by Coles as Tier 3 suppliers) in relation to the implementation of its Active Retail Collaboration (**ARC**) program (consisting of elements including Economic Order Quantities (**EOQ**) and a supplier portal (**The Portal**)), in contravention of the Australian Consumer Law.
6. The proceedings have been resolved between the parties, upon admissions made in the Agreed Statements of Facts and Admissions filed in the proceedings, and as part of that resolution Coles and GHPL have agreed to give this undertaking.

**Commencement of undertaking**

1. This Undertaking comes into effect when:

(a) this Undertaking is executed by Coles and GHPL;

(b) this Undertaking so executed is accepted by the ACCC; and

(c) following the making of orders by the Federal Court in the ARC proceedings (the **commencement date**).

Undertaking to ARC Renegotiation and Repayment

1. Coles and GHPL undertake, for the purposes of s 87B of the Act, to give effect to the matters set out at paragraphs 9 to 17 below.
2. Within two weeks of the commencement date, Coles will appoint the Honourable Jeff Kennett AC as an Independent Arbiter to undertake the reviews set out below.
3. With respect to each supplier identified by Coles for the purposes of the ARC program introduced to suppliers in October 2011 who Coles described as Tier 3 suppliers, listed in Annexure A to this Undertaking, the Independent Arbiter will:

(a) Retain a partner of an independent accounting firm (the firm), with relevant expertise and appropriate resources, approved by the ACCC and Coles to assist the Independent Arbiter.

(b) Instruct the firm to prepare an analysis of each Tier 3 supplier that identifies the extent to which the supplier has utilised ARC including:

(i) in relation to the Portal, how often and which elements of the Portal each supplier has used since it gained Portal access;

(ii) in relation to EOQs, whether each supplier has been obtaining EOQs at the level indicated by Coles during ARC negotiations.

(c) Within eight weeks of appointment (or a period otherwise agreed between Coles and the ACCC), provide the details and results of the firm’s analysis to each Tier 3 supplier (and to Coles) together with a summary of the amount paid by the Tier 3 supplier to Coles in ARC rebates each financial year.

(d) At the same time as providing the details and results at (c) above, provide the following options (to be available to the Tier 3 suppliers for a period of 6 weeks) to each such Tier 3 supplier, noting that eligibility for any refund of prior payments will be based on the matters set out in paragraphs (e) and (f) below:

(i) Remain in ARC, but initiate a review to be conducted by the Independent Arbiter of eligibility for any refund of prior payments and the rebate to be paid going forward.

(ii) Exit ARC but initiate a review to be conducted by the Independent Arbiter of eligibility for any refund of prior payments. ARC payments would cease immediately and ARC benefits would cease after 6 months. Senior Coles Management, in good faith, will work with the supplier on how it can continue to supply Coles without access to the Portal and EOQ.

Exit ARC without participation in a review by the Independent Arbiter. ARC payments would cease immediately and ARC benefits would cease after 6 months. Senior Coles Management, in good faith, will work with the supplier on how it can continue to supply Coles without access to the Portal and EOQ.

Remain in ARC on current terms, without participation in a review by the Independent Arbiter.

(e) Upon election by a Tier 3 supplier requesting a review under 10(d)(i) or (ii) above, the Independent Arbiter will review the circumstances of the supplier and assess whether each supplier should receive a refund and or any adjustment to the rebate. In relation to any review conducted by the Independent Arbiter, the Independent Arbiter will invite the Tier 3 supplier and Coles to provide information and submissions in respect of the assessment and, as appropriate, discuss the assessment with the supplier and Coles. A supplier or Coles may provide any submissions confidentially to the Arbiter. The Arbiter will conduct the review confidentially.

(f) Without limiting the information and submissions referred to in paragraph (e), when determining the eligibility for any refund of prior payments and the rebate to be paid going forward the Independent Arbiter must take into account:

(i) the circumstances of the Tier 3 supplier’s agreement to commence paying the ARC rebate, including the information that was provided by Coles at the time the agreement was made and whether the Tier 3 supplier had an opportunity to decline to participate in ARC or to negotiate the terms of the ARC rebate amount; and

(ii) the benefit in broad terms the Tier 3 supplier considers it has received from access to ARC over and above the arrangements it had with Coles prior to the implementation of ARC.

