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WOOLWORTHS GROUP LIMITED (ACN 000 014 675)  
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*Sia Lagos*

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No. VID 974 of 2024

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Australian Competition and Consumer Commission**

Applicant

**Woolworths Group Limited (ACN 000 014 675)**

Respondent

## **WOOLWORTHS' OUTLINE OF SUBMISSIONS**

## A Introduction

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- 1 The Prices Dropped program was a long-term shelf price reduction program introduced by Woolworths in around 2015 to address the prominence of fluctuating short term “high-low” promotions, following feedback that consumers were seeking a better balance between short term promotions and consistent daily value on shelf.<sup>1</sup>
- 2 Products on the Prices Dropped program were sold in-store and online using distinct red (or red-bordered) Prices Dropped Tickets.<sup>2</sup> Those tickets prominently displayed the current price of the product, together with a “was” price and a specific date (e.g., “19/12/2022”) showing the last date the product was offered for sale at the “was” price.<sup>3</sup>
- 3 The Applicant (ACCC) does not contend that any of the information recorded on the relevant Prices Dropped Tickets was inaccurate in any way. Rather, the ACCC alleges that the Prices Dropped Tickets *implicitly* conveyed a singular type of false, misleading or deceptive representation to consumers in respect of 266 products that were included on the Prices Dropped program in the period from 2 September 2021 to 4 May 2023. The misleading representation alleged is that the Prices Dropped Price “*was a genuine reduction to, or discount from, the product’s previous regular price*”.<sup>4</sup>
- 4 The ACCC’s Opening Submissions dated 25 March 2026 (AOS) reveal that this alleged representation involves a number of nested concepts, each of no fixed content. First, the ACCC explains that the phrase “*previous regular price*” is “*not used in this context as a term of art*”, but rather refers to “*the price at which a product is **ordinarily** offered for sale to consumers by Woolworths for a **reasonable period** of time*” (emphasis added).<sup>5</sup> Next, the term “ordinarily” is said by the ACCC to have a precise meaning, being “*to exclude short-term specials or other brief price fluctuations which ordinary reasonable consumers would understand from experience are inherently transient and*

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<sup>1</sup> Statement of Agreed Facts (SOAF) [25] (CB Tab 11, p 105).

<sup>2</sup> SOAF [16], [20] and [31] (CB Tab 11, p 103 and 105). Capitalised phrases in this document adopt terms defined in the pleadings and SOAF.

<sup>3</sup> The “was” date feature of the Prices Dropped tickets is notably omitted from the description of the tickets in paragraph 2 of the ACCC’s Opening Submissions dated 25 March 2026 (AOS), with the result that there is a material omission from the premise of the hypotheticals posed in that paragraph.

<sup>4</sup> Concise Statement [12] (CB Tab 2, p 10); AOS [159].

<sup>5</sup> AOS [160].

*time-limited.*”<sup>6</sup> In this way, the definition of “ordinarily” adopted by the ACCC itself incorporates an abstract notion: the definition excludes unspecified types of price fluctuations, the defining feature of which is that they are apparently understood by ordinary reasonable consumers to be transient and time-limited.

- 5 The concept of a “reasonable period” is said by the ACCC not to involve any “*fixed, bright, lines whereby a price charged for x days will always qualify, but y days will not*”.<sup>7</sup> Instead, the ACCC contends that what is reasonable is to be determined by reference to a further set of vague and abstract adjectival phrases. Thus, the ACCC says that a price will be charged for a “reasonable period” where it is “*charged for such a period as to make it the **meaningful** price from which to claim that there was a discount*” (emphasis added).<sup>8</sup> The concept of a “meaningful” price is not one found in the Concise Statement, but is repeated throughout the ACCC’s opening submissions. The ACCC seeks to run a case that the alleged representations were misleading because they represented to consumers that the Prices Dropped Price effected a discount having “*meaning and significance*”,<sup>9</sup> and because the Prices Dropped Tickets conveyed to consumers that the relevant products were cheaper “*in a way that was meaningful to them*”.<sup>10</sup> The ACCC does not offer any definition of the term “meaningful”.
- 6 A central flaw in the case the ACCC seeks to advance is that it depends upon a hypothesised ordinary and reasonable consumer that is unreal. The ordinary and reasonable consumer propounded by the ACCC is simultaneously inattentive to the content of pricing tickets, and yet also someone who thinks about those same tickets in complex, abstract and almost philosophical terms.<sup>11</sup>
- 7 As to inadvertence, the ACCC contends that the relevant representations were conveyed to consumers “*walking down a Woolworths supermarket aisle or shopping online*”.<sup>12</sup> It embraces the observation of Allsop CJ in *ACCC v Coles Supermarkets Australia Pty Ltd* that consumers in that context will be affected by “*an intuitive sense of attraction*

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<sup>6</sup> AOS [160]; see also AOS fn 11.

<sup>7</sup> AOS [168].

<sup>8</sup> AOS [161].

<sup>9</sup> AOS [2].

<sup>10</sup> AOS [19].

<sup>11</sup> AOS [4], [7], [19], [154].

<sup>12</sup> AOS [2].

*rather than by any process of analytical or logical choice*".<sup>13</sup> Thus, the ACCC submits that consumers shopping in-store and online would have absorbed the "*general thrust of Prices Dropped Tickets and been unlikely to carefully scrutinise the meaning derived from them.*"<sup>14</sup>

8 Those propositions, however, reveal the inherent unlikelihood that any hypothetical ordinary and reasonable consumer would construe the Prices Dropped Tickets in the manner suggested by the ACCC. The ordinary and reasonable consumer, approaching "*grocery shopping as a chore, not an event*",<sup>15</sup> would not engage in the complex thought process upon which the ACCC's case depends. They would not construe the struckthrough "was" price as a price at which the product was previously "ordinarily offered for sale" (excluding specials and other brief fluctuations understood by that consumer to be inherently transient and time-limited) for a "reasonable period of time", with the reasonableness of such time period determined by what was necessary in the mind of the consumer for the resulting discount to be "meaningful" in their subjective assessment. That construction would involve a level of abstract consideration of a kind that was unlikely in the relevant context. In the words of the High Court in *Campomar Sociedad, Limitada v Nike International Limited*, a response of that kind to the Prices Dropped Tickets would be "extreme and fanciful", such that it cannot properly be attributed to an ordinary and reasonable consumer.<sup>16</sup> Put shortly, the complexity of the alleged implied representation tells against the conclusion that it was conveyed.

9 A further difficulty with the ACCC's conception of the hypothetical ordinary and reasonable consumer is that it overlooks what is relevant to a consumer when reviewing pricing tickets in-store and online. The concern of such ordinary and reasonable consumers is with the prices they will pay today and, in some cases, the prices they will pay in the future. In this respect a Prices Dropped Ticket informed the consumer that the current price was lower than the "was" price the consumer would have paid immediately prior to the offering of that lower price. Information of that kind is relevant information to a consumer during the course of their shop because it is useful in

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<sup>13</sup> [2014] FCA 634; (2014) 317 ALR 73 at [43] (Allsop CJ) (*Coles Baked Fresh*); see AOS [151].

<sup>14</sup> AOS [154].

<sup>15</sup> AOS [154].

<sup>16</sup> [2000] HCA 12; (2000) 202 CLR 45 at [105] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (*Campomar*); see, similarly, *ACCC v Prouds Jewellers Pty Ltd* [2008] FCA 75; (2008) 75 IPR 306 at [43] (Moore J) (*Prouds FCA*).

deciding what to buy now. By contrast, ordinary and reasonable consumers do not look to pricing tickets to tell them anything about the historical pricing trends of grocery products or the details of historical prices which have been overtaken by inflation and are no longer current. Information of that kind would not be relevant to the consumer looking to make a decision about what to purchase today, and what to plan to purchase tomorrow.

10 Ordinary and reasonable consumers would understand the Prices Dropped Tickets to convey the simple and straightforward matters expressly stated on those tickets — matters which even a busy and inattentive shopper would easily discern. The tickets conveyed a representation that the retail price of the product had been reduced from a previous higher price.<sup>17</sup> That representation was true in each case.

11 In the remainder of these submissions, we address the limits of the ACCC’s case in **Part B**, the applicable legal principles in **Part C**, the characteristics of the ordinary and reasonable consumer in **Part D** and the Prices Dropped Representation in **Part E**. In **Part F**, we respond to the reliance the ACCC places on Woolworths’ policies as a foundation for the alleged contraventions. In **Part G**, we describe briefly the pricing histories of the 12 sample products. As to these, the ACCC refers several times to the 266 products and 276 Particularised Instances the subject of its claim. However, it is common ground that this trial on liability is being conducted by reference to the 12 sample products in accordance with the Court’s orders dated 23 May 2025.

## **B The ACCC’s case and its limits**

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12 In both the Concise Statement and its opening submissions, the ACCC says that its case is that the Prices Dropped Tickets represented that each relevant product’s Prices Dropped Price was a genuine reduction to, or discount from, the product’s “previous regular price”.<sup>18</sup> What has changed, however, is the ACCC’s definition of the phrase “previous regular price”.

13 In November 2024, shortly after these proceedings were commenced, Woolworths sought clarification from the ACCC as to the meaning of the phrase “previous regular

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<sup>17</sup> Concise Response [12(a)] (CB Tab 6, p 81).

