

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited [2014] FCA 634

Citation: Australian Competition and Consumer Commission v
Coles Supermarkets Australia Pty Limited [2014] FCA 634

Parties: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION v COLES SUPERMARKETS
AUSTRALIA PTY LIMITED (ACN 004 189 708)**

File number: VID 475 of 2013

Judge: **ALLSOP CJ**

Date of judgment: 18 June 2014

Catchwords: **CONSUMER LAW** – *Australian Consumer Law* ss 18(1), 29(1)(a), 33 – Misleading or deceptive conduct or conduct likely to mislead or deceive, false or misleading representations, conduct liable to mislead the public – Whether the use of the phrases “baked today, sold today”, “freshly baked”, “baked fresh” and “freshly baked in-store” is misleading where the complete baking process is not undertaken in-store on the day – Whether the relevant context for assessing misleading or deceptive conduct includes a cynical consumer culture

PRACTICE AND PROCEDURE – Admissibility of evidence – relevance – whether evidence of third party conduct is relevant – hearsay – whether statements made by third parties serve a non-hearsay purpose

Legislation: *Competition and Consumer Act 2010* (Cth), Sch 2 (*Australian Consumer Law*), ss 18(1), 29(1), 33
Evidence Act 1995 (Cth) ss 78, 79, 191(2)

Cases cited: *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682
Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; 304 ALR 186
Australian Competition and Consumer Commission v Turi Foods Pty Ltd [2013] FCA 665
Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; 218 CLR 592
Campomar Sociedad Limitada v Nike International [2000] HCA 12; 202 CLR 45

CRW Pty Ltd v Sneddon (1972) AR (NSW) 17
Fraser v NRMA Holdings Ltd (1994) 124 ALR 548
Google Inc v Australian Competition and Consumer Commission [2013] HCA 1; 294 ALR 404
Interlego AG v Croner Trading Pty Ltd (1992) 39 FCR 348
Keehn v Medical Benefits Fund of Australia Ltd (1977) 14 ALR 77
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44; 149 CLR 191
Reckitt & Coleman Products Ltd v Borden Inc [1990] 1 WLR 491; 17 IPR 1
Ritz Hotel Ltd v Charles of the Ritz Ltd (1987) 14 NSWLR 104
Taco Company of Australia v Taco Bell Pty Ltd (1982) 42 ALR 177
Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (1992) 38 FCR 1
Trade Practices Commission v J & R Enterprises (1991) 99 ALR 325
Westpac Banking Corporation v Northern Metals Pty Ltd (1989) 14 IPR 499

Secondary Materials: *Shorter Oxford Dictionary on Historical Principles 3rd edition*, vol 1

Date of hearing: 20 February 2014

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 162

Counsel for the Applicant: Mr C D Golvan SC with Ms F K Forsyth

Solicitor for the Applicant: Baker and M^cKenzie

Counsel for the Respondent: Mr P D Crutchfield SC with Mr M I Borsky

Solicitor for the Respondent: King & Wood Mallesons

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 475 of 2013

**BETWEEN: AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION
Applicant**

**AND: COLES SUPERMARKETS AUSTRALIA PTY LIMITED
(ACN 004 189 708)
Respondent**

JUDGE: ALLSOP CJ

DATE OF ORDER: 18 JUNE 2014

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. Within seven (7) days, the applicant provide draft orders contended for to the respondent.
2. Proceedings be set down on a date to be fixed in consultation with the Associate for the making of orders.

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

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DATE: 18 JUNE 2014
PLACE: MELBOURNE**

REASONS FOR JUDGMENT

1 The Australian Competition and Consumer Commission (“**ACCC**”) claims that Coles Supermarkets Australia Pty Limited (“**Coles**”) has engaged in misleading conduct in the manner in which it advertises and sells bread. The particular phrases used by Coles that are the subject of suit are:

“Baked Today, Sold Today”

“Freshly Baked”

“Baked Fresh”

“Freshly Baked In-Store”

“Coles Bakery”.

2 For the reasons that follow, I am persuaded that Coles has engaged in that misleading conduct.

Broad factual outline

3 The fundamental facts are agreed in an Agreed Statement of Facts (Exhibit A).

4 The Fast Track Statement also sought relief in respect of the words “Baked Fresh”, but the Agreed Statement of Facts did not address that phrase. Further, from the material tendered, I was not able to perceive the use of the phrase. Rather, “Freshly Baked In-Store”

and “Freshly Baked” were the phrases used employing the word “fresh”. Nevertheless, the parties have, to a degree, directed themselves to the phrase, and I will deal with it.

5 Various bread products are sold at Coles supermarkets where there is an in-store bakery with packaging displaying one or more of the above groups of words. These packages are sold in circumstances where there is signage at the premises “freshly baked” and “baked today, sold today”. That signage is not directed to any particular product, but rather is general signage easily visible from the counter.

6 The baking that is undertaken by Coles’ in-store bakeries conforms with the three common methods of preparing bread that is sold to consumers in Australia in ready-to-eat form. The first method is that the bread is prepared by weighing and mixing ingredients (or using a pre-mixture), adding water, shaping and proving the dough (“prove” means leaving the dough to rise), and placing the dough in an oven and applying heat. This is sometimes referred to as preparing “from scratch”. In other words, the making of the dough is from ingredients that are not frozen and the baking is done thereafter on the premises.

7 The second method is that a supplier supplies frozen dough to Coles and at the in-store bakery, the dough is thawed and proven, and then is placed into an oven and heat is applied.

8 The third method is where a supplier not only makes and shapes the dough, but proves the dough, and par-bakes the dough in an oven. At a point after some baking, the partly baked product is snap frozen and is then stored for a period of time by either the supplier or by Coles, or by both of them. At some later time, Coles places the product in an oven at the in-store bakery and applies heat to it, in effect, to complete the baking process.

9 Thus, there are three types of baking operations by Coles: heating in an oven of proven dough made from material that is unfrozen; heating in an oven of dough that has been supplied frozen but which has been thawed and proven; and heating in an oven product that is frozen dough partly baked. It is the third of the processes – the par-baking of bread – that is the particular subject of complaint by the ACCC.

10 Some description is required of the supermarket stores of Coles. Typically, Coles supermarket stores are divided into several sections, including meat, seafood, delicatessen, fruit and vegetables, bakery and dairy. Coles supermarket stores offer bread and other bakery products for sale in the bakery section. Many Coles supermarket stores have an in-store

baking area which is located adjacent to the Coles bakery section in the supermarket store. Those baking areas have from one to four ovens. If a Coles supermarket store does not have an in-store baking area, it will only offer commercially packaged bread for sale, with the exception of two stores in Caulfield and Elsternwick, which offer par-baked bread rolls produced by an automatic bread roll machine on a trial basis. There are currently 89 Coles supermarket stores that do not have an in-store baking area, and 637 Coles supermarket stores that have an in-store baking area.

11 The Agreed Statement of Facts (Exhibit A) included a section by way of overview of the Australian baking industry. Some of the detail is unnecessary to recount, but the following should be noted.

12 The Australian baking industry includes plant bakeries (which I take to be factories), independent bakeries, franchised bakeries and in-store bakeries. There are three categories of bakery products offered for sale in Australia: bread; biscuits; and cakes and pastry. Bread is the principal product in the baking industry with pan or loaf breads accounting for approximately 45% of all sales.

13 The three most common methods of preparing bread sold to consumers in ready-to-eat form are the three methods that I have described and that are used by Coles: scratch, frozen dough, and par-baked. These are also the three most common methods of baking biscuits, cakes and pastries.

14 Bread is sold through various retail outlets in Australia, including supermarkets, specialist bakeries, convenience stores, petrol stations, and fast food outlets and restaurants. In 2008, of bread sold in Australia (excluding fast food outlets and restaurants), 59% was sold in supermarkets, 31% was sold in specialist bakeries, and 10% was sold in convenience stores. The marketing and advertising that is in issue in this case can be seen to be the attempt by Coles to increase its market share by appealing to those who might otherwise buy bread from specialist bakeries.

15 Plant bakeries manufacture commercially packaged bread for wholesale distribution. Plant bakeries account for the majority of Australia's bread production. The largest plant bakeries are those of George Weston Foods and Goodman Fielder, with other plant bakeries including Allied Mills, breadsolutions, Laurent, PFD and Speedibake. Mechanised processes produce commercially packaged bread from the mixing stage to slicing and packaging in

approximately 3.5 hours. Commercially packaged bread can be 24 hours old before it arrives in the supermarket or other retail outlet. There is generally no information provided to consumers on the packaging or other marketing of commercially packaged bread regarding how long ago commercially packaged bread came out of the oven. Commercially packaged bread is generally labelled with a “best before” date which indicates that the bread will retain its optimal eating quality until that stated date. Commercially packaged bread sold in supermarkets is generally located in different aisles or on different shelves from in-store bread, but is often displayed in the same section of the store.

16 Specialist bakeries are either independent bakeries or franchised bakeries. Ordinarily, specialist bakeries have on-site preparation and retail capabilities, and have the capacity to manufacture bread from scratch. Some specialist bakeries manufacture bread and other bakery products at a central baking facility and then deliver the bread or other bakery products to the retail store in ready-to-eat form. Specialist bakeries generally have open, small sized store fronts with visible baking areas, and generally only offer bread, other bakery products, and drinks for sale. Independent bakeries may be independently run by individuals, families, or privately owned companies, and are not affiliated with plant bakery companies or franchised bakeries.

