

Compliance Factsheet - Unconscionable Conduct

What is unconscionable conduct?

Unconscionable conduct is where a company engages in unethical behaviour which abuses its bargaining power - ***it is conduct so unreasonable it goes against good conscious***. This type of conduct is illegal and the ACCC's new Chairman Rod Sims, has publicly stated that he is watching the way Supermarkets deal with suppliers for any potential unconscionable conduct.

There is no precise definition of unconscionable conduct, however to avoid being unconscionable you must be able to show that relations with your suppliers are **fair, just and reasonable** and that your negotiations do not place suppliers (especially smaller suppliers or companies with financial difficulties) at a serious disadvantage.

Hard, tough and competitive negotiation to drive a bargain and obtain the best deal for Coles is fine. Unfair, unreasonable, bullying, threatening or unethical supplier dealings are unacceptable.

What are the penalties for engaging in unconscionable conduct?

Unconscionable conduct can attract fines of up to **1.1 million** for companies and **\$220,000** for individuals. Additionally, Coles may be required to pay compensation or have contract arrangements changed or declared void.

In addition to significant financial penalties, companies found guilty of unconscionable conduct attract highly negative publicity, damage their supplier relationships in the long term and generally lose customer loyalty. Any investigation of unconscionable conduct is likely to result in the business being compelled to produce significant amounts of internal documentation to the ACCC for examination (including correspondence with suppliers, internal and confidential emails, strategy documents etc).

How can you tell if your negotiations are tough but acceptable... or becoming unconscionable?

Your conduct might be unconscionable:

- if you are requesting conditions that are not reasonably necessary to protect legitimate business interests;
- if you are using undue influence, pressure or unfair tactics;
- if you withhold critical information that might affect the interests of the supplier;
- if your supplier was not able to understand a document;
- if you state that you can vary the terms of the contract without the agreement of the supplier;
- if you are not acting or negotiating in good faith;
- if you have a much stronger bargaining position than the other party (usually coupled with one of the above factors);
- if your supplier has **not had a real opportunity to negotiate**.



Examples of unconscionable conduct

Whether or not conduct is unconscionable will depend on the supplier's circumstances in each case and how Coles conducts itself when dealing with that supplier, both in negotiating supply terms and throughout the supply relationship. Examples of potentially unconscionable conduct could include:

- writing to a supplier imposing changes to pricing or supply terms without providing reasonable opportunity for discussion or debate;
- threatening to delete or withdraw a product unless a supplier provides greater funding, rebates or discounts than otherwise previously agreed.



You should consult the legal team if you have any concerns about the way you need to manage a supplier relationship or negotiation.

Things to remember in your communications

Keep the following in mind when drafting communications to your suppliers:

1. Where you depart from your usual terms of trade or dealings with a supplier (for example to renegotiate costs outside of the standard supply terms), make sure the documents requesting the change also state the legitimate commercial reason for the request.
2. Always ensure your supplier has reasonable time to review and consider a proposal. Always provide the supplier with the opportunity to discuss the matter with you.
3. Never use language that suggests that you are punishing, taking advantage of a supplier's weakness, or bullying a supplier to achieve a particular outcome.
4. Do not threaten harsh outcomes such as removing product without due consideration for fair process with the supplier.

Who can I contact for more information?

You can contact **Marnee Nugent** (03 9829 3842) or **Rebecca Irish** (03 9829 5716) in the Wesfarmers Corporate Solicitors Office for more information about avoiding unconscionable conduct.

Negotiating a good deal for Coles – how far is too far?

Background

Inappropriate or unfair dealings with suppliers can breach the competition law rules and have serious reputational and commercial implications for the business. These guidelines identify risk areas to avoid when speaking to suppliers and explain how far is too far in negotiations.

What are the penalties for a breach?

Supplier relations that fall within any of the risk areas identified below may breach the *Competition and Consumer Act 2010* and serious penalties will apply. Maximum penalties of up to \$10 million or 10% of Wesfarmers' group turnover for the last financial year (whichever is higher) may apply. If you are involved personally, fines of up to \$500,000 can apply or a 10 year prison term for cartel conduct.

What high risk competition law areas do I need to know about?

Make sure that you understand the following risk areas before entering into discussions with a supplier.

1. *Resale price maintenance*

- You can agree a maximum retail price. Your supplier cannot require you to sell goods at a minimum price and you must not agree to maintain a minimum selling price. A supplier can refuse supply if in the past 12 months Coles has sold their products below cost as a way of attracting customers into stores (the "loss leading exception").