<sup>18</sup> See Concise Statement, [12] (CB Tab 2, p 10); AOS [159].

price” as used in the Concise Statement.<sup>19</sup> The ACCC responded that those words “have their natural and ordinary meaning”.<sup>20</sup> The ACCC’s response did not use the phrase “reasonable period of time”.<sup>21</sup> That phrase first appeared in the ACCC’s Opening Submissions.

- 14 It is a stretch to suggest that the natural and ordinary meaning of the phrase “previous regular price” is the meaning given to that phrase by the ACCC in its submissions. Nevertheless, it is now clear that the *only* case the ACCC now seeks to advance is an allegation that the Prices Dropped Tickets falsely conveyed that the Prices Dropped Price was a genuine reduction to, or discount from, the price at which the relevant products were “ordinarily” offered for sale to consumers by Woolworths for a “reasonable period of time”.
- 15 The limits of that case ought be emphasised.
- 16 Importantly, the ACCC does not suggest that the Price 2 price was unreal or not a genuine price and that the Prices Dropped Tickets were misleading for that reason. That is unsurprising given that, as described below, the Price 2 prices were typically the supplier’s Recommended Retail Price (**RRP**); the Price 2 prices were charged to consumers in Woolworths stores and online for weeks in each case; and typically thousands of units of the relevant products were sold at the Price 2 prices. Those matters clearly establish the genuineness of the Price 2 prices.
- 17 Similarly, the ACCC does not allege that the Prices Dropped Tickets conveyed any misrepresentation as to value to ordinary and reasonable consumers. It does not, for example, advance a case that the Prices Dropped (or Price 3) Price was anything other than a good deal that provided real value to consumers in the circumstances. Nor does the ACCC suggest that the Prices Dropped Price was not a genuine discount relative to what would otherwise have been the price of the product had it not been on the Prices Dropped program at the time. Again, this is not surprising. The price changes at issue

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<sup>19</sup> Letter from KWM to JWS seeking further and better particulars of the Concise Statement, [8] (5 November 2024) (CB Tab 4, p 64).

<sup>20</sup> Letter from JWS to KWM providing further and better particulars of the Concise Statement, [8] (28 November 2024) (CB Tab 5, p 70).

<sup>21</sup> Letter from JWS to KWM providing further and better particulars of the Concise Statement (28 November 2024) (CB Tab 5, p 68).

in these proceedings occurred during a period of considerable inflation,<sup>22</sup> and, in most cases, were facilitated by suppliers providing funding to Woolworths to support the reduction in the retail price of the product.<sup>23</sup> These matters likely explain the fact that the ACCC does not allege, or seek to prove, that the Prices Dropped Tickets made any misrepresentation as to value to consumers.

## C Applicable legal principles

- 18 Save for the matters described below, the general principles summarised in AOS [23]-[46] that are relevant to assessing whether the alleged impugned conduct has contravened ss 18 and 29(1)(i) of the *Australian Consumer Law* are not in dispute. Central to that approach is the four step inquiry set out in *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8; (2023) 277 CLR 186 at [80]-[84] (*Self Care*), with steps 3 and 4 being the key issues in dispute in these proceedings.
- 19 The relevant matters of principle on which the ACCC and Woolworths differ are as follows.
- 20 *First*, while the ACCC is correct that, to be described as misleading or deceptive, conduct must have a tendency to lead into error,<sup>24</sup> it should be emphasised that responses short of error are insufficient. Thus, conduct is not misleading merely because it leads to uncertainty, questioning or wonderment.<sup>25</sup>
- 21 *Second*, in relation to the fourth step in *Self Care*, the Court must determine whether the meaning conveyed by the alleged conduct was misleading or deceptive (or likely to mislead or deceive) by reference to the knowledge and characteristics that should be attributed to the hypothetical ordinary and reasonable consumer in *this* particular case.<sup>26</sup> That attribution must be informed by the whole of the surrounding circumstances.<sup>27</sup> In

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<sup>22</sup> Affidavit of Paul Stephen Harker affirmed 26 November 2025 (**First Harker Affidavit**), [34]-[38] (CB Tab 22, p 556-561).

<sup>23</sup> SOAF [40] (CB Tab 11, p 107).

<sup>24</sup> AOS [34].

<sup>25</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu* [1982] HCA 44; (1982) 149 CLR 191 at 209-210 (Mason J) (*Puxu*); *Campomar* at [106] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Coles Baked Fresh* at [39] (Allsop CJ).

<sup>26</sup> *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8; (2023) 277 CLR 186 at [90] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ) (*Self Care*).

<sup>27</sup> *Puxu* at 199 (Gibbs CJ).

the present case, those circumstances include not only the immediate context — the Woolworths supermarket or website — but also the macroeconomic climate that was affecting grocery prices in the Relevant Period. In this way, while the construct of an ordinary and reasonable consumer allows for a range of reasonable reactions to the alleged conduct (cf. AOS at [37]), a key question for the Court is whether the particular reaction propounded by the ACCC would manifest in the ordinary and reasonable consumer, having regard to the objectively realistic level of reflection, knowledge and consideration that consumers would have in the context in which the products were purchased and the consumer’s surroundings.<sup>28</sup>

- 22 *Third*, contrary to the ACCC’s submission at AOS [39]-[44], the mere fact that a debate about whether a phrase is misleading is “objectively open” does not suggest that those phrases have the requisite tendency to lead ordinary and reasonable consumers into error.
- 23 The passage on which the ACCC relies to support its assertion in this respect is the penalty decision in *ACCC v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330 at [95]. The relevant passage in that case was discussing penalty, not liability. The Court was explaining there why the existence of a reasonable debate as to the meaning of the impugned phrases was not a mitigating factor on the question of penalty. The Court was not embracing the existence of such debate as a shorthand means of determining liability.
- 24 Moreover, unlike the present case, *Coles* concerned the question of whether the express statements used by the respondent in its advertising (such as “Freshly Baked” or “Baked Today. Sold Today”) were misleading. The circumstances in the present case are significantly different, including because the ACCC does not contend that any phrase or statement on the Prices Dropped Ticket was misleading.
- 25 *Fourth*, at AOS [47]-[49], the Applicant eschews detailed consideration of the authorities which have considered the meaning of representations of “was/now” advertising.

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<sup>28</sup> *ACCC v Woolworths Group Ltd* [2019] FCA 1039 at [194] (Mortimer J); see further *Self Care* at [84] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

- 26 The relevant authorities include the decision in *Australian Competition and Consumer Commission v Prouds Jewellers Pty Ltd*, where the Full Court held that “was/now” price claims convey to ordinary and reasonable consumers that the price had changed relative to the price imposed “immediately before” the relevant promotion.<sup>29</sup> That conclusion was consistent with the decision of Moore J at first instance,<sup>30</sup> who rejected the proposition that the word “was” conveyed any more general proposition as to past or historical pricing.<sup>31</sup> It would not be correct to treat those conclusions as the product only of the particular facts in *Prouds*. The use of “was/now” claims is not a novel form of marketing, and Moore J and the Full Court’s analysis in *Prouds* reflects how such claims are understood by ordinary and reasonable consumers. Indeed, the facts of the present case make the position even clearer, because of the inclusion of a “was” date on the Prices Dropped Ticket.
- 27 The ACCC’s reliance on the concept of a “reasonable period of time” appears to be derived from *Australian Competition and Consumer Commission v Kogan*.<sup>32</sup> In that case, Davies J found that Kogan’s offer of a 10% discount for consumers who used a special tax-time code at checkout (during a 3-day EOFY sale) conveyed a representation that the price to which the discount applied was a price at which the product was, or would be, available for sale for a reasonable period before and after the promotion.<sup>33</sup> Importantly, the express representations in that case were to the effect that the promotional price was “time-specific and time limited”, with the effect that the ordinary and reasonable consumer would understand there was a limited opportunity to obtain the reduced price.<sup>34</sup> That being so, the Court found Kogan’s conduct to be misleading where the promotional prices were not, in fact, a discount from the price at which the products had been offered for a reasonable period of time before or after promotion. In other words, the representation in *Kogan* was that the promotional price was time limited, with the effect that the truth or falsity of that representation depended upon whether or not it differed to the price at which the products were offered before and after the promotion.

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<sup>29</sup> *ACCC v Prouds Jewellers Pty Ltd* [2008] FCAFC 199 at [32] (Black CJ, Ryan and Gordon JJ).

<sup>30</sup> *Prouds FCA* at [45], [51], [66] (Moore J).

<sup>31</sup> *Prouds FCA* at [66] (Moore J).

<sup>32</sup> [2020] FCA 1004; (2020) 145 ASCR 609 (*ACCC v Kogan*).

<sup>33</sup> *ACCC v Kogan* at [52], [91] (Davies J).

<sup>34</sup> *ACCC v Kogan* at [72], [75] (Davies J).

28 *Kogan* is not, however, authority for the proposition that “was/now” pricing will be misleading if the “was” price was not charged for a “reasonable period of time”. To construe the decision that way is to misunderstand the relevance of the “reasonable period of time” analysis in that case. In *Kogan*, the ACCC relied on the concept of a “reasonable period” only to capture the proposition that a “was/now” claim may be misleading where the “was” price was not a price genuinely charged for anything more than a fleeting and *de minimis* period.<sup>35</sup> That is, the concept of a “reasonable period” accepted in *Kogan* was a period long enough to substantiate that the price to which the discount applied was a genuine price. The ACCC accepted that a two-week period was a “reasonable” period for this purpose.<sup>36</sup> Nothing in *Kogan* supports the proposition that ordinary and reasonable consumers construe “was/now” statements as conveying any representation as to the duration of the period during which a “was” price was charged beyond the proposition that the duration cannot be so short as to deny that “was” price the quality of genuineness.