17 Franchised bakeries such as Bakers Delight, Brumby’s, and Brown’s Bakers of Distinction are authorised by a company to use that company’s baking methods and conduct that company’s baking business under a particular brand name and franchise laws.

18 In-store bakeries in supermarkets, if they exist, will generally be located in the bakery section. Supermarket in-store bakeries perform on-site preparation processes for bread and other bakery products using the three methods earlier identified. At the in-store bakeries, packaging and labelling is applied, and retail assistance is provided in relation to those products. Only some supermarket in-store bakeries have the capacity to manufacture bread and other bakery products from scratch. The evidence reveals that both Coles and Woolworths supermarkets have in-store bakeries.

19 Breads baked daily in in-store bakeries generally have few, if any, preservatives, while bread baked in plant bakeries may contain preservatives.

20 Since at least October 2011, Coles has offered for sale at supermarket stores that have an in-store baking area, bread and other bakery products produced by one or more of the three alternative methods earlier referred to.

21 Of Coles' supermarket stores with an in-store baking area, approximately 262 sell scratch and par-baked products, 161 sell frozen dough and par-baked products, 214 sell only par-baked products, and no store sells scratch, frozen dough and par-baked products.

22 The particular bread and other bakery products offered for sale by a Coles supermarket depends upon factors such as availability of space, staff, and other factors. The same type of in-store bread may be made from scratch in one store and made by a different method, frozen dough or par-baked, in another store.

23 As at 14 December 2012, Coles supplied approximately 90 lines of scratch products, 106 lines of par-baked products, and 109 lines of frozen dough products across its supermarket stores with an in-store baking area.

24 The particular details of bread production used by Coles are set out in paras 73 – 75 of the Agreed Statement of Facts. They are as follows:

Scratch

73 To produce bread from scratch and offer it for sale, Coles' employees:

- (a) put a premix or premixes in a mixing bowl, add yeast and water, forming a dough;
- (b) knead or fold the dough;
- (c) shape the dough in a baking mould;
- (d) prove the dough;
- (e) place the dough in an oven and apply heat;

(the above process takes an average of 90 minutes, without interruption. For scratch products, heat is applied in an oven for between 22 – 32 minutes).
- (f) remove the product from the oven and allow it to rest within the Coles In-store Baking Area;
- (g) package the product; and
- (h) place the product on shelves or in baskets in the Coles Bakery section of the Coles Supermarket Store for sale to consumers on the same day that the above process was carried out and within 20 to 30 minutes of the product being removed from the oven.

Frozen dough

74 To produce bread using the frozen dough method and offer it for sale:

- (a) the supplier to Coles:
 - (i) either weighs and mixes the ingredients or puts a premix or premixes in a mixing bowl and adds yeast and water, forming a dough;
 - (ii) kneads or folds the dough;
 - (iii) shapes the dough in a baking mould;
 - (iv) freezes the dough; and
 - (v) delivers the frozen mould to a Coles Supermarket Store with a Coles In-store Baking Area; and
- (b) Coles' employees:
 - (i) thaw the frozen mould, prove the mould in-store and then place the mould in an oven and apply heat;
 - (ii) remove the product from the oven and allow it to rest within the Coles In-store Baking Area;
 - (iii) package the product; and
 - (iv) place the product on shelves or in baskets in the Coles Bakery section of the Coles Supermarket Store for sale to consumers within 20 to 30 minutes of the product being removed from the oven.

Par-baked

75 To produce bread using the par-baked method and offer it for sale:

- (a) the supplier to Coles follows an individual recipe and process for the product, involving:
 - (i) mixing ingredients to form a dough;
 - (ii) kneading or folding the dough;
 - (iii) shaping the dough;
 - (iv) proving the dough;
 - (v) fermenting, in the case of more complex products;
 - (vi) adding additional items (such as seeds or herbs), where appropriate;
 - (vii) placing the dough in an oven and applying heat;
 - (viii) removing the product from the oven;
 - (ix) snap freezing the product;

- (x) packaging the product (i.e. in a box or other storage container for transportation to Coles);
 - (xi) storing the product, when necessary; and
 - (xii) causing the frozen product to be delivered to Coles in a vehicle with frozen storage; and
- (b) following delivery of the product to Coles and distribution to a particular Coles Supermarket Store, the product is:
- (i) stored frozen, generally for up to a few days;
 - (ii) placed still frozen in an oven located within the Coles In-store Baking Area and heat is applied for a pre-determined period of time;
 - (iii) removed from the oven and allowed to rest within the Coles In-store Baking Area;
 - (iv) packaged; and
 - (v) placed on shelves or in baskets in the Coles Bakery section of the Coles Supermarket Store for sale to consumers within 20 to 30 minutes of the product being removed from the oven.

25 The agreed facts also included further details as to aspects of manufacture, including as to par-baked product, the time frozen at the supplier; the delay of delivery to Coles; the time of freezing at Coles' distribution centres and stores; the time in the oven at the supplier; and the time in the oven at Coles. There was some dispute about these matters to which I will come in due course.

26 As to the par-baked products (which were variously defined as "Particularised Products" and "Particularised Signage Products" in the Agreed Statement of Facts, by reference to tabs 1A and 1B) it was agreed that they underwent the following changes when placed in an oven at a Coles in-store baking area in order to make the product saleable:

- (a) the products became hot;
- (b) the exterior of the products became darker in colour, harder and a crust was generated;
- (c) moisture in the products evaporated;
- (d) the interior of the products became softer, lighter and less dense in texture; and
- (e) the products developed a strong "bread" aroma.

27 In the end, there was no dispute that the process of heating at Coles of the par-baked bread can be legitimately described as baking.

28 All in-store bread sold at a Coles store with an in-store baking area is labelled with a “baked on” date indicating the day the bread came out of the oven, as well as a “best before” date.

29 Coles’ website, from October 2012, provided information about baking by Coles. At paras 81 – 82 of the Agreed Statement of Facts, the following was stated:

81 From at least 10 October 2012, the following information was available from the Coles website (with the home page located at www.coles.com.au):

(a) at www.coles.com.au/Products/Departments/Baker.aspx Coles listed (by State) its Coles Supermarket Stores with a Coles In-store Baking Area and stated:

“It is in these stores that our dedicated bakers and bakery team members prepare and bake onsite to provide a quality offer for you, ultimate freshness, golden baked crusts and tempting aromas”;

(b) under the heading “*Our Baking Methods*”:

“From scratch to par baking, we promise to offer consistent high quality bread”;
and

(c) at www.coles.com.au/Products/Departments/Bakery/Our-Baking-Methods.aspx:

“Our baking methods

Scratch baking

Coles bakers make a range of bread and bakery items from scratch, mixing and preparing dough early in the morning to make our delicious breads and bakery items. After our doughs have rested, the bakers start the process of dividing the dough into all the various shapes and flavours of bread and rolls. The bread and rolls are allowed to rest and prove until they form beautiful smooth shapes ready to be baked. The breads are baked and finished in store to guarantee the ultimate freshness, golden baked crust and tempting aromas.

Parbaking and frozen dough

To ensure our bakeries have a selection of high quality artisan-style breads to serve to customers every day, across Australia, Coles bakery team members prepare some bakery products using frozen dough and ‘parbake’ products.

Frozen dough and parbake (‘partially baked’) products are made with the same care and attention as our scratch products, only they are mixed and prepared offsite by our specialty supplier partners, frozen instantly and transported to Coles for baking and finalising in-store by Coles bakers. This innovative technology enables Coles to transport beautiful bakery products to stores across our network without compromising quality and ensures that

we can offer consistently high-quality products baked in-store for ultimate freshness, golden baked crusts and tempting aromas.”

82 From around 15 July 2013, the statements in paragraph 81 were moved to one webpage (at www.coles.com.au/Products/Departments/Bakery.aspx) and changes so as to read:

(a) under the heading “*Our Coles in-store bakeries add a new dimension to the store experience...you will smell the difference!*”:

“Our dedicated bakers and bakery team members bake onsite to provide you the ultimate in golden baked crusts and tempting aromas”; and

(b) under the heading “*Our Baking Methods*”:

“Scratch baking

Coles bakers make a range of bread and bakery items from scratch, mixing and preparing dough early in the morning to make our delicious breads and bakery items. The breads are baked and finished in store to guarantee the ultimate freshness, golden baked crust and tempting aromas.

Parbaking and frozen dough

To ensure our bakeries have a selection of high quality artisan-style breads to serve to customers every day, across Australia, Coles bakery team members prepare some bakery products using frozen dough and ‘parbake’ products.

Frozen dough and parbake (‘partially baked’) products are made with the same care and attention as our scratch products, only they are mixed and prepared offsite by our specialty supplier partners, frozen instantly and transported to Coles for baking and finalising in-store by Coles bakers.”

