DISCOUNT OR DECEPTION? COLES FOUND TO HAVE MISLED CONSUMERS IN "DOWN DOWN" PROMOTIONS

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IN BRIEF

On 14 May 2026, the Federal Court of Australia (the Court), in a prosecution commenced by the Australian Competition and Consumer Commission (ACCC), found that Coles Supermarkets Australia Pty Ltd (Coles) had engaged in misleading conduct and made misleading representations about the price of products in trade or commerce between February 2022 and May 2023.

The proceedings, centred on Coles' long-running “Down Down” promotional campaign which advertised lower prices on frequently bought grocery items, such as milk, bread and laundry liquid.

The Court found that, for a discount on a product to be a “genuine discount,” it required the following:

- A pre-promotional price that was commercially justifiable and not artificially inflated.
- Commercial volumes of the product sold at that pre-promotional price.
- *Importantly*, a reasonable period during which the product was ordinarily offered at that price.

The Court held that a price that was only ever held for a short time (in these instances, about four weeks), notwithstanding that these prices were commercially grounded (the prices followed supplier price increases, were based on suppliers' recommended retail prices (RRPs) and, hence, were “genuine prices”), was, in the context of Coles' long-standing pricing behaviour and policies/“guardrails,” too short to constitute a genuine reference price, rendering the represented discounts illusory and misleading.

The Court stated that had the prices been held at the higher prices for a period of 12 weeks immediately prior to the “Down Down” promotion, the conduct would not have been misleading. However, while it was not explicitly stated, it is clear that the reference to the 12-week period related directly to Coles' own policies/guardrails which were in place prior to the period in which the conduct took place—further detail below.

According to ACCC Chair Gina Cass-Gottlieb, the ACCC brought these proceedings as it considered that “Coles' pricing practices within its 'Down Down' program made it harder for consumers to identify genuine value for money while shopping for household essentials.” [1]

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This decision by the Court has important implications for businesses and their promotional strategies and activities. We set out a number of key considerations for businesses in light of the Court's decision in more detail below.

Background

The ACCC commenced proceedings against Coles in September 2024 over alleged false or misleading representations made to consumers.

Specifically, Coles was alleged to have briefly raised prices (for periods of about four weeks or less) on 245 items (the Affected Products) by at least 15% before putting them on “Down Down” promotions. The Affected Products included Arnotts' Shapes biscuits, Bega cheese, Band-Aids, Danone Yoghurt and more.

The Affected Products were marked with “Down Down” pricing tickets which noted both a promotional price and a “was” price for each product (being the temporarily increased price). Even though the promotional price was lower than the “was” price, it remained higher than the regular price before that temporary increase.

The ACCC's allegations were that the “Down Down” pricing tickets constituted false or misleading representations that the Affected Products' promotional price was a genuine discount, even though the “was” price displayed on the pricing tickets was the temporarily increased price and not the product's regular price. Therefore, the discounts did not actually exist.

Coles denied the alleged representation, asserting that supplier cost increases and related negotiations resulted in the price increases from which the discounting occurred. Coles argued that the “was” price reflected the immediately preceding regular price and that the promotional price therefore represented a genuine discount.

For completeness, in parallel with the ACCC prosecution, a class action proceeding was commenced making similar allegations, and the initial trial involved all issues of liability in both the ACCC proceeding and the class action proceeding (the Joint Liability Trial).

The Joint Liability Trial was conducted using 12 out of the 245 Affected Products (Sample Products), all of which were manufactured and packaged grocery products instead of fresh products.

Is the Discount Genuine or Illusory?

The Court approached the issue of what separates a genuine discount from an illusory one, ultimately finding that the duration that the “was” price had been offered, particularly in the context of Coles' own policies and guardrails that were in place in the three years prior to the conduct taking place (and which were amended at the conduct's commencement), was the decisive issue in this case.

The Court accepted that most ordinary consumers, when grocery shopping, would not have formed a conscious belief about the period for which the “was” price was offered.

As such, consumers would only have an intuitive sense that the discount being offered was genuine. In addition, incorporated into the notion of a genuine discount is the idea that the previous price was an ordinary price that had been offered by Coles for a reasonable period.

Therefore, the Court's view was that the “Down Down” pricing tickets conveyed a representation about Coles offering a genuine discount.

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Was the Discount Genuine?

To determine whether the discount was genuine, the Court had to consider all relevant factors, including whether the "was" price shown on the "Down Down" pricing ticket truly reflected the product's usual sale price over a reasonable time frame.

These relevant factors included the following:

- The commercial circumstances under which the price of the product had been determined.
- The level at which the price was set.
- The period over which the product was sold at that price.
- The volume of product sales at that price.