29 That is significant because the duration of a “was” price is, at most, only one of a number of factors that may be relevant in assessing whether such a price is genuine, and depending on the facts, it may be an insignificant factor in that assessment. Again, where a retail price reflects the actual costs of the product to the retailer, is consistent with a supplier’s RRP, and where material volumes are sold at that price, there can be no real question as to the genuineness of that retail price. The circumstance that such a price might only have been charged for a relatively short period does not negate its genuine character. Even if such temporal considerations were relevant in the circumstances, the evidence in this case will show that the periods for which Price 2 was charged were not so short as to negate its genuine character.

#### **D The relevant class of consumers**

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30 This is a case where the alleged representation conveyed by a pricing ticket was directed at the public or a section of the public, so it is necessary to identify the class of persons to whom the alleged conduct is directed and then to objectively attribute characteristics and knowledge to a hypothetical ordinary or reasonable member of that class.<sup>37</sup>

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<sup>35</sup> *ACCC v Kogan* at [84] (Davies J).

<sup>36</sup> *ACCC v Kogan* at [20] (Davies J).

<sup>37</sup> *Self Care* at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

- 31 Prices Dropped Tickets are directed toward actual and potential purchasers of products from Woolworths Supermarkets.
- 32 The hypothetical ordinary and reasonable Woolworths customer had at least the following characteristics:
- (a) They understood that Woolworths is one of Australia’s largest supermarkets and sells products from its physical stores and online;
  - (b) They shopped frequently at Woolworths. Woolworths customers shop at Woolworths (in-store or online) approximately 2.5 times each week on average;<sup>38</sup>
  - (c) They understood it was common for prices charged for products in Woolworths Supermarkets to change frequently, including as a result of the product going on and off promotion or Woolworths changing the “white ticket” prices;
  - (d) In conducting their shopping, they looked at promotional and pricing program tickets briefly but sufficiently to observe the features of the promotion or price reduction. In respect of the Prices Dropped Ticket, they would have observed the words “Prices Dropped”, together with the Prices Dropped Price, and the “was” date;
  - (e) They would appreciate that Woolworths had different types of promotional and pricing programs; that some were of short duration (such as specials advertised on yellow price tickets<sup>39</sup>); and that some were mechanisms of longer duration, such as the Prices Dropped Program;<sup>40</sup> and
  - (f) They would have been aware that Australia was experiencing significant price inflation during the Relevant Period, and that the retail price of many items sold, including in supermarkets (both at Woolworths and elsewhere), was increasing.<sup>41</sup>

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<sup>38</sup> First Harker Affidavit, [60(c)] (CB Tab 22, p 568-569).

<sup>39</sup> See First Harker Affidavit, [13(a)], [15]-[16] (CB Tab 22, p 551-552).

<sup>40</sup> See First Harker Affidavit, [13(c)], [14], [21]-[22] (CB Tab 22, p 551, 553); SOAF, [12]-[15], [27] (CB Tab 11, p 102-103, 105).

<sup>41</sup> See First Harker Affidavit, [35]-[38] (CB Tab 22, p 556-561).

## E The representation conveyed by Prices Dropped Tickets

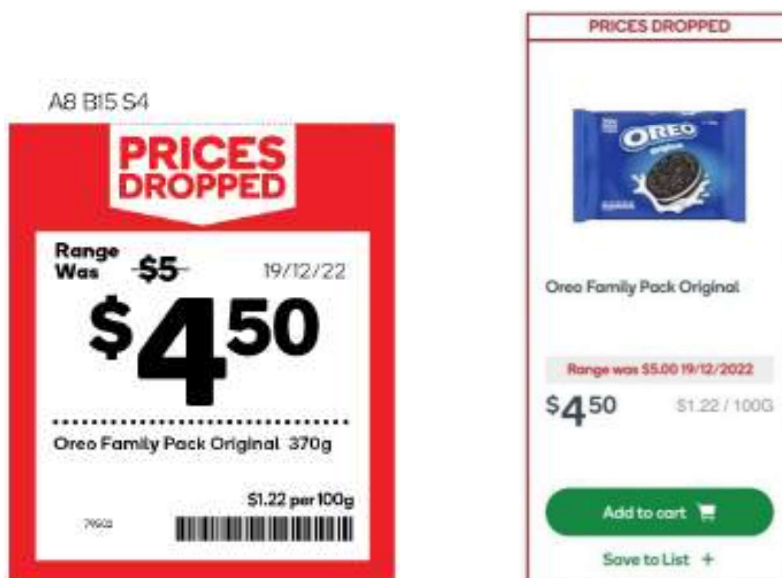
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33 The Prices Dropped Tickets were shown to consumers as paper tickets, or electronic shelf labels, in-store, as well as on product tiles on the Woolworths website and app.<sup>42</sup> The tickets had the following features:

- (a) A red and white border or box with the words “PRICES DROPPED”;
- (b) The product name, being the name of the product and any specifications such as flavour, scent or size;
- (c) The Prices Dropped Price; and
- (d) A “was” price, being the price at which the Affected Product was previously sold to consumers (excluding any special) before it was sold at the Prices Dropped Price.

34 Each of the Prices Dropped Tickets on the sample products also contained a specific date which identified the last date the product was sold at the “was” price.

35 By way of example, the in-store and online Prices Dropped Tickets for the Oreo Sample Product appeared as follows:<sup>43</sup>



<sup>42</sup> SOAF [33] (CB Tab 11, p 106).

<sup>43</sup> SOAF, Annexure A, (CB Tab 11, p 113).

- 36 The representation conveyed by a Prices Dropped Ticket is straightforward. It is that the shelf price of the product has been reduced (“dropped”) from the struck-through “was” price which was charged at the stated date. This is the “*natural and ordinary meaning*”<sup>44</sup> of the Prices Dropped Tickets. That representation was true.
- 37 Moreover, the evidence will demonstrate that the Price 2 price was, in each case, a genuine price, such that the discount from the Price 2 price to the Prices Dropped Price was a genuine discount.
- 38 Six matters demonstrate that the Price 2 prices were genuine.
- 39 *First*, Woolworths increased the price to Price 2 in most cases because of a cost price increase from the supplier.<sup>45</sup> Moreover, those cost price increases occurred during a period in which Woolworths was inundated with cost price increases from suppliers in well above normal levels.<sup>46</sup> It was not feasible for Woolworths simply to absorb these price increases and maintain the Prices Dropped program.<sup>47</sup> That being so, Price 1 prices could not be maintained and it was inevitable that retail prices would rise. The applicable facts in this respect for each of the sample products are described briefly in Section G.
- 40 *Second*, the Price 2 price was typically set at a level consistent with the retail price recommended by the supplier (save in the case of Woolworths’ own brand products, such as the Essentials Pasta Sample Product, where there was no RRP).<sup>48</sup> Woolworths adopted the supplier’s RRP as the Price 2 price (subject to rounding) for each of the sample products, other than the Essentials Pasta Sample Product (being an own brand

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<sup>44</sup> *ACCC v Kogan* at [12] (Davies J).

<sup>45</sup> SOAF [58] (CB Tab 11, p 111).

<sup>46</sup> First Harker Affidavit, [35], [36] (and documents referred to in that paragraph), [37] (and documents referred to in that paragraph), [49] (CB Tab 22, p 556-560, 565); Affidavit of Sam Edward Woodcock affirmed 25 November 2025 (**Woodcock Affidavit**), [21]-[22] (CB Tab 31, p 764); Affidavit of Martin John McCaig sworn 21 November 2025 (**McCaig Affidavit**), [19] (CB Tab 24, p 600-601); Affidavit of Stuart Robert Alexander Robinson sworn 21 November 2025 (**Robinson Affidavit**), [13]-[14] (CB Tab 28, p 701).

<sup>47</sup> First Harker Affidavit, [49] (CB Tab 22, p 565).

<sup>48</sup> MPL.0003.0028.9584 (CB Tab 171, p 4211) and MPL.0003.0028.9585 (CB Tab 172, p 4123); MPL.0002.0002.6772 (CB Tab 224, p 4447); MPL.0055.0011.3663 (CB Tab 296, p 4783); MPL.0002.0004.9105 (CB Tab 357, p 5217); MPL.0002.0004.9106 (CB Tab 358, p 5218); MPL.0018.0003.9135 (CB Tab 496, p 6050); MPL.0008.0010.1832 (CB Tab 545, p 6307); MPL.0019.0006.4651 (CB Tab 598, p 6648); MPL.0003.0029.9147 (CB Tab 644, p 6839); MPL.0021.0007.7603 (CB Tab 709, p 7311); MPL.0021.0007.7604 (CB Tab 710, p 7312).

product) and the Kleenex Sample Product, where the supplier suggested an RRP of \$3.30, but Woolworths adopted a lower Price 2 price of \$3.00.<sup>49</sup>

41 *Third*, supplier RRPs were genuine price recommendations and the evidence does not suggest any pattern of RRPs for Prices Dropped products being in any way inflated. In many cases, in advising of an increase in the RRP for a Prices Dropped product, the supplier also advised similar increases in the RRPs for other products in the range, including products proposed to be sold on a *white* ticket. For example, in December 2021, Woolworths received an initial cost price increase request from Carman’s which recorded that the RRP for the Carman’s Sample Product (which was on Prices Dropped) had increased by 10% from \$10.00 to \$11.00.<sup>50</sup> At the same time, the RRP for each of Carman’s Aussie Oat 6pk, Trad Oat Slice 5pks and Protein Bar Value Pcks — which were not sold on the Prices Dropped program — also increased by 10%.<sup>51</sup> In this way, the proportionate increase in RRP for Carman’s products did not differ depending on whether the product was on Prices Dropped. That being so, there was no sense in which the RRP for the Prices Dropped products could be regarded as inflated or artificial.