30 It should be noted, at this point, that the ACCC makes no allegation that par-baked bread is, from an objective viewpoint, of an inferior nature, standard, quality or value to bread made from scratch. Nor is there any qualitative difference of this kind between bread that is par-baked and bread that is made from frozen dough. Rather, the ACCC asserts that Coles has marketed frozen and par-baked products using an express or implied representation that they were either baked from scratch, or, at least, entirely baked on the day they were offered for sale, meaning that the entirety of the baking or heating process in an oven took place on that day. Based on these representations by Coles, it was said that customers would be likely to purchase bakery products in the erroneous belief that they had either been baked from scratch, or entirely baked on the day of purchase, which is not the case. While the customer may thereby acquire bread of a physical quality that is both satisfactory and

unaffected by any misrepresentation, it may be that Coles has made a sale that it otherwise may not have made because of the asserted misleading or deceptive conduct.

The issues and the essence of the ACCC's case

31 Before turning to the relevant legal principles and some of the contested evidence, it is appropriate to be precise about the issues in the case.

32 The complaint of the ACCC in these proceedings relates only to par-baked bread. The complaint is not about the bread produced from thawed frozen dough. That said, if the correct conclusion is that some of the impugned phraseology represents or connotes that the bread is made from scratch, that may impugn the conduct in relation to bread made from frozen dough. Nevertheless, the relief sought (including pecuniary penalties) is only in relation to par-baked bread.

33 The ACCC identifies the following key aspects of the production process of the par-baked bread:

- (a) significant baking at the supplier's premises;
- (b) the freezing of the product for storage and transportation;
- (c) the fact that storage and transportation can be up to six weeks (with one past supplier taking up to six months);
- (e) the bread being placed in an oven in store in a frozen state, usually for a time less (and sometimes significantly less) than the time of baking at the supplier's premises; and
- (e) consumers have no way of identifying from the packaging or signage that any product was made by the par baking process.

34 The ACCC submits that from the marketing phrases consumers are likely to form the erroneous impression that the preparation of these Coles bread products is a single complete process done in-store, on the day, including the preparation of the dough, or that the complete baking or making process is done in-store, on the day.

Relevant legal principles

35 There was no dispute about the relevant legal principles to apply. Section 18(1) of the *Australian Consumer Law* ("ACL") provides that:

A person must not, in trade or commerce, engage in conduct that is misleading or

deceptive or is likely to mislead or deceive.

36 Section 29(1)(a) of the ACL provides that:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;

37 Section 33 of the ACL provides that:

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose, or the quantity of any goods.

38 For the enquiry under s 18, it is necessary to identify the impugned conduct and then to consider whether that conduct, considered as a whole and in context, is misleading or deceptive or likely to mislead or deceive: *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; 294 ALR 404 at 423-424 [89], 426 [102] and 430 [118]; and *Campomar Sociedad Limitada v Nike International* [2000] HCA 12; 202 CLR 45 at 84-85 [100]-[101]. The same applies to the enquiry as to representations and conduct under ss 29(1)(a) and 33, respectively.

39 Conduct is misleading or deceptive or likely to mislead or deceive if it has the tendency to lead into error, if there is a sufficient causal link between the conduct and the error on the part of the person exposed to the conduct: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 304 ALR 186 at [39]. The causing of confusion or questioning is insufficient; it is necessary to establish that the ordinary or reasonable consumer is likely to be led into error.

40 There is no meaningful difference between the words and phrases “misleading or deceptive” and “mislead or deceive” (s 18), “false or misleading” (s 29(1)(a)) and “mislead” (s 33): *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14].

41 It is necessary to view the conduct as a whole and in its proper context. This will or may include consideration of the type of market, the manner in which such goods are sold, and the habits and characteristics of purchasers in such a market: see generally *ACCC v TPG*

at [52]; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; 149 CLR 191 at 199; and *Reckitt & Coleman Products Ltd v Borden Inc* [1990] 1 WLR 491; 17 IPR 1 at 16-17 (a passing off case). The context will also include relevant disclaimers or explanations: *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 at 608 [49] (where the disclaimer, in small print, but in a short document, was “there to be read”).

42 In assessing advertising material, the “dominant message” of the material will be of crucial importance: *ACCC v TPG* at [45].

43 Where conduct or representations is or are directed to members of the public at large, the conduct or representations must be judged by their effect on “ordinary” or “reasonable” members of the class of prospective purchasers: *Campomar v Nike* at 86-87 [105]. In a context such as the present, the purchasing of a staple such as bread in a supermarket, the ordinary or reasonable person may be intelligent or not, may be well educated or not, will not likely spend any time undertaking an intellectualised process of analysis, will often be shopping for many other items, and will be likely affected by an intuitive sense of attraction rather than by any process of analytical or logical choice. The dominant message of advertising for bread is likely to be simple, though intuitively diffuse. What is reasonable care by members of the public (cf *Parkdale v Puxu* at 199) must be judged in the above context. The purchase of bread from a baker or bread shop should not normally call for astute attention to disclaimers about the wares on sale at the counter.

44 Whilst the words and phrases “misleading or deceptive”, “mislead or deceive”, “false or misleading” and “mislead” are synonymous, the authorities reveal that a distinction is to be made between “likely to mislead or deceive” (in s 18) and “liable to mislead” (in s 33). The latter has been said to apply to a narrower range of conduct: *Westpac Banking Corporation v Northern Metals Pty Ltd* (1989) 14 IPR 499 at 502; *Trade Practices Commission v J & R Enterprises* (1991) 99 ALR 325 at 338-339; and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd* [2013] FCA 665 at [79]. Under s 33, what is required is that there be an actual probability that the public would be misled: *J & R Enterprises* at 339. (This citation of *J & R Enterprises* at 338-339 should not be taken to endorse the comments of O’Loughlin J as to a burden beyond reasonable doubt at 339.) The submissions of the parties were not such as to require examination of these cases.

45 Evidence that someone was actually misled or deceived may be given weight. The presence or absence of such evidence is relevant to an evaluation of all the circumstances

relating to the impugned conduct. Where the conduct and representations are to the public generally and concern a body of simple direct advertising, the absence of individuals saying they were misled may not be of great significance. There was no such evidence here. The ACCC was criticised for that. That criticism is unfounded. The objective assessment of advertising using ordinary English words in an attempt to persuade can be undertaken without the lengthening of a trial by the bringing of witnesses of indeterminate numbers. Language, especially advertising, seeking to raise intuitive senses and associations, can have its ambiguities and subtleties. The task of evaluating the objective character and meaning of the language in the minds of reasonable members of the public is not necessarily one that will be assisted in any cost-effective manner by calling members of the public. The question is one for the Court: *Taco Company of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202.

46 Half-truths may be misleading by the insufficiency of information that permits a reasonably open but erroneous conclusion to be drawn: *Fraser v NRMA Holdings Ltd* (1994) 124 ALR 548 at 563; *Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 50. In *Tobacco Institute*, Hill J referred to the valuable observations of Sheldon J and Sheppard J (when the latter was a member of the Industrial Court) in *CRW Pty Ltd v Sneddon* (1972) AR (NSW) 17 at 28, as well as making pertinent and valuable observations of his own. Hill J said the following at 50:

However, as was observed by Sheldon and Sheppard JJ in *CRW Pty Ltd v Sneddon* (1972) AR (NSW) 17 at 28 (the context was the *Consumer Protection Act 1969* (NSW)):

“An advertisement published in a newspaper is not selective as to its readers. The bread is cast on very wide waters. The advertiser must be assumed to know that the readers will include the shrewd and the ingenuous, the educated and the uneducated and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself or (often) herself omitted facts or to resolve ambiguities. An advertisement may be misleading even though it fails to deceive more wary readers.”

Where, as in the present case, the advertisement is capable of more than one meaning, the question of whether the conduct of placing the advertisement in a newspaper is misleading or deceptive conduct must be tested against each meaning which is reasonably open. This is perhaps but another way of saying that the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error: *Keehn v Medical Benefits Fund of Australia Ltd* (1977) 14 ALR 77 at 81 per Northrop J and cf the approach taken by Mason J in *Parkdale*.

47 These comments are of particular importance in assessing the evidence in this case. Where advertising material uses simple phrases and words evoking attractive notions, but without necessarily precise meaning, ambiguity or reasonably available different meanings may well arise. Context and the “dominant message” will be important. If one or more of the reasonably available different meanings is misleading, the conduct may well be misleading or deceptive, or false and misleading.

The context here

48 The following should be emphasised about context. Consumers are buying a staple product. It is a product in respect of which recency of manufacture and processing is an essential buying criterion. People do not wish to buy stale bread; they wish to buy fresh bread. It is an obvious and important marketing attraction for the product to be purchased to seem both fresh and recently baked. Most members of the community would understand that bread is made from dough which is made from ingredients, or mixtures of ingredients, to which yeast and water are added.

49 The store signage, the availability of bread on show and the in-store bakery layout, combine to communicate to the ordinary purchaser of bread that baking takes place on the premises and is freshly done. The products in question are sold in stores with a visible in-store baking area adjacent, with between one and four ovens. There is no differentiation in signage (save for “barker cards”, to which I will come) between products made by the three processes.

50 Coles sought to widen the notion of relevant context here by looking to usage of the phraseology in question by other retailers. Objection was taken to the admissibility of that evidence. I will deal with this matter after dealing with matters relied upon by the ACCC.