(g) Any Tier 3 supplier that elects pursuant to paragraph 10(d)(ii) or (iii) to exit ARC may rejoin ARC at any time. Such a supplier may, within 3 months of the election to leave ARC, request that the Independent Arbiter review and assess the ongoing rebate that would be applicable if the supplier had not exited ARC, and thereafter rejoin ARC at its request at the rate determined by the Independent Arbiter.

1. With respect to the suppliers named in the second proceedings, the Independent Arbiter will review the circumstances of the suppliers in respect of whom Coles has made admissions in a Statement of Agreed Facts, and assess, without restriction or limitation, whether each supplier should be paid a refund of relevant payments to Coles or GHPL. This review is to be completed within 3 months from the commencement of the undertaking.
2. The Independent Arbiter may retain any other resources he or she considers necessary or desirable to efficiently conduct the reviews contemplated by this proposal.
3. The Independent Arbiter must complete the review set out in paragraphs 10(d)(i) and (ii) and make a determination within a three month period commencing from the date a Tier 3 supplier elects under either paragraph 10(d)(i) or (ii) above, or in the case of a request under paragraph 10(g) within 3 months of the supplier making that request (in each case unless the supplier and Coles agree to extend the period).
4. Coles and GHPL must provide any information or documents requested by the Independent Arbiter, and will be bound by the determination of the Independent Arbiter in respect of each supplier.
5. At the conclusion of the review process, without revealing the identity of any supplier or information confidential to specific suppliers the Independent Arbiter will report publicly on the outcome of the reviews including on the amount of refunds provided to suppliers in accordance with paragraphs 10(d)(i) and (ii) and 11.
6. Coles or GHPL will pay to each supplier any refund determined by the Independent Arbiter within 28 days of the determination.
7. Coles will bear the costs of the Independent Arbiter and the firm as well as the costs of any additional resources retained by the Independent Arbiter.

**Acknowledgments**

1. Coles acknowledges that:

18.1 the ACCC will make this Undertaking publicly available including by publishing it on the ACCC’s public register of section 87B undertakings on its website;

18.2 the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and

18.3 this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

**Executed as an Undertaking**

**Annexure A to s 87B Undertaking by Coles Supermarkets Australia Pty Ltd and Grocery Holdings Pty Ltd - List of Tier 3 Suppliers**