42 *Fourth*, the evidence will show that several thousands of units of each sample product were sold at the Price 2 price;<sup>52</sup> that is, hundreds, and more often thousands, of units every day (although the period over which those sales occurred is immaterial to the question of whether the price was a real price). Those sales, by themselves, are material and sufficient to prove that Price 2 was genuine.

43 In its opening submissions, the ACCC apparently seeks to undermine those sales figures by dividing the total number of units sold by the total number of Woolworths stores to arrive at a bare average per store.<sup>53</sup> The notional “per store” averages do not advance the analysis. They are meaningless without information about the relativities between stores (for example, there might be a reason having nothing to do with price as to why a particular Woolworths store somewhere in Australia sells a less than average number of the Lucky Dog Sample Product) and the number of stores in which particular

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<sup>49</sup> Affidavit of Timothy Charles Moffatt affirmed 21 November 2025 (**Moffatt Affidavit**), [74]-[75] (CB Tab 25, p 649-650).

<sup>50</sup> MPL.0002.0004.9106 (CB Tab 358, p 5218).

<sup>51</sup> MPL.0002.0004.9106 (CB Tab 358, p 5218).

<sup>52</sup> Annexure C to the SOAF at line items 10, 11, 13, 22, 66, 80, 98, 108, 168, 188, 209, 233 (CB Tab 11, p 164-165, 167, 185, 192-194, 203-205, 233-234, 245, 252-253, 273-275).

<sup>53</sup> AOS at [141].

products are ranged.<sup>54</sup> However, even taking those figures at face value, they do not contradict or undermine the sales that *did* occur, which on any view are sufficient to prove that Price 2 is a genuine price.

44 Moreover, in its table at AOS [141], the ACCC has omitted the figures for Price 3. Those figures have been included in the table below. One can see that there are, in each case, only small changes between the “per store” averages for Price 1, Price 2 and Price 3. The similarities between the Price 1, Price 2 and Price 3 “per store” averages demonstrate the uninformative nature of the analysis.

SAMPLE PRODUCT	PRICE 1		PRICE 2		PRICE 3	
	Avg Unit/Day (ACCC's Opening Subs [141])	Per Store/Day (ACCC's Opening Subs [141])	Avg Unit/Day (ACCC's Opening Subs [141], except for Tiny Teddy)	Per Store/Day (ACCC's Opening Subs [141], except for Tiny Teddy)	Avg Unit/Day <sup>55</sup>	Per Store/Day <sup>56</sup>
Tim Tam (84628-EA)	4,593.7	4.4	3,937.9	3.8	4,423	4.3
Tiny Teddy (641537-EA)	3,682.9	3.6	3,326.7 <sup>57</sup>	3.2	4,178	4.0
Bragg (476910-EA)	385.6	0.4	298.9	0.3	332	0.3
Carman's (31158-EA)	878.0	0.8	749.2	0.7	909	0.9
Essentials Pasta (188800-EA)	4,715.6	4.5	4,119.7	4.0	4,938	4.8
Fab (657424-EA)	991.8	1.0	355.3	0.3	1,366	1.3
Kleenex (79502-EA)	7,243.0	7.0	5,572.6	5.4	8,823	8.5

<sup>54</sup> See, for example, MPL.0081.0001.0005 (see native file) at Cell W12 - the Bragg Sample Product was ranged in only 713 stores. Further, Column W indicates that the number of stores in which products are ranged (in this case in the Health Foods Pantry sub-category) varies widely across products.

<sup>55</sup> Figure is calculated by Price 3 divided by 'Days on P3' in column J of Annexure B to the SOAF, except for in relation to Stayfree.

<sup>56</sup> Figure is calculated by Price 3's average unit per day divided by 1,037 (being the number of Woolworths Supermarket Stores during the Relevant Period, per SOAF at [9] (CB Tab 11, p 102)). Each figure is rounded to the nearest decimal place.

<sup>57</sup> Figure is calculated by reference to evidence in Deery Affidavit, [52] (CB Tab 21, p 531); MPL.0094.0001.0006 (CB Tab 281, p 4705); MPL.0095.0001.0009 (CB Tab 269, p 4677); MPL.0080.0001.2613\_N (CB Tab 270, p 4692); MPL.0080.0001.2614\_N (CB Tab 271, p 4693); MPL.0080.0001.2615\_N (CB Tab 272, p 4694).

SAMPLE PRODUCT	PRICE 1	PRICE 2	PRICE 3
Lucky Dog (433643-EA)	2,319.2	2.2	1,644.5
Nestle Cerelac (379228-EA)	348.6	0.3	346.5
Oreo (73032-EA)	2,621.0	2.5	2,022.1
Sakata (41814-EA)	6,550.7	6.3	5,674.4
Stayfree (44861-EA)	448.2	0.4	392.3

45 *Fifth*, the Price 2 price was the price that Woolworths category managers would generally expect to charge for each sample product if supplier funding for the Prices Dropped program was withdrawn at any point.<sup>59</sup>

46 *Sixth*, the sample products were, in each case, offered at the Price 2 price for a sufficient duration to confirm the price was genuine. In this regard, it is to be recalled that the products at issue in these proceedings are fast moving consumer goods sold in supermarkets. They are products of a kind that consumers buy frequently and repeatedly.

47 That frequency is recorded in the “Inter-Purchase Interval” (IPI) data maintained by Woolworths, which records the frequency with which consumers shop a given subcategory (such as the “muesli and oats” subcategory within the “Breakfast Foods” category).<sup>60</sup> The IPIs for most of the sample products were shorter than 4 weeks, with the IPI for the Cerelac, Tim Tam, Oreo, Sakata and Carman’s sample products shorter than 3 weeks.<sup>61</sup> Even in the case of the most infrequently purchased subcategory for a sample product, being that relating to the Fab sample product, customers purchased from the category every 51 days on average.<sup>62</sup> Importantly, the IPI measures the average frequency of *purchases*, rather than the frequency with which customers browse a

<sup>58</sup> Figure is calculated by reference to evidence in Moffatt Affidavit, [63] (Tab 25, p 645).

<sup>59</sup> Woodcock Affidavit, [39] (CB Tab 31, p 769); Robinson Affidavit, [63] (CB Tab 28, p 63); McCaig Affidavit, [84(a)] (CB Tab 24, p 622). See, more generally, First Harker Affidavit, [24]-[25] (CB Tab 22, p 554); Moffatt Affidavit, [29] (CB Tab 25, p 636); Affidavit of Callum Michael Davies affirmed 15 December 2025 (Davies Affidavit), [28(b)(ii)] (CB Tab 19, p 493); Affidavit of Barry O’Leary sworn 15 December 2025 (Second O’Leary Affidavit), [48] (CB Tab 26, p 666).

<sup>60</sup> First Harker Affidavit, [47(b)] (CB Tab 22, p 563).

<sup>61</sup> 1050794.015.001.0020 (CB Tab 69, p 1053, 1061, 1081, 1091).

<sup>62</sup> 1050794.015.001.0020 (CB Tab 69, p 1071).

category or check pricing. Many, if not most, ordinary and reasonable consumers would see Woolworths' pricing of a product more often than they purchase that product, including because pricing is subject to change with promotions and pricing programs. In this regard, it is again significant that Woolworths customers shop at Woolworths approximately 2.5 times per week on average,<sup>63</sup> affording frequent and regular opportunities to view Woolworths prices and changes in those prices.

48 It follows from these matters that it at least can be said that a price that is in place in Woolworths Supermarkets for a period of weeks is a genuine price. That is because such a price is one that is observable by the millions of customers that shop at Woolworths each week, and the price at which those items are genuinely offered for sale to those customers.

49 The ACCC contends that the IPI data is likely to overstate the frequency at which consumers purchased the sample products,<sup>64</sup> but the three reasons given for that proposition are not compelling.

(a) The first reason is that the data are drawn from Woolworths' Everyday Rewards program. That fact does not imply the data are overstated, including because there is no reason to suppose that Everyday Reward program members buy particular products more frequently than anyone else.

(b) The second reason is that the IPI records purchase frequency for a subcategory, rather than a product. That is true, but does not make a material difference. Whether or not a consumer is purchasing a *specific* product is not to the point. The relevant fact is that these are subcategories shopped or seen frequently and regularly by consumers (including as they compare and evaluate different products and offers).

(c) The ACCC's third argument is that there are "*likely to be many consumers who purchase products less frequently than the 'average' Woolworths Everyday Rewards customer*". There may or may not be. There is certainly no evidence to suggest that the "average" Woolworths Everyday Rewards customer is

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<sup>63</sup> First Harker Affidavit, [60(c)] (CB Tab 22, p 568-569).

<sup>64</sup> AOS [133].

unrepresentative of the average Woolworths customer. Moreover, and in any event, the significance of the IPI is not that it proves that any specific customer saw or purchased a product within a given period. It is that the relevant subcategories are frequently and regularly seen or shopped by consumers.