The facts relied by the ACCC and the disputes in relation thereto

51 During final addresses, the ACCC refined the factual material in a document entitled “Applicant’s Proposed Findings of Fact”. There was some, though restricted, debate about them. At the risk of some repetition, it is worth identifying important facts relied on and taken from that document. It is also necessary to resolve those residual factual debates, which centred upon the extent to which the ACCC was entitled, through oral and documentary evidence led and tendered at the hearing, to qualify or contradict the Agreed Statement of Facts.

52 It is to be recalled that an agreed fact such as contained within Exhibit A binds the parties and evidence may not be adduced to contradict or qualify an agreed fact unless the Court gives leave: *Evidence Act 1995* (Cth), s 191(2). No leave was sought; but no objection was taken to the evidence in question. In any event, the area of debate is such that is capable of resolution without fundamental contradiction of the agreed facts.

53 The findings of fact sought by the ACCC, and that are to be read in addition to the “broad factual outline” above, which also contains findings based on the agreed facts, are as follows.

54 None of the products the subject of the proceedings was baked from scratch; all were par-baked products. None was entirely baked by Coles.

55 All of the products were initially baked by suppliers, usually some weeks prior to the product being offered for sale; the time between initial baking and completion of baking at Coles was between several days and weeks. One product, Cuisine Royale that had been initially baked in Ireland, was baked at Coles some months later.

56 The agreed facts contained a schedule with detail of approximate time in the oven at the supplier and at Coles for each product. The total number of minutes for being in the oven varied from product to product: 35-40, 25-30, 49, 46, 17.5, 21 and 33. The percentage of that time designated as in the oven at the supplier extrapolated from these oven times in the agreed facts varied from 56% up to 83%. It is to be recalled that some of the time in the oven at Coles was taken defrosting the frozen product.

57 There was a contest as to whether it could be stated that the process undertaken at Coles was only 20% of the entire baking process. The ACCC sought to establish that finding from the evidence of Mr Upton (the managing director of Frozen Bakery Solutions), Mr Boillon (the managing director of Laurent Bakeries), Ms Healing (an employee of Coles), and some documents of third parties.

58 I do not think it appropriate or accurate to make such a broad unitary finding. From all the evidence, it is apparent that some suppliers’ products take less time in heating at Coles than others. Some, using the so-called “minute” process, need the least time in the oven at Coles (in the order of 20% of the total time, including defrosting). Others will require a greater percentage of total heating time in the oven at Coles (over 20%, and in some cases, over 40%).

59 I do not consider this dispute important. The ACCC accepted that the process in the
Coles oven was baking. Part of the so-called Maillard reaction occurred during heating at
Coles. It was not in any way inaccurate to say that the process at Coles involved some
baking.

60 Each product was offered for sale in conjunction with at least two of the marketing
phrases, either on the packaging or with adjacent signage, and in a Coles store with an in-
store bakery (with one exception).

61 Coles in-store bakeries have the following features:

- (a) the in-store baking area is adjacent to the bakery section where bread is sold;
- (b) the in-store baking area has between one and four ovens;
- (c) par-baked products are placed in and removed from ovens in the in-store bakery;
- (d) in more than a third of in-store bakeries, products are baked from scratch as well as
the par-baking process being used;
- (e) bread is sometimes sold in-store as “naked” bread, without packaging, but which then
might be placed by the consumer in bags which have the marketing phrases.

62 The packaging and signage used in the Coles in-store baking area and bakery section
of each Coles store do not differentiate between products made from scratch, from frozen
dough and using the par-baked method.

The ACCC’s reliance on documents of Coles

63 The ACCC tendered documents produced by Coles. Initially, objection was taken to
their admission. During the hearing, Coles withdrew its objection pressing its entitlement to
make submissions as to relevance. Broadly speaking, the ACCC submitted that the
documents contained relevant admissions. I will first describe the documents and then make
some comments on the weight and admissibility of the documents thereafter, even though
they have been put into evidence.

64 The first document was a Coles marketing document opaquely entitled “Bakery LB1
(Preliminary) Confidential” dated 13 July 2012. The document at 0495 describes the
“messaging” and “proof points” of the messaging. Adjacent to the “messaging” of “Baked
Today, Sold Today” under “proof points”, there appeared “✓ Our bread is baked fresh every
day – we never sell yesterday’s bread”. Underneath this, written in red, was the following:
“Need more definition here and whether it stacks up legally and in the eyes of the customer.”

This was said to be an admission of an appreciation of the risk of using the phrase, “Baked Today, Sold Today”.

65 The same document at 0526 has a matrix under the heading “What’s important to shoppers when buying fresh food?” Under the headings “Freshness” and “Authentic” there appeared “Natural – fewer processes” and “I’m able to buy something I know has been produced in a certain way”, respectively. This was said to be an admission of a recognition of the sense of fewer processes being conveyed if the word “fresh” was used.

66 On the following page (at 0527) under the heading “There’s no freshness like Coles freshness”, there was a list of “visual and aroma cues required for the customer to prove that the bread is baked in-store”. These included the warm bread on show, supportive signage and showing the bakers off in the store. It is unclear what admission is said to have been made here. Plainly, the document illustrates a desire on Coles’ part to create the intuitive sensory perception of freshness, recency of baking, and, importantly, that the baking takes place on the premises.

67 Page 0542 was also tendered, but it is of no assistance and I would otherwise have rejected it.

68 The second document, entitled “Bakery, Project Whitechapel” is a set of slides or pages for a meeting in May 2012. On page 024 dealing with in-store bakery, the proposition “there is no freshness like Coles freshness” was discussed. At the bottom of the page, the following appears: “The use of the term ‘fresh’ needs to be considered given the majority of ISB products are baked from frozen”. This was said to be an admission of risk in relation to the use of the word “fresh”.

69 The third document was a power point presentation entitled “In Store Bread” apparently prepared by Ruth McLennan. There was evidence from an affidavit of Mr Prowse filed for the ACCC of the employment positions of the persons apparently involved with the making or sending of these documents. That evidence reveals that Ms McLennan was a Coles employee with the job description of “Category Manager – in-store bread and in-store cakes”. Her skills and experience included retail, grocery, merchandising and store management. On page 0151 the “Baked Today, Sold Today” message communicated “freshness”. It was said to be an admission regarding the message to be communicated.

70 The fourth document was an email dated 27 November 2012 of Mr Tony Phillips (who was otherwise unidentified in the evidence) enclosing an email of Ms Jane Robinson (a category marketing manager for fresh food) of August 2009 in which Ms Robinson said:

Baked Today, Sold Today seen as a stronger message rather than baking fresh throughout the day

...

Would like the word “fresh” to be included in the creative concept.

...

There are two permanent messages that have been developed by Neil which are:

- we only sell our bread on the day it’s baked
- now baking fresh out of the oven throughout the day

71 These were said to be admissions as to the message to be conveyed.

72 The fifth document, entitled “Driving Profitable Bakery Growth for Coles” and dated February 2012 was a set of power points which included at p 1232 a description of par-baking technology for the Cuisine Royale range. It stated that breads are baked to 90% in the factory and there was just 18 minutes in an in-store “bake off”. To the extent that this contradicts or qualifies the agreement of the parties as to time of baking, it should be rejected. It adds nothing of value to the evidence; and the technical knowledge of the person who prepared it is not known. I would have rejected the tender.

73 The sixth document was an email string of June 2012. One email dated 23 June 2012, sent by Ms Kate Roff (the head of Coles brand marketing) to Mr Simon McDowell (the then chief marketing officer), stated that based on “customer claims hierarchy”, “Baked Today, Sold Today is still the most important claim to deliver to customers as it is the strongest link to Freshness”. From the emails that surround this email, it is evident that there was some disagreement in Coles about “Baked Today, Sold Today”. Mr Paul Sonnenveld (the then Business Category Manager – Bakery) said in an email to Ms McLennan about Ms Roff’s email:

This seems to be the easy answer not necessarily the bold one. I am not sure Greg and I are aligned around BTST being the biggest message. Everyone claims this, no differentiation and risky when it comes to PB products”.

74 This was said to be an admission of risk of using “Baked Today, Sold Today” with par-baked products.

75 The seventh document was entitled ‘PSE Brief to MarComms’ dated June or July 2012. It is unclear what the document is. It appears to have been authored by Ms Amy Ryan (the ‘‘Category Marketing and Events Planning Manager’’). The document concerns bakery ‘‘insights’’. On page 2593, under the page heading ‘‘Key Quality & Value Proof Points’’ and evidently discussing bread, there was written:

Things we cannot say:

- Fresh
- Available all day
- Baked today sold today

This was said to be an admission of risk of using these phrases.

76 The eighth document is an email string of August 2012. In an email dated 14 August 2012 to a number of people: Mr Goran Majstorovic (Senior Manager – Advertising, Media & Design), Ms Suzy Lewis (Senior Manager – Campaigns and Store Marketing), Mr Nick Chapman (position unidentified), Mr Tony Phillips, and Ms Amy Ryan, Ms Roff said:

We have removed any reference to ‘‘fresh’’ in relation to our par-bake products.