| **SUPPLIER** |
| --- |
| 1. | 3M Australia Pty Ltd; |
| 2. | 7 Chefs Pty Ltd; |
| 3. | A. Clouet (Australia) Pty Ltd; |
| 4. | AB World Foods Pty Ltd; |
| 5. | Affiliated Sponge Distributors Pty Ltd; |
| 6. | Allen Family Trust and Peregrine Trust, trading as Danish Patisserie; |
| 7. | Allsep’s Pty Ltd; |
| 8. | Anchor Foods Pty Ltd; |
| 9. | Arthur Brunt International Foods Co Pty Ltd; |
| 10. | Aspen Pharmacare Australia Pty Ltd; |
| 11. | Atkins Nutritionals Australia Pty Ltd; |
| 12. | Aussie Bodies Pty Ltd, now Vitaco Health Australia Pty Ltd; |
| 13. | Austech Products Pty Ltd; |
| 14. | Australian Bakels (Pty) Ltd; |
| 15. | Australian Beverage Holdings Pty Ltd, trading as Noble Beverages; |
| 16. | Australian Char Pty Ltd; |
| 17. | Australian Food Industries Pty Ltd; |
| 18. | Australian Pet Brands Pty Ltd; |
| 19. | Australian Wholefoods Pty Ltd; |
| 20. | Bakemark Pty Ltd; |
| 21. | Bakery Fresh Pty Ltd; |
| 22. | Banquet Desserts Pty Ltd; |
| 23. | Barilla Australia Pty Ltd; |
| 24. | Bartter Enterprises Pty Ltd; |
| 25. | Bayer Australia Ltd; |
| 26. | Beiersdorf Australia Ltd; |
| 27. | Beijing Soya Bean Products Pty Ltd; |
| 28. | Bellamy's Organic Pty Ltd; |
| 29. | Bevco Pty Ltd; |
| 30. | Bic Australia Pty Ltd; |
| 31. | Big Sister Foods Pty Ltd and Miss Muffin Pty Ltd; |
| 32. | Biotech Pharmaceuticals Pty Ltd; |
| 33. | Bon Food Pty Ltd; |
| 34. | Bonds Industries Pty Ltd, trading as Pacific Brands; |
| 35. | Borgcraft Pty Ltd; |
| 36. | Boundary Bend Olives Pty Ltd, trading as Cobram Estate; |
| 37. | Brands RMJ Pty Ltd; |
| 38. | Brownes Foods Operations Pty Ltd; |
| 39. | Brunnings Garden Products Pty Ltd; |
| 40. | Buontempo Enterprises Pty Ltd, trading as Roma Food Products; |
| 41. | Cantarella Bros Pty Ltd; |
| 42. | Carman’s Fine Foods Pty Ltd; |
| 43. | Ceres Natural Foods Pty Ltd, trading as PureHarvest; |
| 44. | Challenge Trust, Rico Tea Trust, Davey Family Trust and The Mountain Mist Trust, trading as Madura Tea Estates; |
| 45. | Charlie's Group (Australia) Pty Ltd, now the Better Drinks Co Pty Ltd; |
| 46. | Church & Dwight (Australia) Pty Ltd; |
| 47. | Clorox Australia Pty Ltd; |
| 48. | Club Trading & Distribution Pty Ltd; |
| 49. | Collins Family Trust and Petric Family Trust, trading as Ivan’s Pies; |
| 50. | Cosmex International Pty Ltd; |
| 51. | Coty Australia Pty Ltd; |
| 52. | Crafty Chef Pty Ltd; |
| 53. | Cypress & Sons Pty Ltd; |
| 54. | Dejour Sanitary Products Pty Ltd, trading as The Woman’s Room. |
| 55. | Diseb Food Group Pty Ltd, trading as Da Vinci Foods Pty Ltd; |
| 56. | Dr. Oetker Australia Pty Ltd; (aka Oetker Gruppe) |
| 57. | DuluxGroup (Australia) Pty Ltd, trading as Yates; |
| 58. | E.D. Oates Pty Ltd; |
| 59. | Euronatural Fine Foods Pty Ltd; |
| 60. | F. Mayer (Imports) Pty Ltd; |
| 61. | Fawcett Bros (NSW) Pty Ltd, now A.C.N 000 907 013 Pty Ltd; |
| 62. | FFT International Pty Ltd; |
| 63. | Fibrecyle Pty Ltd; |
| 64. | Fifya Pty Ltd; |
| 65. | Fine Breads of Australia Pty Ltd (under external administration); |
| 66. | Freshfood Services Pty Ltd; |
| 67. | Freudenberg Household Products Pty Ltd; |
| 68. | Frozen Bakery Solutions Pty Ltd, trading as Breadsolutions; |
| 69. | Frucor Beverages (Australia) Pty Ltd; |
| 70. | Gaspar Nominees Pty Ltd, trading as Bakery Du Jour; |
| 71. | Golden North Pty Ltd; |
| 72. | Griffins Foods Ltd; |
| 73. | Grove Fruit Juice Pty Ltd; |
| 74. | Gruma Oceania Pty Ltd; |
| 75. | Guzzi’s Pty Ltd; |
| 76. | Hansells Food Australia Pty Ltd, formerly Old Fashioned Foods (Australia) Pty Ltd; |
| 77. | Harice Pty Ltd; |