- 50 This points to a more fundamental difficulty with the ACCC's case as to the duration of the "reasonable period" for which it contends. The ACCC submits that the Price 2 periods in this case were insufficient because "*many consumers would not have had much, if any, opportunity to purchase Affected Products at Price 2*",<sup>65</sup> including because the IPIs of the relevant products were such that "*consumers were, at best, likely to have only purchased an Affected Product at Price 2 once*".<sup>66</sup>
- 51 Those statements are incorrect. In this case, consumers had the *opportunity* to purchase the relevant sample products each day of the Price 2 period. That opportunity was not limited to the particular times they in fact made a purchase of the product during that period. This is particularly so when Woolworths customers shop at Woolworths approximately 2.5 times per week on average.<sup>67</sup>
- 52 More fundamentally, however, whether a "was" price is genuine does not turn on whether many or most customers in fact purchased the product at the "was" price more than once (or at all). If that were so, retailers could never use "was/now" statements in the sale of infrequently purchased items such as computers, cars or jewellery. The true position is that, in the case of frequently and regularly purchased products seen and/or purchased by consumers at least every few weeks on average, the circumstance that the products were offered for sale, and in fact sold, at a particular price for a period of weeks is conclusive of the fact that that price was genuine, even before one considers the five other factors described above.
- 53 Considered together, the preceding matters demonstrate that the Price 2 price was a genuine price in each case. That being so, and given that there is no dispute that the Price 3 price was a substantial discount from the Price 2 price, it follows that the Price 3 price was, in all cases, a genuine discount.

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<sup>65</sup> AOS [170].

<sup>66</sup> AOS [173].

<sup>67</sup> First Harker Affidavit, [60(c)] (CB Tab 22, p 568-569).

54 It remains only to deal with the other reasons the ACCC contends that the Price 2 price was not charged for a reasonable period. We address the first of those reasons (see AOS [170]-[180]) in paragraphs 49-51 above. The remaining four reasons are addressed below.

- (a) The ACCC contends that, where products were promoted on yellow ticket specials during the Price 2 period, the effect was to deny consumers “*an opportunity to notice the change from Price 1 to Price 2*”.<sup>68</sup> That submission is again predicated on the assumption that it matters whether all consumers saw or purchased the product at the Price 2 price. That assumption is incorrect for the reasons given above.
- (b) The ACCC submits that, “*in the context of groceries, what ordinary reasonable consumers would regard as a “reasonable period” in each case would logically be informed, to a substantial degree, by the historical pricing patterns of the relevant product*”.<sup>69</sup> That submission does a disservice to the ordinary and reasonable consumer. Consumers are not so naïve as to believe that grocery prices remain constant over time. They are alive to the reality and impact of inflation, particularly in periods of high inflation such as the Relevant Period in this case.<sup>70</sup>
- (c) The ACCC contends that the “*long-term nature of Prices Dropped promotions is important context that would have informed a consumer’s understanding of how long one would have expected a benchmark price to be offered*”.<sup>71</sup> That is not correct. The fact that the Prices Dropped Price is long term in nature does not imply that the “was” price that preceded it was similarly longstanding. Nor does it suggest that the “was” price was required to be similarly longstanding to be a genuine or real price at which products were offered to consumers.
- (d) The ACCC submits that, “*in many cases, Price 2 was a price only implemented by Woolworths in order to ‘establish’ a higher ‘Was’ price for the purpose of*

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<sup>68</sup> AOS [181].

<sup>69</sup> AOS [182].

<sup>70</sup> MPL.0124.0001.0001 0004 (SCB).

<sup>71</sup> AOS [191].

*permitting it to then advertise Price 3 to consumers as a 'discounted' price*".<sup>72</sup> That case is not consistent with the evidence. For present purposes, it is sufficient to observe that it is a case that depends on a decontextualised account of the alleged conduct at issue. The volume of supplier cost price increases in the Relevant Period resulted in changes to the prices of a large number of products in Woolworths supermarkets. Those changes were not limited to products on the Prices Dropped program. It was frequently the case that Woolworths increased the retail prices of products to new white ticket prices, and frequently at the supplier's RRP. That included products where it was not anticipated that the product would later be placed on the Prices Dropped program. It is not correct to suggest that the purpose of implementing higher white ticket prices was to establish a higher "was" price. Rather, the new white ticket price reflected, in each case, the new price of the relevant product following the relevant cost price increase and absent any promotion or pricing program. Further, even if there were such a purpose, it still would not gainsay that the "was" price was genuine having regard to the matters described at paragraphs 38 to 52 above.

## **F      Relevance of Woolworths' Prices Dropped Policies**

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- 55      In its opening submissions, the ACCC deals at some length with Woolworths' internal policies relating to the Prices Dropped program, and specifically with the internal rules concerning the "Price Establishment Period" (**PEP**) (being the period at which a product had to be sold on a white ticket prior to being placed on the Prices Dropped program).
- 56      Those policies are of no real relevance to questions that the Court must resolve. Selfevidently, those policies do not define the boundary between lawful and contravening conduct. At most, they reflect an *a priori* assessment of what the law might require in a particular case, but more likely they reflect an assessment of what may be required to ensure Woolworths stays well within the bounds of lawful conduct. The fact of that assessment, however, does not weigh in the analysis of whether some later conduct, in fact, amounted to a contravention. Similarly, conduct that is otherwise

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<sup>72</sup> AOS [193].

lawful does not contravene merely because it may have transgressed a company's internal policies designed to promote practical compliance with prohibitions on misleading or deceptive conduct (Cf. AOS [142]).

57 At AOS [103], the ACCC suggests that Woolworths' Prices Dropped policies provide cogent evidence of the "*mental impression Woolworths intended the Prices Dropped Tickets to place in the mind of consumers*". That is not so.

58 Since at least 2014, the ACCC has published guidance to Australian retailers that use two-price comparison advertising (such as "was/now" statements) and which state that a "*critical issue is whether relevant consumers would have paid the 'was' or 'strike through' price to purchase that item for a reasonable period before the sale commenced.*"<sup>73</sup> The ACCC guidance continues:<sup>74</sup>

*What's considered to be a reasonable period in the circumstances will vary from case to case and will depend on the type of product or market involved and usual frequency of price changes for that product or in that market.*

59 There is nothing surprising about the fact that regulatory guidance of this kind might find reflection in the internal business policies of major Australian corporations such as Woolworths. The fact that it does so, however, does not imply acceptance of the correctness of the regulator's views as opposed to a recognition that non-compliance with those views might attract regulatory scrutiny.

60 Thus, contrary to AOS [106], when regard is had to the 2016 Woolworths "*Low Price Always*" and "*Prices Dropped!*" – *Campaign Rules and Guidance*<sup>75</sup> in this context, it is plain that it was directed at prompting compliance with this ACCC regulatory guidance. This is clear from the express purpose of the document, which was focused on managing "legal risks" associated with the Prices Dropped and Low Price programs

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<sup>73</sup> ACCC, *Advertising and Selling Guide* (April 2014) at 25 [MPL.0126.0001.0003] (SCB); ACCC, *Advertising and Selling Guide* (November 2017) at 24 [MPL.0126.0001.0001] (SCB); ACCC, *Advertising and Selling Guide* (July 2021) at 25-26 [MPL.0126.0001.0002] (SCB).

<sup>74</sup> ACCC, *Advertising and Selling Guide* (April 2014) at 25 [MPL.0126.0001.0003] (SCB); ACCC, *Advertising and Selling Guide* (November 2017) at 24 [MPL.0126.0001.0001] (SCB); ACCC, *Advertising and Selling Guide* (July 2021) at 25-26 [MPL.0126.0001.0002] (SCB).

<sup>75</sup> MPL.0001.0005.0030 (CB Tab 72, p 1109).

and on providing practical guidance and rules to ensure the programs did not fall foul of the prohibitions on misleading conduct in the ACL.<sup>76</sup>

61 Likewise, contrary to AOS [118], when regard is had to the September 2022 Price Trust Policy<sup>77</sup> in the context of the ACCC regulatory guidance, it is plain that the rules it states in relation to “price establishment” of a “was” price for a “reasonable period” was simply directed at ensuring Woolworths steered clear of the ACCC’s stated boundary lines with respect to “was/now” statements.

62 Further, in any event, while the ACCC refers to Woolworths’ other Prices Dropped policies in the Relevant Period (i.e. the 2020 “Low Price & Prices Dropped Guidelines / Process”<sup>78</sup> (**2020 Guidelines**) and the January 2022 revised Prices Dropped guidelines<sup>79</sup> (**January 2022 Guidelines**)), it does not assert that these policies record any appreciation by Woolworths that the Prices Dropped Tickets conveyed the pleaded representation. Nor could it, because those policies contain no such statements and merely record the guidelines that the commercial team was to follow.

63 A further point must be made in relation to Woolworths’ internal policies. The ACCC makes a number of submissions as to the extent of non-compliance with those policies. Those submissions are premised, in large part, on the proposition that, in the period from January 2022 to September 2022, the 2020 Guidelines were the applicable policy governing the length of time at which a product had to be sold at a white ticket price before being placed on Prices Dropped (save in the case of products that were on the Prices Dropped program at the time Woolworths received a cost price increase request from a supplier).<sup>80</sup> That proposition is not correct.

64 The true position is addressed in Mr Harker’s second affidavit. It is that, between January 2022 and September 2022, the applicable price establishment period required by Woolworths for products placed on Prices Dropped following a cost price increase request from a supplier was that stipulated by the January 2022 Guidelines — i.e., 3 to

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<sup>76</sup> MPL.0001.0005.0030 under “1. Purpose of this document” (CB Tab 72, p 1110).

<sup>77</sup> MPL.0001.0005.0063 (CB Tab 130, p 2811).