77 Ms Ryan responded:

Just to reiterate...quite simply, things we cannot say in our campaign whether it be out of store or in store:

Fresh
Available all day
Baked Today Sold Today

The only instance where we will be saying BTST is on the packaging and potentially on shelf POS for lines where we scratch bake (this will be highlighted on the detailed POS tool/brief)

78 Both these emails were said to contain direct admissions of risk.

79 The ninth document is an email of Ms Lewis dated 20 August 2012 on the subject ‘‘Bakery: meeting notes and next steps’’. The email plainly refers to par-baked bread (5% baked at Coles, 90-95% baked off site). There is a list of things under headings ‘‘Can’’ and ‘‘Can’t’’ as follows:

Can

- Award Winning
- 100% Australian Flour (Coles Brand only)

- Taste's Great
- Reduced Salt – will people then wonder what salt is still in?
- Show Bakers holding bread and removing bread from the oven

Can't

- No Preservatives
- No Additives
- Baked Today
- Fresh
- Show Bakers kneading bread

80 This was said to be an admission about the risk of using the phrase “Baked Today, Sold Today” and “Fresh”.

81 I do not consider that any of these documents were admissible as admissions against Coles. No foundation was laid for the conclusion that any such person had authority to bind Coles. Further, as so-called admissions, the evidence is of no real weight. The foundations for the views expressed are not articulated.

82 Evidence of someone being misled is admissible. None of this evidence is of that precise character. Some of the statements can be seen to embody opinions (partly expressed and partly implied) of the persons concerned that the use of the phrases in question would be misleading or deceptive. To be admissible as opinions, the statements would need to be justified as lay opinion or expert opinion under s 78 or s 79 of the *Evidence Act*, or under some cognate common law principle: *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1987) 14 NSWLR 104 at 105. No attempt was made to argue that; and so I will not consider the material on these bases.

83 It may be that if any of the documents could be understood to be statements as to someone's state of mind upon seeing or hearing a relevant phrase, rather than as an opinion as to their misleading character, the statements could be admissible for a non-hearsay purpose. Such evidence of the state of mind of that person might be functionally equivalent to evidence (that would be admissible) of someone being misled. Whilst not put precisely thus, this perhaps can be seen as the substance of the submission that these documents contained admissions. Further, some of the evidence may be seen as evidence that Coles sought to create a certain meaning.

84 Coles submitted on the authority of *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 that evidence of the meaning a defendant intended to convey by words (in

contradistinction to an intention to deceive) was inadmissible. In *Interlego*, Gummow J (with whose reasons Black CJ and Lockhart J agreed) said at 394:

However, there is a difference between inferring deception from an intention to deceive and inferring a contravention from an intention to use words to convey a certain message. Here, there was no evidence that the respondent intended to deceive consumers, and indeed the appellants made no such submission. In the circumstances, the evidence of Mr Grey as to the meaning which the words “works with” were intended to convey can be no substitute for, and can be of little assistance in determining, the objective question of what meaning Australian consumers would understand the words to convey.

85 The above statement must be understood by reference to the facts in that case. The statement was not in an advertising campaign. The words “works with” were used to state that the respondent’s toys “worked with” the applicant’s toys. There can be no doubt that the intention of the respondent cannot substitute for the Court’s objective evaluation. It may, however, depending on the circumstances, be of assistance. In the circumstances before the Court in *Interlego*, it was of no assistance. Here, we have documents concerned with an apparently carefully constructed and thought out marketing campaign. The documents were created by, and contained the contemporaneous views of, Coles employees, whom one can infer had a degree of responsibility and skill in connection with dealing with the consuming public. As French CJ, Crennan, Bell and Keane JJ said in *TPG* at [55]:

It has long been recognised that, where a representation is made in terms apt to create a particular mental impression in the representee, and is intended to do so, it may properly be inferred that it has had that effect. Such an inference may be drawn more readily where the business of the representor is to make such representations and where the representor's business benefits from creating such an impression.

(footnotes omitted)

86 The utility of that evidence may not be great, but it may be probative to at least support a prima facie impression that strikes the Court.

87 Looking at the documents in question in accordance with the above approach:

(a) Pages 0495 and 0527 of the first document are admissible as evidence of the message intended to be conveyed. They are not otherwise probative of any state of mind of the author as to the effect of the words.

(b) Page 0526 would otherwise have been rejected. It contains neither evidence of the message intended or evidence of state of mind from any impugned use.

(c) The second document would otherwise have been rejected. To the extent that some state of mind can be inferred, it is one that is equivocal and of no assistance.

(d) The third and fourth documents are admissible as evidence of the message intended to be communicated.

(e) The sixth document is admissible as evidence of the message of freshness intended to be conveyed by “Baked Today Sold Today”. Further, the email of Mr Sonnenveld can be understood as a statement of his state of mind that “Baked Today Sold Today” means to him or is open to meaning to his mind that the whole baking process takes place on the day. It is evidence of that state of mind.

(f) The seventh document would otherwise have been rejected. This is, in substance, opinion evidence, the foundation for which is unclear. There is no clear link to any impugned phrase.

(g) The eighth document would otherwise have been rejected. Whatever its proper characterisation, it is plainly a document that is reactive to the actions by then undertaken by the ACCC.

88 Whilst some of the documents are admissible, their weight and effect on my analysis and evaluation expressed below has been marginal, at best.

Matters relied upon by Coles

89 The submissions of Coles were partly based on the meaning of the words and phrases used and partly on context.

90 As to the meaning, the primary submission was that baking took place in-store, that it was baking that occurred on that day, that product could be described as freshly baked because it had been recently baked, and that nowhere was it said that the whole baking process occurred on the day and in-store.

91 As to context, it was submitted that the consumer was being given a clear choice between commercially manufactured bread with preservatives and which lasts for days, and bread baked in-store that does not have preservatives that must be eaten on the day or soon after purchase. The bread that is baked in-store is crunchier, and has the smell and flavour of freshly baked bread.

92 Also as to context, it was submitted that the par-baked bread is often sold, adjacent
not only to the commercially manufactured bread, but also to a bake at home product. That
bake at home product clearly has been partially baked, and so the meaning of the word
“bake” here can be seen to encompass the notions of finishing the baking process at home.

93 The word “fresh” or “freshly” is to be taken, it was submitted, as “recent” or
“recently”, and is not to be taken as saying anything about baking from scratch or the place of
undertaking the baking process. The word “fresh” can be seen to connote perishableness
such as “fresh fruit” in a store.

94 From the usage of the word “bake” by other persons, it was submitted that the word is
not to be taken as conveying anything other than the application of heat in an oven for some
period of time in which some part of the baking process takes place.

95 It was submitted that there is no representation that the baking process is done entirely
by Coles in-store.

96 Coles submitted that it can be inferred that it is a matter of complete indifference to a
consumer whether it is baked from scratch, from frozen dough, or whether it is par-baked.
The important thing, and the substance of the representation, is that there is available bread
that has recently been baked in an oven, which is in contradiction to commercially
manufactured bread.

97 Coles submitted that the posited reasonable or ordinary consumer would have
knowledge of the usage of third parties disclosed in the evidence. In this respect, reliance
was placed in particular upon the specialist bakers, such as Baker’s Delight, expressly saying
that they made from scratch.

The third party usage evidence and its admissibility

98 Coles relied on the affidavits of three solicitors, Mr Russell, Ms Brysha-Pullen, and
Mr Musa, which described various usages of relevant words at different times and places by
different commercial entities. Detailed objections were notified by the ACCC; the parties
addressed me in writing and orally on these matters.

99 It will be necessary to deal with the detail of the objections, but it is convenient at the
outset to understand what Coles seeks broadly to obtain by this evidence. The evidence is
said to explain the context in which Coles’ conduct is to be assessed, including the

knowledge and experience which ought be imputed to the posited “ordinary or reasonable consumer”. Coles accepted that the evidence had to be probative of the fact that there is a usage of the word “bake” in the community that encompasses in meaning the notion of partly baked.

The affidavit of Ms Brysha-Pullen

100 Ms Brysha-Pullen visited a number of Woolworths, IGA and Aldi supermarkets as well as Bakers Delight, Brumby’s and Subway stores, in June and July 2013. On these occasions, she made certain observations.

101 I will deal with a number of the paragraphs in question in detail, sufficient to expose my reasons for how I propose to deal with all of the contested evidence.

102 In paras 3 to 5, Ms Brysha-Pullen describes a visit to the Woolworths supermarket at Southern Cross Station in Melbourne on 17 June 2013. There was an in-store bakery, near which bread was offered for sale, in both unpackaged and packaged form. There was a large sign “Baked Today, Sold Today” and packaged products had the words “Baked Fresh in Store”.

103 Nothing in the paragraph or the exhibited photographs reveals how the bread being sold was made. Unless one makes an assumption, from other evidence, that the reasonable or ordinary consumer would understand that the bread being sold could have been made from any one or more of the three usual processes, the evidence takes the matter no further.

104 Given, however, that there was no cross-examination of Ms Brysha-Pullen, the most practical way of dealing with the evidence is to admit each part (unless bad in form) and to assess the worth of the evidence globally. This approach permits Coles to rely on as much evidence as to so-called context in its submissions without having the evidence broken up outside its complete pattern, if there be a pattern. Paragraphs 3 to 5 are therefore allowed.

105 In paras 6 to 8, Ms Brysha-Pullen describes a visit to the Woolworths supermarket at Carlton in Victoria on 18 June 2013. Unpackaged bread was displayed in a cabinet adjacent to signs “Baked Fresh Daily” and “Prepared In-Store by our Bakers”. The same comment as made in [103-104] above can be made. The evidence will be allowed on the same basis.