| 78. | Heritage Fine Chocolates (Aust.) Pty Ltd; |
| 79. | Hormel Foods Australia Pty Ltd; |
| 80. | Hot Shots (Aust.) Pty Ltd; |
| 81. | Hoyt Food Manufacturing Industries Pty Ltd; |
| 82. | Huhtamaki Australia Pty Ltd; |
| 83. | Hunter Leisure Pty Ltd; |
| 84. | International Consolidated Business Pty Ltd; |
| 85. | Jalna Dairy Foods Pty Ltd; |
| 86. | Jensen’s Choice Foods Pty Ltd, now A.C.N. 006 988 218 Pty Ltd; |
| 87. | Juicy Isle Pty Ltd; |
| 88. | Kadac Pty Ltd; |
| 89. | KAO (Australia) Marketing Pty Ltd, now KAO Australia Pty Ltd; |
| 90. | Kikkoman Australia Pty Ltd; |
| 91. | Kylie (Australia) Pty Ltd; |
| 92. | LA Pottier and LE Pottier, trading as Alinal Health Bread & Selected Foods; |
| 93. | La Famiglia Fine Foods Pty Ltd; |
| 94. | Laucke Flour Mills Pty Ltd; |
| 95. | Laurent Bakery Pty Ltd; |
| 96. | Lemnos Foods Pty Ltd; |
| 97. | Lenan Corporation Pty Ltd; |
| 98. | Leo’s Imports and Distributors Pty Ltd; |
| 99. | Libpac Pty Ltd; |
| 100. | Logan Farm Pty Ltd; |
| 101. | Maggie Beer Products Pty Ltd; |
| 102. | Mailton Holdings Pty Ltd, trading as Bernard’s Bakery; |
| 103. | Makmur Enterprises Pty Ltd; |
| 104. | Manildra Flour Mills Pty Ltd; |
| 105. | Manning Valley Free Range Eggs; |
| 106. | Marathon Food Industries Pty Ltd; |
| 107. | Massel Australia Pty Ltd; |
| 108. | Masterpet Australia Pty Ltd; |
| 109. | Mattel Pty Ltd; |
| 110. | McCormick Foods Australia Pty Ltd; |
| 111. | Menora Foods Pty Ltd; |
| 112. | Meteor Party Pty Ltd; |
| 113. | Minerva Australia Pty Ltd; |
| 114. | Mirabella International Pty Ltd; |
| 115. | Moo Premium Investments Pty Ltd; |
| 116. | Mountain H20 Pty Ltd; |
| 117. | Nature’s Care Manufacture Pty Ltd; |
| 118. | Nature’s Gift Australia Pty Ltd; |
| 119. | Nature’s Organics Pty Ltd; |
| 120. | Nerada Tea Pty Ltd; |
| 121. | Nice-Pak Products Pty Ltd; |
| 122. | Norco Co-operative Ltd; |
| 123. | Nova Concepts Australia Pty Ltd; |
| 124. | Nudie Foods Australia Pty Ltd; |
| 125. | Nutricia Australia Pty Ltd; |
| 126. | Nutrisoy Pty Ltd; |
| 127. | Nuttelex Food Products Pty Ltd; |
| 128. | Ostindo International Pty Ltd; |
| 129. | P. & T. Basile Pty Ltd, trading as Basile Imports; |
| 130. | Pace Farm Egg Products Pty Ltd; |
| 131. | Pactum Australia Pty Ltd, formerly Contract Beverage Packers of Australia Pty Ltd; |
| 132. | Pascoe’s Pty Ltd; |
| 133. | Passage Foods Pty Ltd; |
| 134. | Pasta Master Distribution Pty Ltd; |
| 135. | Paton’s Macadamia Plantations Pty Ltd; |
| 136. | Peerless Holdings Pty Ltd; |
| 137. | Pental Products Pty Ltd; |
| 138. | Pep’s Distribution Service Pty Ltd; |
| 139. | Philemon Pty Ltd, trading as Waterwheel Industries (under external administration); |
| 140. | Pied Piper Pty Ltd, trading as The Pied Piper Fine Foods; |
| 141. | Popina (VIC) Pty Ltd; |
| 142. | Poseidon Tarama Pty Ltd; |
| 143. | Potts Bakeries Pty Ltd, now CGJPG Pty Ltd; |
| 144. | Preshafood Limited; |
| 145. | Prime Pet Care Pty Ltd, trading as 4 Legs Pet Food Co; |
| 146. | Prolife Foods Pty Ltd; |
| 147. | Queen Fine Foods Pty Ltd; |
| 148. | Rachelli International BV; |
| 149. | Real Foods Pty Ltd; |
| 150. | Ricci Remand Chocolate Co Pty Ltd, now RR070912 Pty Ltd; |
| 151. | Rinoldi Pasta Pty Ltd; |
| 152. | Robern Menz (MFG) Pty Ltd; |
| 153. | Ross Cosmetics Aust. Pty Ltd; |
| 154. | Safcol Australia Pty Ltd; |
| 155. | Sargents Pty Ltd; |
| 156. | Savion Products Pty Ltd; |
| 157. | Scalzo Trading Co Pty Ltd; |
| 158. | SFH Baking Products Pty Ltd, trading as Quattro’s Bakehouse & Fine Foods; |
| 159. | Soulfresh Pty Ltd; |