2. *Predatory pricing*

- Coles must not sell below cost for a sustained period with the illegal anti-competitive purpose of eliminating new or existing competition. Any deep discounting can attract media and regulator attention - reasons must be 100% legitimate and carefully documented. **Consult with legal before selling below cost.**

3. *Misleading representations*

- Do not make misleading statements. Make sure that what you say and write (including emails) is clear and honest - if you think a supplier has misunderstood, correct them!

4. *Cartel conduct*

- Never use your supplier as an excuse for anti-competitive behaviour. Do not use suppliers as an intermediary to exchange commercially sensitive information with competitors. Negotiate your own deal - you can raise any publicly known adverse price differential but do not discuss price or terms on which suppliers sell to your competitors. Do not ask a supplier to require your competitor to maintain a minimum retail price.

5. *Unconscionable conduct*

- Coles must act fairly and in good faith in all dealings and negotiations with suppliers to avoid an accusation of unconscionable behaviour. Take special care when dealing with smaller companies or companies with financial difficulties.

6. *Exclusive dealings*

- You can generally negotiate an "exclusive" line for your business. You cannot enter into an exclusive agreement if it has the purpose or effect of substantially lessening competition in any market in Australia. Check with legal if you are uncertain whether exclusivity is permitted.

7. *Third line forcing*

- It is illegal (unless notified to the ACCC) to link our products with another company's products, for example:

Coles offers discounts on



on condition that customers are members of



How do I negotiate a good deal without going too far?

You can use your bargaining power to get the best price possible and to range, derange, promote or market goods to get the best deal for Coles. Negotiations that cross the line from being tough and aggressive to bullying and unfair will sever a partnership that should be fostered to ensure our future success.

Make sure that you:

- are reasonable and respect the terms and spirit of the supply contract and commercial relationship
- do **not** push suppliers into accepting anything that puts them at a serious disadvantage - be mindful of small suppliers who do not have the capacity to fund promotions
- do **not** force price so low that a supplier has no profit or has gone below cost
- do **not** impose unreasonable penalties.

For example, it is unreasonable to threaten product deletion if a promotional clash occurs or to demand compensation for loss of 'expected sales' (when no actual loss has been suffered by Coles). Bullying, threatening or harassing language such as "fix this or else" is unacceptable.



How do I keep up with competitor promotions?

You can use publicly available information on competitor prices and promotions when planning Coles' promotional activity and advertising. You cannot ask your supplier to reveal competitor information. Even if you become aware of an advertising clash, you must not fish for additional information (e.g. "will my promotion stand out?"). Any perception that we have asked about competitors' promotional activity could trigger a cartel investigation.

Risk Matrix

See below a summary of risk levels for common supplier situations:

Likely to be ok	You must seek legal advice	Could breach the law with serious penalties
<i>Using publicly available competitor price information (e.g. from stores or announcements) as a benchmark for setting our prices</i>	<i>Pricing goods in stores below cost</i>	<i>Seeking or accepting price or promotion information about our competitors' activities directly or indirectly from our suppliers</i>
<i>Seeking greater financial support from larger suppliers for promotional activities</i>	<i>Hard and aggressive negotiations with smaller suppliers to fund deep discounts</i>	<i>Using threatening language or promising something you don't intend to do</i>
<i>Advising a supplier that you will not change your promotion dates due to a marketing clash</i>	<i>Penalising suppliers (e.g. de-range or cancel promotions) for refusing to do what you want</i>	<i>Unreasonably penalising suppliers, for example where Coles has suffered no loss</i>

Who can I contact for more information?

You can contact Marnee Nugent (03 9829 3842) or Helen Anness (03 9829 5716) in the Wesfarmers Corporate Solicitors Office for more information on supplier relationships.

Complaints Helpline

Is it right? Is it lawful? Are you at ease?

Are you aware of behaviour that is unethical, illegal or not in the interest of Coles? If you feel you can't discuss your concerns with your normal Coles representative Stopline is here to help.

Stopline is a national anti-corruption organisation enlisted by companies to provide an independent, confidential hot-line service that team members, suppliers and others can use to anonymously report a wide range of real or suspected unethical behaviour. Their investigators are experienced in dealing with calls regarding:

- Theft
-
- Fraud
-
- Serious breaches of conduct
-
- Inappropriate relationships with suppliers, producers or agents
-
- Breaches of the competition and consumer act.

All calls made to the hotline service remain anonymous. No caller identification is used but callers can be provided with their own caller code, if needed.

Phone: 1300 304 550 or Email: coles@stopline.com.au