106 In paras 9 to 12, Ms Brysha-Pullen describes a visit to Woolworths supermarket at South Melbourne on 18 June 2013. There was an in-store bakery section in which bread and

other bakery products were offered for sale in unpackaged and packaged form. There was a large sign saying “Bakery”. A preparation area including work benches, trays and a large oven, was visible. Various expressions of signage were used including: “Baked Fresh Daily”, “Prepared in-Store by our Bakers” and “Baked Fresh In-Store”. The same comments as made in [103-104] above can be made. The evidence will be allowed on the same basis.

107 In paras 13 to 24, Ms Brysha-Pullen describes a visit to the Woolworths supermarket at Abbotsford in Victoria on 25 July 2013. There was an in-store bakery section in which “Bake at Home” products were offered for sale. These products were packaged and displayed on shelves and included various types of loaves of bread and rolls. These packages had on them “Bake at Home in 18 mins”, “Fresh Hot Bread straight out of the oven, just like you would get from a bakery”, and “Baked in the Oven in just 18 minutes”. Others had similar packaging statements with different time periods. Another said, “Hot Bread in 5 minutes”. On one particular type of bread there was on the packaging “Traditional Italian Par-Baked Bread Rolls”, “Bake at home in 6 minutes” and “This product has been par-baked then snap frozen to retain its fresh-baked flavours”. Other pizza bases were also described as “par-baked”.

108 The ACCC objected to these paragraphs as relating to “bake at home” products of Coles. I would allow these paragraphs on the basis that they give some foundation for the argument that “bake at home” products may say something about the word “bake”. They are also relevant, however, to reveal that the express identification of product as “par-baked” can be done. The ultimate importance of this evidence will be dealt with in due course. The evidence will be allowed on the same basis as I have allowed earlier paragraphs.

109 In paras 25 to 29, Ms Brysha-Pullen describes a visit to the Woolworths supermarket at the QV Shopping Centre in Melbourne on 25 July 2013. There was a cabinet in which bread and other bakery products were offered for sale. Most of the products in the cabinet were unpackaged. The cabinet was adjacent to shelves on which bake at home products were offered for sale including some of the bake at home products which referred to the product being par-baked. Around the corner from the cabinet and shelves was a refrigerated section in which chilled bake at home products were offered. Around the corner from the refrigerated section, there was an aisle where commercially packaged bread was sold underneath several signs stating “Fresh Bread”. The sign entitled “Fresh Bread” was an aisle sign which identified smallgoods, chilled cheese, Naytura foods, and chilled juices and

drinks; there was also a sign above the commercially packaged bread identifying “Fresh Bread”.

110 Once again, none of these usages on their own are sufficient to lead to a conclusion that consumers would understand that any baked bread might be par-baked. The context of the bake at home product is clear. No consumer could be under any impression other than that the product had been partly baked, whether or not that was described in terms on the packaging, which, in some cases, it was. Further, no consumer would be misled into thinking “Fresh Bread” on a sign above aisles where commercially packaged bread was sold meant that the bread had been baked by people in the store. The product is self-evidently commercially manufactured bread. Nevertheless, I will deal with the admissibility in the same manner as I have dealt with earlier paragraphs, and they will be allowed.

111 Paras 30 to 32 were not read.

112 In paras 33 to 35, Ms Brysha-Pullen describes a visit to the IGA supermarket in North Melbourne on 18 June 2013. There was a cabinet in which bread and other bakery products were offered for sale, and above the cabinet there was a sign stating “now baking”. The cabinet was adjacent to and opposite shelves on which commercially packed packaged bread and other bakery products were offered for sale. Broadly, the same comments can be made as appear in [103-104] above. Further, if any more can be taken from the layout of the store such that it could be seen that there was no baking facilities, then the proposition that there was now baking going on may well be misleading. The evidence takes the matter nowhere. Nevertheless, in accordance with the approach that I have adopted, I will allow the material to be the subject of consideration as a whole.

113 In paras 36 to 38, Ms Brysha-Pullen describes a visit to the IGA supermarket in Spencer Street, Melbourne. There, there was a cabinet in which bread and other bakery products were offered for sale. There were several small signs inside the cabinet, one of which was for a cheddar cheese bacon roll with a sign underneath “freshly baked”. The same comments apply as in [103-104] above. The cheese and bacon roll may have been freshly baked, in that it may have been recently baked. It is also possible that the sign is misleading. Notwithstanding these difficulties, for the reasons above, I will admit the material.

114 In paras 39 to 45, Ms Brysha-Pullen describes a visit to the IGA supermarket in North Fitzroy, Melbourne. Adjacent to the entrance to the store on an external wall, there was a

large sign stating “fresh bakery”. Inside the store, there was a section with a large sign stating “Bakery”, adjacent to which bread and other baking products were offered for sale. Alongside this part of the store, there was an area which appeared to be for the preparation of bread and other bakery products. The area, which was not accessible to the public, contained work benches, tables, trays and what appeared to be an oven. In the bakery section, there was a large display area which was comprised of several portable shelving trolleys. Above the display there was a sign stating “oven fresh daily”. The products on the trolleys in the display area were not commercially packaged bread or bakery products, and were packaged in plain plastic bags with white labels. At one end of the display area, there was a refrigerated section which chilled “bake at home” products were offered for sale, wrapped in packaging which stated, amongst other things, “take and bake” and “bake for 5 minutes”. At the opposite end of the store, there was a refrigerated section in which chilled bake at home products were offered for sale. The same comments can be made as in [103-104] above. It is not clear from the evidence or photographs whether it would be possible to infer at this store that no baking from scratch could take place. The bake at home products in their context make it clear that some preparation has already taken place. Nevertheless, I admit the material.

115 Paragraph 46 was not pressed.

116 In paras 47 to 50, Ms Brysha-Pullen describes a visit to the Aldi supermarket, in Franklin Street, Melbourne on 18 June 2013. At the entrance to the store, there was a sign stating “now baking”. Inside the store, there was a cabinet in which bread and other bakery products were offered for sale. The products in the cabinet were unpackaged. The cabinet was adjacent to shelves on which commercially packaged bread and other bakery products were offered for sale. Above the cabinet was a sign stating “Come see what we’ve baked” and “freshly baked”. On both sides of the cabinet there was some signage stating “freshly baked in store today” and bags containing bread were marked “freshly baked”. The same comments can be made about this evidence as in [103-104] above. I allow the material on the same basis.

117 Paragraph 51 was not pressed.

118 At paras 52 to 55, Ms Brysha-Pullen describes a visit to the Bakers Delight Carlton store in Melbourne on 18 June 2013. There were signs adjacent to the entrance “fresh baked 7 days”, “delightful bread”, and “our fresh favourite”. Inside the store, bread and other

bakery products were displayed in cabinets and on shelves or tables. Most products were unpackaged. There were signs on the trays in the cabinets stating “fresh for you today”. She purchased two buns which were placed in a brown paper bag which was printed with the words “baked today”. Once again, the evidence is equivocal and the same comment can be made as made in [103-104] above. Nevertheless, I allow the evidence on the same basis.

119 At paras 56 to 58, Ms Brysha-Pullen describes a visit to the Bakers Delight store in South Melbourne. Similar comments can be made as in relation to the Carlton store. The evidence will be allowed on the same basis.

120 At paras 59 and 60, Ms Brysha-Pullen describes what she saw when she accessed Bakers Delight webpages and YouTube website. These were annexed to the affidavit. The website stated a number of things. There were laudatory statements about the quality of the bread. A person looking at the website was invited to find out all he or she needed to know as to the fresh baking of the bread from scratch every day. It can be taken that if one went to the Bakers Delight website, one would find a clear statement that they bake from scratch. I will allow the evidence on the basis that it reveals that some retailers identify their practice of baking from scratch.

121 The YouTube videos were exhibit Q. These contain descriptions by a Bakers Delight baker of the detail of making from scratch with baking going on in the background. He uses the expression “We bake ours today, sold today”. I was only able to access the first of these videos. The three referred to in para 60(b), (c) and (d) were not accessible.

122 In paras 61 to 63, Ms Brysha-Pullen describes a visit to the Brumby’s store located at the QV Shopping Centre in Melbourne. At that store, bread and other bakery products were displayed in cabinets or on shelves. Most of the products were unpackaged. Most of the packaged products were in plastic containers or in bags with stickers saying “baked today”. Once again, the same comments can be made as in [103-104] above. The evidence will be allowed on the same basis.

123 At paras 64 to 66, Ms Brysha-Pullen describes a visit to the Brumby’s Melbourne Central store. There, bread and other bakery products were displayed in cabinets, or on shelves, or in baskets, with signs stating “baked today”. Most of the products were unpackaged. Once again, the same comments can be made as in [103-104] above. The evidence will be allowed on the same basis.

124 In para 67, Ms Brysha-Pullen refers to screen shots of a series of Brumby's webpages on the Internet, copies of which were annexed to her affidavit. Once again, these webpages contain laudatory statements about the bread made by Brumby's. The webpages makes it clear that their bread is baked from scratch. Once again, nothing definitive can be taken from these sites. Should a reasonable or ordinary consumer be minded to go to these, it would be made clear that this particular seller bakes from scratch. It says nothing about the particular context in which bread is sold, either at Coles, or Woolworths, or IGA, or anywhere else. Nevertheless, I will allow the evidence on the same basis.