| 160. | Source Holdings Pty Ltd, trading as Source Food and Drink; |
| 161. | SPF Corporation Pty Ltd; |
| 162. | Spring Gully Foods Pty Ltd; |
| 163. | Stahmann Farms Enterprises Pty Ltd; |
| 164. | Steric Trading Pty Ltd; |
| 165. | Stuart Alexander & Co Pty Ltd; |
| 166. | Swedish Match Australia Pty Ltd, now Scandinavian Tobacco Group Australia Pty Ltd; |
| 167. | Sweet Season Pty Ltd, trading as Universal Candy; |
| 168. | Swisse Wellness Pty Ltd; |
| 169. | Tasti Pty Ltd; |
| 170. | The Decor Corporation Pty Ltd; |
| 171. | The Heat Group Pty Ltd; |
| 172. | The Import Trading Trust, trading Webb Distributors (Universal) Pty Ltd; |
| 173. | The Pitruzzello Family Trust, trading as Pantalica Cheese Company Pty Ltd; |
| 174. | The Trustee for Atlantic Pacific Trading Trust; |
| 175. | The Trustee for Betta Foods Unit Trust, trading as Betta Foods Australia Pty Ltd as trustee for Betta Foods Unit Trust; |
| 176. | The Trustee for Bridgewater Poultry Farm No.1 Trust, trading as Bridgewater Poultry Farm Pty Ltd; |
| 177. | The Trustee for Encore Tissue (Aust) Unit Trust, trading as Encore Tissue; |
| 178. | The Trustee for F & D Family Trust, trading as Dallas International Pty Ltd; |
| 179. | The Trustee for Jackel Trading Discretionary Trust, trading as Jackel Pty Limited; |
| 180. | The Trustee for Scott Marketing Group, trading as Scott Marketing Group Pty Ltd; |
| 181. | The Trustee for The Bickfords Australia Unit Trust, trading as Bickfords Australia Pty Ltd; |
| 182. | The Trustee for the Foodtech Unit Trust, trading as Colonial Farm (Rust) Pty Ltd; [sic, (Aust)] |
| 183. | The Trustee for The Joss Food Trust, trading as Trialia Foods Australia Pty Ltd; |
| 184. | The Trustee for the S & J Goldsworthy Family Trust, trading as Beechworth Honey Pty Ltd; |
| 185. | The Trustee for the Tassios Family Trust, trading as Chris’ Greek Dips; |
| 186. | The Trustee for Weis Australia Trust, trading as Weis Frozen Foods; |
| 187. | Three Threes Condiments Pty Ltd; |
| 188. | Trend Laboratories Pty Ltd, trading as Trendpac; |
| 189. | Tru Blu Beverages Pty Ltd; |
| 190. | True Foods Pty Ltd; |
| 191. | Unibic Australia Pty Ltd (under external administration); |
| 192. | Unicharm Australasia Pty Ltd, trading as Australian Pacific Paper Products; |
| 193. | V & G Lubrano Investments Pty Ltd, trading as Sandhurst Fine Foods Co; |
| 194. | V.I.P. PetFoods (Rust) Pty Ltd; |
| 195. | Valeant Pharmaceuticals Australasia Pty Ltd; |
| 196. | Vesco Foods Pty Ltd; |
| 197. | Ward, McKenzie Pty Ltd; |
| 198. | Willow Ware Australia Pty Limited; |
| 199. | Y & M Friedman Family Trust, trading as Yumi's Fresh Quality Seafoods; |
| 200. | Yakult Australia Pty Ltd; |
| 201. | The A2 Milk Company Limited, formerly A2 Corporation; |
| 202. | AB Food & Beverages Australia Pty Ltd, trading as Twinings & Co; |
| 203. | Ansell Limited; |
| 204. | Blackmores Limited; |
| 205. | Blue Lake Milling Pty Ltd; |
| 206. | Buderim Ginger Limited; |
| 207. | Bundaberg Brewed Drinks Pty Ltd; |
| 208. | Capilano Honey Limited; |
| 209. | Conga Foods Pty Ltd; |
| 210. | Dilmah Australia Pty Ltd; |
| 211. | ET Browne (Australia) Pty Ltd; |
| 212. | Ferrero Australia Pty Ltd; |
| 213. | Jalco Group Pty Ltd; |
| 214. | Funtastic Limited; |
| 215. | Kao Brands Australia Pty Ltd; |
| 216. | Noon International Australia Pty Ltd; |
| 217. | Pfizer Australia Pty Ltd; |
| 218. | Pharm-a-Care Laboratories Pty Ltd; |
| 219. | Selleys Pty Ltd; |
| 220. | Star Maid International Pty Ltd; |
| 221. | New TOCG Pty Ltd, trading as The Original Croissant Gourmet; |