<sup>78</sup> MPL.0001.0005.0031 (CB Tab 73, p 1120).

<sup>79</sup> MPL.0001.0005.0047 (CB Tab 96, p 1817).

<sup>80</sup> AOS [109], [142], [145].

6 weeks, depending on the IPI.<sup>81</sup> As a consequence, the ACCC's submissions as to the extent of non-compliance with Woolworths' policies is incorrect and overstated.

## **G Overview of Sample Products**

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65 As observed at the outset of these submissions, the ACCC's case is that a singular type of false or misleading representation was made in respect of each of the 266 relevant products. The ACCC's case is the same, regardless of the particular details and circumstances of the individual product or its inclusion on the Prices Dropped program.

66 Nevertheless, Woolworths has, in its evidence, addressed the detail relevant to each of the 12 sample products at length. By way of introduction, we summarise that detail below.

### **G.1 Arnott's Tim Tam Original Fam Pk 365g (84628-EA)**

67 Between 21 April 2021 and 5 October 2022, Arnott's Tim Tam Original Fam Pk 365g (84628-EA) (**Tim Tam Sample Product**) was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online on the Low Price program at a price of \$4.50.<sup>82</sup> From around July 2022, Arnott's and Woolworths began negotiating a cost price increase for the Arnott's chocolate biscuits, which encompassed 23 different products.<sup>83</sup> Arnott's cost price increase request, which included increases to Arnott's overall deferred deal,<sup>84</sup> was ultimately accepted, and on 6 October 2022, the Tim Tam Sample Product was offered to consumers at Woolworths Supermarkets and Woolworths Online for \$6.00 on a white ticket for three weeks, in line with the PEP requirements for the product,<sup>85</sup> when the IPI was just 2.9 weeks.<sup>86</sup> During that time, 82,696 units were sold in total (equating to an average of 3,938 per day).<sup>87</sup> The price of

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<sup>81</sup> Affidavit of Paul Stephen Harker sworn 13 April 2026, [10] (CB Tab 22, p 549).

<sup>82</sup> SOAF, Annexure C, Row 10, (CB Tab 11, p 164).

<sup>83</sup> MPL.0003.0028.9581 (CB Tab 173, p 4224); MPL.0003.0028.9582 (CB Tab 174, p 4226); MPL.0002.0002.5568 (CB Tab 186, p 4276); MPL.0002.0002.5569 (CB Tab 187, p 4280).

<sup>84</sup> MPL.0003.0027.6620 (CB Tab 194, p 4310); MPL.0003.0027.6621 (CB Tab 195, p 4311).

<sup>85</sup> SOAF, Annexure C, Row 10 (CB Tab 11, p 164); Second O'Leary Affidavit, [36]-[37] (CB Tab 26, p 661-662).

<sup>86</sup> 1050794.015.001.0020 (CB Tab 69, p 1092).

<sup>87</sup> SOAF, Annexure C, Row 10 (CB Tab 11, p 164).

\$6.00 was the same as Arnott's RRP.<sup>88</sup> On 27 October 2022, the Tim Tam Sample Product was placed on the Prices Dropped program at the price of \$5.50.<sup>89</sup>

## **G.2 Arnott's Tiny Teddy Variety 15Pk 375g (641537-EA)**

68 From 1 January 2021 to 10 May 2022, the Arnott's Tiny Teddy Variety 15 Pk 375g (641537-EA) (**Tiny Teddy Sample Product**) was offered and sold to consumers in Woolworths Supermarkets and Woolworths Online on the Prices Dropped program with a price of \$5.00.<sup>90</sup> In January 2022, Arnott's made a cost price increase request in respect of its sweet and savoury biscuit products,<sup>91</sup> encompassing about 75 products.<sup>92</sup> The Arnott's cost price increase carried the potential of a significant cost impact on Woolworths,<sup>93</sup> but the Tiny Teddy Sample Product was a relatively insignificant component of the overall pack group and proposed cost increase.<sup>94</sup> On 13 May 2022, the Tiny Teddy Sample Product was offered to consumers in Woolworths Supermarkets and Woolworths Online at a price of \$6.50 on a white ticket for 20 days.<sup>95</sup> During that period, 66,534 units were sold in total; that is, an average of around 3,327 units per day.<sup>96</sup> On 2 June 2022, the Tiny Teddy Sample Product was placed on the Prices Dropped program at the price of \$5.50.<sup>97</sup>

## **G.3 Essentials Pasta Penne Ribbed 500g (188800-EA)**

69 From 1 January 2021 to 15 February 2022, the Essentials Pasta Penne Ribbed 500g (188800-EA) (**Essentials Pasta Sample Product**) was offered and sold to consumers in Woolworths Supermarkets and Woolworths Online on a "Low Prices" ticket at a price of \$0.80.<sup>98</sup> In around September 2021, Woolworths Food Company (**WFC**) became aware of a likely increase in the price of Durum wheat caused by a failure in

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<sup>88</sup> MPL.0003.0027.6620 (CB Tab 194, p 4310); MPL.0003.0027.6621 (CB Tab 195, p 4311).

<sup>89</sup> SOAF, Annexure C, Row 11 (CB Tab 11, p 164).

<sup>90</sup> SOAF, Annexure C, Row 11, (CB Tab 11, p 164).

<sup>91</sup> Affidavit of Cormac Deery sworn 15 December 2025 (**Deery Affidavit**), [20] (CB Tab 21, p 516).

<sup>92</sup> MPL.0002.0002.6772 (CB Tab 224, p 4447); MPL.0002.0002.6773 (CB Tab 225, p 4458).

<sup>93</sup> Deery Affidavit, [21] (CB Tab 21, p 521).

<sup>94</sup> Deery Affidavit, [39]-[40] (CB Tab 21, p 526).

<sup>95</sup> MPL.0094.0001.0006 (CB Tab 281, p 4705); MPL.0095.0001.0009 (CB Tab 269, p 4677); MPL.0080.0001.2613 N (CB Tab 270, p 4692); MPL.0080.0001.2614\_N (CB Tab 271, p 4693) and MPL.0080.0001.2615 N (CB Tab 272, p 4694).

<sup>96</sup> SOAF, Annexure C, Row 11 (CB Tab 11, p 164).

<sup>97</sup> SOAF, Annexure C, Row 11 (CB Tab 11, p 164).

<sup>98</sup> SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

the Canadian crop (amongst other causes), which would likely impact the cost of pasta.<sup>99</sup> In order to secure supply, the relevant commodity manager at WFC combined with the category manager at Woolworths sought and obtained pre-approval for a cost price increase in an amount which entailed an average cost for durum wheat of [REDACTED]<sup>100</sup> On around 22 December 2021, the supplier for the Essentials Pasta Sample Product, Rinoldi, submitted a price change request in respect of three “Essentials” pasta products, including the Essentials Pasta Sample Product.<sup>101</sup> Rinoldi’s initial request proposed a 25.86% increase in the cost of the Essentials Pasta Sample Product.<sup>102</sup> Woolworths made enquiries of other pasta suppliers, however Rinoldi’s final proposed terms transpired to be the most favourable and were agreed.<sup>103</sup> The cost price increase relating to the Essentials Pasta Sample Product was to cost Woolworths [REDACTED] being around 10.5% of the financial impact of the cost price increase as a whole.<sup>104</sup>

70 Between 16 February 2022 and 13 March 2022, the Essentials Pasta Sample Product was offered to consumers at \$0.80 on a white ticket.<sup>105</sup> From 14 March 2022, the Essentials Pasta Sample Product was offered and sold to consumers in Woolworths Supermarkets and Woolworths Online on a white ticket at a price of \$1.00 for 45 days,<sup>106</sup> which was in line with PEP requirements for the product, given the IPI for the product was 4.2 weeks.<sup>107</sup> During that time, 185,388 units were sold in total, equivalent to an average of 4,120 per day.<sup>108</sup> Because the Essentials Pasta Sample Product was an Own Brand product, there were no supplier RRP, but the price of \$1.00 was selected to preserve a similar (though smaller) gross profit as that applying before the cost price increase.<sup>109</sup> Over the course of that time, while the price of Aldi’s competing pasta product moved from \$0.80 to \$0.99, Coles did not alter its price point for its competing

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<sup>99</sup> Affidavit of Carlo Ortolani sworn 21 November 2025 (**Ortolani Affidavit**), [19]-[23] (CB Tab 27, p 684-686); MPL.0057.0003.3670 (CB Tab 451, p 5814); MPL.0065.0002.0001 (CB Tab 450, p 5811).

<sup>100</sup> Ortolani Affidavit, [24]-[27] (CB Tab 27, p 686-687).

<sup>101</sup> Ortolani Affidavit, [28] (CB Tab 27, p 687).

<sup>102</sup> Ortolani Affidavit, [30] (CB Tab 27, p 687).

<sup>103</sup> Affidavit of Thomas Allen Rojas affirmed 21 November 2025 (**First Rojas Affidavit**), [31]-[32] (CB Tab 29, p 725-726).

<sup>104</sup> MPL.0069.0001.0001 (CB Tab 449, p 5804).

<sup>105</sup> SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

<sup>106</sup> SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

<sup>107</sup> 1050794.015.001.0020 (CB Tab 69, p 1043).