125 In paras 68 to 70, Ms Brysha-Pullen describes a visit to the Subway restaurant, King Street, Melbourne on 18 June 2013. There was a cabinet in which biscuits and other bakery products were offered for sale. There were several signs, one of which stated "freshly baked BAKED BARS". Even assuming that one could tell from the surrounds in the restaurant that there was no bakery or baking equipment on site, that does not tell one anything about the correctness of the statement made in the sign. It may be that "freshly" in this context means "recently". It may have been recently baked somewhere and brought to the Subway restaurant. The same comments can be made as in [103-104] above. Notwithstanding this, I allow the evidence.

126 In paras 71 to 73, Ms Brysha-Pullen describes a visit to the Subway restaurant, Collins Street, Melbourne on 20 June 2013. In the window of the restaurant, there was a large sign saying "we bake our own bread". Once again, nothing can be taken from this. It may be that Subway does bake its own bread. It may be that it is clear that it is not done on these premises. If that is the case, the phrase must be looked at in its context and may be taken that they are saying that the bread is baked by Subway. It may be. The same comments can be made in [103-104]. I will nevertheless allow the evidence.

127 In paras 74 to 75, Ms Brysha-Pullen annexes screen shots of a series of Subway webpages. No particular relevance can be gleaned from this material, notwithstanding my benign attitude to the admission of the above evidence. This material is of no assistance at all and should be rejected.

128 Paragraphs 76 to 81 were not pressed.

129 In para 82, Ms Brysha-Pullen annexes part of an ACCC Grocery Inquiry Report of 2008. The purpose of this was to reveal that from the ACCC's own words, there was a

recognition of language which made the impugned representations innocent. At p 310 of the report, there was a statement to the following effect:

A number of MSC [Major Supermarket Chains] have in-store bakeries. In-house supermarket bakeries commonly source partially prepared frozen or ambient product from the large bread wholesalers. This enables the supermarkets to offer freshly baked bread without having to produce bread from scratch in the manner of the specialist bakery.

Specialty bakeries stores include independent hot bread shops as well as the Bakers Delight and Brumby's owned franchised outlets. Strong growth of these franchises in recent years has depleted the quantity of sales of independent bakeries. Bakers Delight now has over 600 stores and Brumby's over 300 stores in Australia.

130 I would reject para 82 and the Report. It is completely irrelevant to the Court making up its mind in relation to the objective character of the representations in their context. The author or authors were not apparently directing him or herself or themselves to the question of misleading or deceptive conduct. Even if they were, it is not shown that they had the material that I have before me. The matter is entirely irrelevant and para 82 should be rejected and the annexure referred to therein. The balance of the affidavit was not objected to.

The affidavit of Mr Hael Musa affirmed 18 October 2013

131 In his affidavit, Mr Musa gives evidence of visits in September 2013 to Woolworths supermarkets at Toorak and Fitzroy, as well as IGA supermarkets in North Melbourne and Spencer Street, Melbourne, as well as a 7-Eleven store in King Street, Melbourne. I will allow the evidence. It is of a very similar character to that contained in Ms Brysha-Pullen's affidavit. In respect of much of it, the same comments can be made that were made in [103-104] above. As to the bake at home products of which he gives evidence, the same comments can be made as I made in relation to Ms Brysha-Pullen's affidavit where that matter arises.

The second affidavit of Mr Musa affirmed 6 December 2013

132 In this affidavit, Mr Musa gives evidence of what he saw and what occurred at various visits to Subway restaurants and Bakers Delight premises. At each of these, there was evidence to what he saw by way of signage, which takes the matter no further than the affidavit of Ms Brysha-Pullen or his first affidavit, and the same comments can be made as in [103-104] above. This evidence will be allowed. However, in respect of each of the visits to the respective stores, he gives evidence of conversations he had with the Subway or Bakers

Delight employees. I will give an example. In para 7 of the affidavit, he engages in a discussion with the Subway employee as to how the bread is made. Various things are said about the processes of making the bread. Similar conversations occurred at a number of premises. Plainly to the extent that the material was put forward to prove the truth of the material, it was inadmissible hearsay. Coles submitted that it was propounded for a non-hearsay purpose about the fact that it was said. There is no relevance or probative value in knowing the fact that this was said, irrespective of its truth. It is hardly relevant to know to a consumer shopping in Coles what people in these other stores will say about how their bread is produced. Thus, I reject the following paragraphs from Mr Musa's affidavit of 6 December 2013: paras 7, 10, 15, 19 and 23. I allow the balance of the material in paras 1 to 22 on the same basis that I dealt with Ms Brysha-Pullen's affidavit and Mr Musa's first affidavit.

133 In paras 24 to 29, Mr Musa gives evidence of media references from various newspapers: the Advertiser, the Courier-Mail, and the Sunday Telegraph. These are articles describing the importation of partly baked bread from the United States by Woolworths. The articles also state that "freshly baked bread sold across Sydney isn't as 'fresh' as customers might expect, with big retailers admitting bread is actually frozen and reheated." I do not see how this material assists either the case of Coles or the proper resolution of the case objectively. Nevertheless, to the extent that it describes the usage of language on 6 December 2013, I will allow it.

134 Paragraph 28 was not pressed.

135 Paragraph 29 had YouTube videos concerning Bakers Delight. This was exhibit HM 15 (incorrectly described as an annexure). These short promotional videos depict employees making bread and talking about it being fresh every day and being baked from scratch.

Affidavit of Mr James Russell affirmed 18 October 2013

136 Mr Russell gives evidence of attendance at a Woolworths supermarket in Young Street, Drouin, Victoria, where there was an in-store bakery section with ovens, trolleys, and a preparation area. Overhanging the in-store bakery section and above the bread and other bakery products was a large sign which stated "freshly baked". The bread was unpackaged and displayed loose in cabinets. The same comments can be made in relation to this evidence as I made in [103-104] above. I will allow the evidence on the same basis.

The affidavit of Jacqueline Healing

137 Objection was taken to para 58 of Ms Healing’s affidavit. I rejected this paragraph during the hearing. It extols the virtues of Coles par-baked bread and other bakery products as to quality. These are not issues in the case. The case is about asserted false representations about how the bread has been prepared.

138 Paras 59 to 63 describe bake at home products in Coles supermarkets. I will deal with these paragraphs in the same way that I have dealt with the direct evidence of their promotion in the store of bake at home products. I do not think that it takes the matter very far, in that it is plain to the consumer that these products are sold in a way which means that the word “bake” in this context does mean “finish the baking”. That said, I am prepared to allow the paragraphs on the same basis that I allowed the other paragraphs concerning the direct selling of bake at home products.

139 In my notes on the copy affidavit which I had before me at the trial, I have a marking that I rejected these paragraphs. That is not reflected in the transcript. To the extent that I did so reject these paragraphs, it plainly did not affect any cross-examination, and I would allow them for what they are worth. It may well be, however, that my notes were inaccurate as perhaps being made before any ruling. In any event, paras 59 to 63 are allowed on the same basis that I have allowed the balance of the direct evidence concerning the sale of bake at home products.

Resolution of the dispute

140 The words “bake” and “baking” are directed to the process of production of bread. In some contexts, to say one is baking would say something about the process of preparation of the mixture together with water and yeast. If one were to say in a household context “I will do some baking today”, the process envisaged and contemplated by those words would include the preparation of the dough. However, in another context, perhaps one in which a commercial baker was operating, if it were said that “baking took place today”, it may well be that the meaning which is conveyed is the heating or cooking process, given that it may not be reasonable to anticipate that the baker would necessarily prepare the dough on the site. These matters will be governed by questions of context.

141 *The Shorter Oxford English Dictionary on Historical Principles 3rd Edition* identifies the meaning of “bake” as:

1. To cook by dry heat acting by conduction and not by radiation, as in an oven etc or on a heated surface; primarily used of preparing bread...2. To harden by heat.

142 That primary meaning, directed as it is to the process of heating, does not deny, however, should the context require it, a broader meaning of the word “baking” or “baked” to include the whole process of the production of the bread from the mixture of material to create the dough, and the baking.

143 Here, the question is a matter of evaluation as to the impression and meaning of words conveyed in a consumer sale context. Minds may differ about meaning in this context. The usage of words was deliberately designed to evoke broad and appealing ideas and connotations. No narrow and precise meaning is likely to be given by a reasonable or ordinary person to laudatory image-evoking phrases. In my view, a reasonably significant number of people who can be described as “ordinary” or “reasonable” members of the public would take the following from the packaging material and signage in the selling environment in the evidence.

144 Before turning to the individual phrases, I should say something more of the third party evidence as a whole. I do not consider that as a whole (or individually) it amounts to evidence that word “bake” means, or has come to mean, “some baking” or “par-baking”. The evidence takes one no further than the use of an ordinary English word in its particular context. I am, however, for the purposes of the resolution of the case, prepared to accept that, depending on the context, a reasonable person may understand “bake” to mean part of a whole baking process. For instance, when one is told to bake obviously par-baked product at home, that is the evident meaning.

145 I will not restate the whole context in which the following impugned phrases are used. The conclusions and reasoning are short. Little complex intellectualisation is required. I accept that, as matters of evaluation, minds can differ about the kinds of conclusions that I express below.