Based on its assessment of the circumstances under which Coles increased the Sample Products' retail prices before placing them on "Down Down" pricing tickets, the Court concluded that the price increases were due to an increase in supplier cost prices and that Coles' decision to increase retail prices (based in part on the price increases and suppliers' RRPs) was commercially justifiable. The Sample Products were both offered for sale at the "was" price in Coles' ordinary course of business and were also sold in commercial volumes.

Nevertheless, the determining consideration was the duration for which the Sample Products were sold at the "was" price.

The Court considered in detail Coles' own policies and in particular the "guardrails" that had been in place since September 2019, particularly the following:

- The requirement that the product which was the subject of the "Down Down" promotion must not have been offered at lower than the "was"/regular price at any time in the preceding 12 weeks.
- The requirement that the product must have been sold at the "was"/regular price for the four weeks immediately prior to the launch of the promotion (or for four out of the previous six weeks).

The Court also did the following:

- Considered that the above guardrails "provided contemporaneous evidence of Coles' efforts to ensure that the Down Down price represented a genuine discount from the previous price"[2]—noting that the Court discounted the fact that the guardrails were amended immediately prior to the conduct commencing as being similarly probative.
- Proceeded to state that "…In that regard, the guardrails demonstrate that Coles was aware of the potential for the Down Down promotional strategy to mislead consumers…."[3]
- Therefore concluded that 13 of the 14 "Down Down" pricing tickets were misleading, as they had not been sold at the "was" price stated on the ticket for a reasonable period prior to the "Down Down" promotion. The only exception was the Nature's Gift Dog Food "Down Down" pricing ticket, which was not misleading as it did not include a "was" price.

As such, the discounts represented on the "Down Down" pricing tickets were not genuine. In offering the Sample Products on the "Down Down" pricing tickets, Coles had done the following:

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- Engaged in misleading conduct in trade or commerce.
- Made a misleading representation with respect to the price of the Sample Products in connection with the promotion of the supply of the Sample Products in trade or commerce.

Penalties

The question of penalties has yet to be determined by the Court. However, Ms. Cass-Gottlieb has stated that the ACCC will be seeking a substantial penalty to reflect "the importance of accurate pricing for consumers."[4]

What Does This Mean for Your Business?

The Court determined that the concept of a genuine discount inherently includes the assumption that the referenced prior price reflects the ordinary sale price over a reasonable period.

While there has been significant "publicity" about the "requirement" to make available the products at the "was" price for a period of 12 weeks, as is set out clearly above, this requirement was clearly contextual to Coles' factual circumstances and is not, in our view, a "hard and fast rule."

The Court determined that the concept of a genuine discount inherently includes the assumption that the referenced prior price reflects the ordinary sale price over a reasonable period. Having said that, businesses should exercise care when using "was/is" or "strike through" pricing strategies in promotions, as they are implicitly making a factual representation about the product's pricing history.

To manage risks in relation to misleading conduct and representations, businesses should "take stock" of their promotional strategies, activities and mechanisms to ensure they are not at risk of contravening the Australian Consumer Law (ACL).

When assessing their promotional strategies, activities and mechanisms, businesses should consider the following:

- What is a *reasonable period* for the product to be offered at the pre-promotional price/"was" price?
    - Are the prices of the product relatively stable, or do they change frequently?
- What *internal guardrails* can be established (e.g. minimum price sale periods) to manage the risk of offering an illusory discount?
    - According to the promoter's rules, how long must product prices remain stable/the products be sold at (or at least offered at) before the product is offered on promotion?
- What is the *volume of sales* for each product at the pre-promotional price?
    - Businesses should keep records of pre-promotion sales volume (or at least the period of time that the product was offered at the "was" price), promotion sales volume and other relevant data points.
- What is the *commercial basis* behind pre-promotional prices?
    - If challenged, can the business provide sufficient evidence on why each specific price point is commercially justifiable? For example, by providing supplier cost data or internal documentation outlining the methodology used in price determination.

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If your business cannot confidently establish that a pre-promotional reference price meets the factors for being a "genuine discount," the most prudent approach may be to avoid "was/is" or "strike through" pricing and identify other ways to communicate the product's value.

If you require any assistance in conducting an assessment on whether your business's promotional activities and strategies pose a risk under the ACL, please contact us and we can assist you further.

FOOTNOTES

[1] Australian Competition and Consumer Commission, 'Court finds that Coles misled customers over 'Down Down' claims', *Australian Competition and Consumer Commission – Media Releases* (Web page, 14 May 2026).

[2] ACCC v Coles Supermarkets Australia Pty Ltd [2026] FCA 598 [173].

[3] See footnote 2.

[4] Max Mason, 'Coles used sham discount offers to trick shoppers, Federal Court rules', Australian Financial Review (Web Page, 14 May 2026).

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