<sup>108</sup> SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

<sup>109</sup> First Rojas Affidavit, [23] (CB Tab 29, p 723).

pasta product.<sup>110</sup> For that reason, the Woolworths category manager decided to place the Essentials Pasta Sample Product on the Prices Dropped program on 28 April 2022 at the price of \$0.80.<sup>111</sup>

#### **G.4 Bragg Apple Cider Vinegar 946ml (476910-EA)**

71 From 1 January 2021 until 24 November 2021, Bragg Apple Cider Vinegar 946ml (476910-EA) (**Bragg Sample Product**) was offered and sold to consumers in Woolworths Supermarkets and on Woolworths Online at a white ticket price of \$12.95, subject to regular yellow ticket specials (i.e. sold on a “high-low” basis).<sup>112</sup> During this period, the promotion of the Bragg Sample Product on yellow ticket specials did not significantly increase sales volumes, because the product had a customer base whose purchases did not significantly fluctuate with price.<sup>113</sup> On 25 November 2021, Woolworths increased the white ticket price of the Bragg Sample Product to \$16.95.<sup>114</sup> Woolworths did so because two days earlier, the category manager responsible for the product learnt that both the supplier’s RRP and the market price was \$16.95, and in circumstances where the product had a loyal customer base and was not ranged in Coles supermarkets, it was rational to increase the price to that level.<sup>115</sup> At this price, the product had substantial sales of 12,253 units (which equates to roughly 299 units per day).<sup>116</sup>

72 Subsequently, in early December 2021, in response to a request for product nominations from his Merchandise Manager, the category manager nominated the Bragg Sample Product for inclusion on an upcoming seasonal Prices Dropped campaign.<sup>117</sup> The decision to do so was entirely unrelated to the category manager’s earlier decision to increase the price to \$16.95. On 5 January 2022, the Bragg Sample Product was placed on the Prices Dropped program at the price of \$16.00.<sup>118</sup> By the time this occurred, the product had been at the white ticket price of \$16.95 for almost 6 weeks, when the IPI

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<sup>110</sup> Affidavit of Thomas Allen Rojas affirmed 14 April 2026, [6]-[7] (SCB).

<sup>111</sup> SOAF, Annexure C, Row 66, (CB Tab 11, p 185); First Rojas Affidavit, [45] (CB Tab 29, p 729).

<sup>112</sup> SOAF, Annexure C, Row 13, (CB Tab 11, p 164-165); Affidavit of Ben Richard Jordan affirmed 3 December 2025 (**Jordan Affidavit**), [41(b)] (CB Tab 23, p 584).

<sup>113</sup> Jordan Affidavit, [41(c)] (CB Tab 23, p 584); MPL.0055.0008.2943 (CB Tab 286, p 4759).

<sup>114</sup> SOAF, Annexure C, Row 13, (CB Tab 11, p 165); Jordan Affidavit, [52] (CB Tab 23, p 586).

<sup>115</sup> Jordan Affidavit, [50]-[51] (CB Tab 23, p 585-586).

<sup>116</sup> SOAF, Annexure C, Row 13, (CB Tab 11, p 165).

<sup>117</sup> Jordan Affidavit, [60], [63] (CB Tab 23, p 588-589).

<sup>118</sup> SOAF, Annexure C, Row 13, (CB Tab 11, p 165); Jordan Affidavit, [68] (CB Tab 23, p 590).

applicable to the product was only 4.1 weeks.<sup>119</sup> On 30 March 2022, the price of the product reverted to \$16.95 on a white ticket upon the conclusion of the Prices Dropped on Healthier Products campaign.<sup>120</sup>

#### **G.5 Carman’s Muesli Bars FrNut Bars 12pk 540g (31158-EA)**

73 From 1 January 2021 to 24 March 2022, Carman’s Muesli Bars FrNut Bars 12pk 540g (31158-EA) (**Carman’s Sample Product**) was offered and sold to consumers in Woolworths Supermarkets and on Woolworths Online on the Prices Dropped program at the price of \$9.00.<sup>121</sup> In December 2021, Woolworths agreed with Carman’s a working framework for a “Joint Category Plan” in which together they would seek to achieve certain gross profit targets across the Carman’s range in Woolworths supermarkets.<sup>122</sup>

74 On 21 December 2021, Carman’s notified Woolworths of a cost price increase across the majority of its product range.<sup>123</sup> This included the Carman’s Sample Product, for which Carman’s also notified that it was increasing its RRP for the product from \$10.00 to \$11.00 and envisaged that the product would return to the Prices Dropped program “once a new base price established”.<sup>124</sup> The increase in RRP on the Carman’s Sample Product was broadly consistent with increases in RRP for Carman’s other products.<sup>125</sup> The financial impact of the cost price increase on Woolworths insofar as it concerned the Carman’s Sample Product family was 4.57% of the impact of the cost price increase as a whole.<sup>126</sup> After several months of negotiation, in March 2022 Woolworths approved cost price increases across the Carman’s range, including for the Carman’s Sample Product, to take effect from 25 March 2022.<sup>127</sup> On 25 March 2022, Woolworths increased the price of the Carman’s Sample Product to \$11.00 on a white ticket.<sup>128</sup> At

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<sup>119</sup> 1050794.015.001.0020 (CB Tab 69, p 1062).

<sup>120</sup> Jordan Affidavit, [69] (CB Tab 23, p 590).

<sup>121</sup> SOAF, Annexure C, Row 22 (CB Tab 11, p 167).

<sup>122</sup> Woodcock Affidavit, [53]-[54] (CB Tab 31, p 772); MPL.0003.0007.1509 (CB Tab 352, p 5207).

<sup>123</sup> Woodcock Affidavit, [64] (CB Tab 31, p 774); MPL.0002.0004.9104 (CB Tab 356, p 5215);

MPL.0002.0004.9105 (CB Tab 357, p 5217); MPL.0002.0004.9106 (CB Tab 358, p 5218).

<sup>124</sup> MPL.0002.0004.9106, Row 19 and note with two asterisks (CB Tab 358, p 5218).

<sup>125</sup> MPL.0002.0004.9106 (CB Tab 358, p 5218).

<sup>126</sup> Woodcock Affidavit [99] (CB Tab 31, p 784).

<sup>127</sup> Woodcock Affidavit, [100] (CB Tab 31, p 784).

<sup>128</sup> SOAF, Annexure C, Row 22, (CB Tab 11, p 167); Woodcock Affidavit, [102] (CB Tab 31, p 785).

this price, the product had substantial sales of 23,975 units (which equates to roughly 749 units per day).<sup>129</sup>

75 Subsequently, in April 2022, Woolworths reached agreement with Carman's on, and approved, a new promotional plan across its range.<sup>130</sup> On 26 April 2022, the Carman's Sample Product was placed on the Prices Dropped program at the price of \$10.00.<sup>131</sup> By this time, the Carman's Sample Product had been at the white ticket price of \$11.00 for about 4.5 weeks,<sup>132</sup> substantially longer than the IPI of 2.8 weeks that applied to this product.<sup>133</sup>

#### **G.6 Fab Laundry Powder Fresh Blossoms 2kg (657424-EA)**

76 From January 2021 to 8 March 2022, the Fab Laundry Powder Fresh Blossoms 2kg (657424-EA) (**Fab Sample Product**) was offered and sold to consumers in Woolworths Supermarkets and Woolworths Online on the Prices Dropped program at the price of \$7.00.<sup>134</sup> On 6 December 2021, Henkel (being the supplier of the Fab Sample Product) submitted a cost price increase request in respect of 38 products across various ranges within laundry liquid and powder. This included the Fab Sample Product. Henkel stated that the cost price increase request was “[i]n response to increases in raw materials and logistics costs.”<sup>135</sup> In the cost price increase request, Henkel proposed an increase in the RRP of the Fab Sample Product (and all other products the subject of the cost price increase request). Following a negotiation on the cost price increase request and related promotional plan, Woolworths took the Fab Sample Product off the Prices Dropped program and offered it on a white ticket at Henkel's RRP of \$14.00 during the relevant PEP, which ran from 9 March to 10 April 2022.<sup>136</sup> While the PEP was less than the IPI that applied for the product (being 7.3 weeks)<sup>137</sup> and the product was erroneously subject to two weekly specials in the PEP,<sup>138</sup> a total of 6,750 units of the Fab Sample Product were sold at the RRP of \$14.00 (which

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<sup>129</sup> SOAF, Annexure C, Row 22, (CB Tab 11, p 167).

<sup>130</sup> Woodcock Affidavit, [108]-[110] (CB Tab 31, p 787).

<sup>131</sup> SOAF, Annexure C, Row 22, (CB Tab 11, p 167); Woodcock Affidavit, [111] (CB Tab 31, p 787).

<sup>132</sup> SOAF, Annexure C, Row 22, (CB Tab 11, p 167).

<sup>133</sup> 1050794.015.001.0020 (CB Tab 69, p 1053).

<sup>134</sup> SOAF, Annexure C, Row 80, (CB Tab 11, p 195-196). See also Davies Affidavit, [16] (CB Tab 19, p 490).

<sup>135</sup> MPL.0018.0003.9135 (CB Tab 496, p 6050).

<sup>136</sup> Davies Affidavit, [18(a)] and [39] (CB Tab 19, p 490, 497).

<sup>137</sup> 1050794.015.001.0020 (CB Tab 69, p 1071).