“Baked today, sold today”.

146 This phrase has no precise meaning. It is plainly intended to convey, and does convey, the contemporaneity or recency of baking – on the day of sale. To someone who has seen all the usages described in the evidence of Ms Brysha-Pullen, Mr Musa and Mr Russell and who has noticed and thought about the bake at home products, the word “baked” may,

perhaps, only convey that some heating or baking has taken place on the day. But wide experience of other usages and an analytical approach to what is displayed, or is for sale at the counter at the shop cannot necessarily be assumed. Nor would that experience or analytical approach demand that conclusion. To many reasonable and ordinary people, the phrase “baked today, sold today” in the context that Coles uses it in the evidence would convey that **the** baking process, not **some** heating or baking process, has taken place today. It conveys that the heating process of cooking the dough was undertaken today. On one clearly available meaning, it is not a statement that **some** baking took place today and initial baking of a substantial kind took place some weeks ago prior to freezing of a par-baked product. It does not matter that there is no particular difference in quality in fact between breads baked by different processes. What is being sought to be highlighted, on one clearly available meaning, in order to obtain a sale from the consumer, is the recency, indeed contemporaneity, of the baking process so as to bring connotations of freshness. In my view, it was misleading or deceptive, likely to mislead or deceive, and liable to mislead the public to say to customers on the package or signage as was done, that par-baked frozen product was “baked today” if it was partly (indeed, substantially) baked previously.

147 The words, “baked today, sold today” do not connote, however, that anything other than the heating or cooking process occurred today. The primary meaning of “baked” is heating in the baking oven. I do not think there is any false or misleading quality about wholly baking today, but not from scratch. The representation about what occurs today is as to the primary process of heating.

“Freshly baked”, “baked fresh”, “freshly baked in-store”.

148 My views in relation to these words on the packaging in relation to par-baked bread are identical to my views in relation to “baked today, sold today”. The process of baking that is connoted by the phrases is the whole process of baking, and, for the same reason, the use of those words on the packaging is, in my view, misleading or deceptive, or likely to mislead or deceive. The addition of the words “freshly” and “fresh” only reinforce this conclusion.

149 The use of the words “fresh” or “freshly” adds a further dimension. What is said to be “fresh” or “freshly done” is the baking. The words “fresh” or “freshly” are not, it seems to me, used only in a temporal sense, though they certainly connote recency. One meaning of the word is “new” or “novel” or “recent” or “recently made”: see *Shorter Oxford Dictionary on Historical Principles 3rd edition*, vol 1, p 805. However, the use of the word brings

forward another meaning, albeit imprecise. On one available meaning, the words convey a meaning or connotation of something else: that the baking process is fresh and that there is the baking of fresh dough. It can be accepted that the adjective or adverb relates directly to bake or baking. As I said, the word “bake” or “baking” can, in a proper context, be wide enough to include the preparation of the material to dough form. What is being sought to be conveyed here is the freshness of the product and the freshness of the whole process of baking. In my view, to use the words “freshly baked”, and especially “baked fresh”, in the context of the in-store bakeries displayed in the evidence, connotes that there has been baking of fresh dough. In these circumstances, I consider the use of those words on the packaging and signage when the baking process has been of par-baked frozen product to be misleading or deceptive, likely to mislead or deceive, and liable to mislead the public. What is sought to be conveyed is a fresh baking process, not a baking process of par-baked frozen product.

Coles bakery

150 It was said that the phrase “Coles bakery” gives rise to the representation that the in-store bakery is the location at which the whole of the baking process has occurred. This is said to be the case when used in conjunction with “baked today, sold today”.

151 I do not think that these words add anything to the misleading or deceptive conduct which I consider exists. They form part of the context in which these goods are sold. The most important part of that context being the fact that there is adjacent to the sale area, an area which is used for baking and preparation of the bread to the evident sight of those persons who are buying bread. I do not think any particular misleading aspect of the conduct arises (other than contextually) from the phrase “Coles bakery”.

The baker cards and Coles’ website

152 All these conclusions must be evaluated and considered in the light of the evidence of Mr Steven Carroll that was filed on behalf of Coles shortly before the trial. Mr Carroll was the “Communications Manager” of Coles. His role as In-Store Communications Manager was to be responsible for the distribution of marketing and other communications to Coles supermarket stores. In October 2013, he caused to be distributed to all Coles supermarket stores a communication entitled “Point of Sale Bulletin”. That document was accompanied by an allotment of what were called “Baked in store point of sale material”. The purpose of this material, according to the document, was “to better explain our different bakery options to customers and address any compliance concerns”. The point of sale material were called

“barker cards”. They were to be inserted into a barker card plastic sleeve and positioned where the products are displayed. The cards had writing in white against a red background. I will come to what the writing stated shortly.

153 Mr Carroll deposed that the point of sale bulletin contained instructions regarding the placement of the barker cards within the Coles bakery section. The cards were 74 mm by 210 mm and were to be attached to the shelf stripping immediately below the products for sale.

154 The first barker card stated the following:

To ensure our quality breads and other baked products are of a consistent high standard, our “baked in-store” products are baked in this store in one of two ways:

- Our bakers make bread from scratch.
- Our artisan style breads and bakery products are initially baked and snapped frozen by our specialty bakery partners and then baked here at Coles.

155 A second barker card stated the following:

To ensure our quality breads and other baked products are of a consistent high standard, our “baked in-store” products are baked in this store in one of two ways:

- Our bakers bake bread and bakery products using frozen dough provided from our specialty bakery partners.
- Our artisan style breads and bakery products are initially baked and snapped frozen by our specialty bakery partners and then baked here at Coles.

156 A third barker card stated the following:

To ensure our quality breads and quality baked products are of a consistent high standard, our “baked in-store” products in this store are initially baked and snap frozen by our specialty bakery partners, and then baked here at Coles.

157 Looking at the evidence as to the positioning of these cards and the size of the print, it is highly doubtful whether many people, if any, would read them. Secondly, even if they did, the first two do not differentiate in identifying product between scratch and frozen, and frozen and par-baked. Given the nature of the signage and packaging otherwise, in my view, these barker cards, in their particular positioning with size and print in the evidence, are inadequate as a disclaimer to remove the misleading or deceptive impression from the conduct and representations which I have discussed. As I said earlier, the process of buying bread is not such as to be likely to entail or call for astute attention to disclaimers or barker cards such as these about the wares on sale at the counter, when those wares on sale are being prominently promoted and lauded as “baked today” or “baked fresh” or “freshly baked”.

Further, it is not clear how many stores complied with Mr Carroll's direction, although there was some evidence that five stores had complied. My conclusions as to the inadequacy of the barker cards to remedy the misleading or deceptive character of the conduct and representations does not depend on what is otherwise the inadequate evidence of compliance with Mr Carroll's instructions.

158 Nor is what is contained on the Coles website adequate or appropriate to deal with the misleading conduct or representations in-store at the point of sale of a staple product such as bread.

Conclusion

159 The conclusions that I have reached are such that I am satisfied that there has been a contravention of s 18(1) and s 33 of the ACL. As to s 29(1)(a) of the ACL, there has also been, in my view, a false or misleading representation that goods have a particular history. There has been, in my view, a misleading representation available to be understood that these goods have been baked on the day of sale, or baked in a fresh process, using fresh, not frozen, product. Thus, in my view, there has been a contravention of s 29(1)(a) also.

160 The above analysis is a factual one, evaluative in character, by reference to the available meaning and connotation of general marketing expressions. There was some debate and discussion during the case about what was called the "degradation of language" and about a mistrust or healthy cynicism of advertising by the public. One needs, of course, not to be unrealistic about the world, advertising or consumer behaviour. Advertising should not be parsed and analysed in the fashion of a 19th Century equity draftsman. Nevertheless, the courts should be astute and careful not to permit consumers to be misled on available meanings or connotations of phrases deliberately chosen to sell products on the basis that everyone takes advertising with a pinch of salt. To place emphasis on advertising licence that bends the truth will not only degrade the language, but lead to a culture of deception in the market. These matters do not elevate this case to a question of principle, but they should be borne in mind when broad laudatory language, intended to affect the buying decisions of members of the public, is such as to lead consumers into error and so to mislead or deceive, and the justification for such involves an intellectual shrug and a knowing nod to the effect that the public is cynical enough to look after itself. These comments are not made by way of criticism of counsel who made the submissions. I received significant assistance from all counsel and solicitors, for which I am grateful.

161 It is not the place of the Court to provide an advice on evidence as to how Coles (or any other retailer) might sell bread that has been par-baked from frozen product, praising its virtues, but not misleading the public. A start would, however, be to make it tolerably clear to the public that the recent baking was the completion of a baking process that had taken place some time before, off site, and that “freshly baked” actually meant the completion of the baking process of frozen product prepared and frozen off site by suppliers.

Orders

162 The ACCC should provide draft orders to Coles within seven days. The matter can thereafter be listed before me in consultation with my Associate. If any debate is to take place on the orders, the parties should prepare short submissions (of no longer than five pages each) as to the proper form of orders. Such submissions and any competing draft orders should be provided to my Associate prior to any debate about the orders.

I certify that the preceding one hundred and sixty-two (162) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate:

Dated: 18 June 2014