<sup>138</sup> Davies Affidavit, [18(b)] and [41] (CB Tab 19, p 490, 497).

equates to approximately 355 units per day).<sup>139</sup> The Fab Sample Product was placed back on the Prices Dropped program on 11 April 2022, as a result of a funding agreement with Henkel. In August 2022, following an internal compliance review by Woolworths in respect of its internal guidelines governing the Prices Dropped program, the product was removed from the Prices Dropped program and sold at the RRP of \$14.00 for approximately 6 weeks (being the period from 9 August to 17 September 2022).<sup>140</sup>

#### **G.7 Kleenex Facial Tissue Xcare Aloe vera 95pk (79502-EA)**

77 From 2 May 2022 to 5 February 2023, the Facial Tissue Xcare Aloe vera 95pk (79502-EA) (**Kleenex Sample Product**) was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online on the Prices Dropped program at the price of \$2.20.<sup>141</sup> On 7 November 2022, Kimberly Clark Australia (**KCA**) (being the supplier of the Kleenex Sample Product), submitted a cost price increase request in respect of its Kleenex Facial Tissue and Vivia Paper Towel ranges (totalling 27 products), noting *“the business [was] no longer able to offset accelerated increases in input costs.”*<sup>142</sup> Following a negotiation between Woolworths and KCA in respect of the cost price increase request and its associated promotional plan, the Kleenex Sample Product was removed from the Prices Dropped program on 6 February 2023 and offered at the price of \$3.00 using a white ticket until 19 March 2023,<sup>143</sup> being a period greater than the product’s IPI of 5.0 weeks.<sup>144</sup> At the white ticket price of \$3.00 (which was lower than KCA’s RRP of \$3.30),<sup>145</sup> a total of 234,050 units of the Kleenex Sample Product were sold (which equates to approximately 5,573 units per day).<sup>146</sup> On 20 March 2023, the Kleenex Sample Product was placed back on the Prices Dropped program at the price of \$2.60, with KCA contributing funding for this price reduction.<sup>147</sup>

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<sup>139</sup> SOAF, Annexure C, Row 80, (CB Tab 11, p 194).

<sup>140</sup> Davies Affidavit, [47]-[53] (CB Tab 19, p 499-500).

<sup>141</sup> SOAF, Annexure C, Row 98, (CB Tab 11, p 203). See also Moffatt Affidavit, [66(a)] (CB Tab 25, p 646).

<sup>142</sup> Moffatt Affidavit, [68] (CB Tab 25, p 646-647); MPL.0050.0006.2414 (CB Tab 532, p 6222).

<sup>143</sup> SOAF, Annexure C, Row 98, (CB Tab 11, p 203). See also Moffatt Affidavit, [66(b)] (CB Tab 25, p 646).

<sup>144</sup> 1050794.015.001.0020 (CB Tab 69, p 1087).

<sup>145</sup> Moffatt Affidavit, [74] (CB Tab 25, p 649). See also 105794.010.001.0011 at .0013 (CB Tab 56, p 967).

<sup>146</sup> SOAF, Annexure C, Row 98, (CB Tab 11, p 203).

<sup>147</sup> SOAF, Annexure C, Row 98, (CB Tab 11, p 203). See also Moffatt Affidavit, [66(c)], [69(b)] and [78] (CB Tab 25, p 646-648, 650) and MPL.0002.0003.3281 (CB Tab 539, p 6270).

## **G.8 Lucky Dog Bones Original 800g (433643-EA)**

78 From 1 January 2021 until 6 March 2022, Lucky Dog Bones Original 800g (433643-EA) (**Lucky Dog Sample Product**) was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online on the Prices Dropped program with a price of \$4.50.<sup>148</sup> On 13 December 2021, Nestle Purina (being the supplier of the Lucky Dog Sample Product), submitted a cost price increase request for 113 products across a wide variety of pet food ranges, including the Lucky Dog Sample Product.<sup>149</sup> Ultimately, the total net impact of this cost price increase request totalled approximately \$ [REDACTED] (or a 10.5% increase in Woolworths' cost price for the 113 products).<sup>150</sup> Following a negotiation between Woolworths and Nestle Purina in respect of the cost price increase request and its associated promotional plan, the Lucky Dog Sample Product was removed from the Prices Dropped program and sold on a white ticket at Nestle Purina's RRP of \$6.50 from 7 March to 4 April 2022, in accordance with Woolworths' PEP requirements for the product, given the IPI for the product was 3.6 weeks.<sup>151</sup> At the RRP of \$6.50, a total of 47,690 units of the Lucky Dog Sample Product were sold (being approximately 1,644 units per day).<sup>152</sup> On 5 April 2022, the Lucky Dog Sample Product was placed on the Prices Dropped program at the price of \$6.00, with Nestle Purina's agreement to provide funding for the placement of the product on the program.<sup>153</sup>

## **G.9 Nestle Cerelac Rice 4m 200g (379228-EA)**

79 From 17 February 2022 to 7 March 2023, Nestle Cerelac Rice 4m 200g (379228-EA) (**Cerelac Sample Product**) was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online at the white ticket shelf price of \$5.00, subject to regular yellow ticket specials (i.e. sold on a "high-low" basis).<sup>154</sup> On 12 December 2022, Nestle (being the supplier of the Cerelac Sample Product), submitted a cost price

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<sup>148</sup> SOAF, Annexure C, Row 108, (CB Tab 11, p 204). See also McCaig Affidavit, [17(a)] (CB Tab 24, p 600).

<sup>149</sup> McCaig Affidavit, [20] to [22] (CB Tab 24, p 601); MPL.0008.0010.1831 (CB Tab 544, p 6305) and MPL.0008.0010.1832 (CB Tab 545, p 6307).

<sup>150</sup> MPL.0008.0009.4348 (SCB).

<sup>151</sup> SOAF, Annexure C, Row 108, (CB Tab 11, p 205); McCaig Affidavit, [17(b)], [17(c)] and [36] (CB Tab 24, p 600, p 606-607); 1050794.015.001.0020 (CB Tab 69, p 1061).

<sup>152</sup> SOAF, Annexure C, Row 108 (CB Tab 11, p 204).

<sup>153</sup> SOAF, Annexure C, Row 108 (CB Tab 11, p 205). See also McCaig Affidavit, [17], [66(b)], [67] and [82] (CB Tab 24, p 600, 617, 621); MPL.0002.0005.1738 (CB Tab 581, p 6558) and MPL.0002.0005.1739 (see native file).

<sup>154</sup> SOAF, Annexure C, Row 168, (CB Tab 11, p 233-234). See also Robinson Affidavit, [27] (CB Tab 28, p 704).

increase request in respect of the Cerelac Sample Product, and three other products within the same price family, citing “*ongoing increases in our input costs.*”<sup>155</sup> Ultimately, the financial impact of the cost price increase request totalled approximately [REDACTED] (or a 28.9% increase in Woolworths costs for the relevant Nestle products in the Cerelac Sample Product’s price family).<sup>156</sup> Following a negotiation between Woolworths and Nestle in respect of the cost price increase request as a whole (including the associated promotional plan for the Nestle products), the Cerelac Sample Product was sold at Nestle’s RRP of \$6.50 from 8 March to 29 March 2023, in accordance with Woolworths’ PEP requirements for the product, given the IPI for the product was 1.0 weeks.<sup>157</sup> The evidence from the Category Manager responsible for the product is that he regarded the \$6.50 price of the product as the genuine shelf price, being the amount at which Woolworths would likely have sold the Cerelac Sample Product in the absence of securing funding to place the product on the Prices Dropped program.<sup>158</sup> At the shelf price of \$6.50, a total of 7,624 units of the Cerelac Sample Product were sold, equating to approximately 347 units per day.<sup>159</sup> On 30 March 2023, the Cerelac Sample Product was placed on the Prices Dropped program at the price of \$6.00, following Nestle’s agreement to provide funding for the placement of the product on the program.<sup>160</sup>

#### **G.10 Oreo Family Pack Original 370g (73032-EA)**

80 From 1 January 2021 to 27 November 2022, Oreo Family Pack Original 370g (73032-EA) (**Oreo Sample Product**) was offered to consumers at Woolworths Supermarkets and Woolworths Online on the Prices Dropped program, at the price of \$3.50.<sup>161</sup> On 2 September 2022, Mondelez, the supplier, submitted a cost price increase request in respect of 11 Oreo products in the Biscuit category, increasing the list price by between 20% - 25% for each of those products,<sup>162</sup> and proposing an increase to the deferred

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<sup>155</sup> Robinson Affidavit, [28] and [29] (CB Tab 28, p 705); MPL.0019.0006.4650 (CB Tab 597, p 6647); MPL.0019.0006.4651 (CB Tab 598, p 6648).

<sup>156</sup> See MPL.0002.0004.0295 (CB Tab 608, p 6710).

<sup>157</sup> SOAF, Annexure C, Row 168, (CB Tab 11, p 234); Robinson Affidavit, [57], [60] and [62(a)] (CB Tab 28, p 713, 714, 715); 1050794.015.001.0020 (CB Tab 69, p 1060).

<sup>158</sup> Robinson Affidavit, [63] (CB Tab 28, p 715).

<sup>159</sup> SOAF, Annexure C, Row 168, (CB Tab 11, p 234).

<sup>160</sup> SOAF, Annexure C, Row 168, (CB Tab 11, p 234). See also Robinson Affidavit, [53(b)] and [62(b)] (CB Tab 28, p 712, 715); MPL.0002.0009.7464 (CB Tab 607, p 6699).

<sup>161</sup> SOAF, Annexure C, Row 188, (CB Tab 11, p 245).

<sup>162</sup> MPL.0002.0002.5457 (CB Tab 619, p 6753).

deal.<sup>163</sup> On 28 November 2022, the Oreo Sample Product was offered for sale to consumers at Woolworths Supermarkets and Woolworths Online at a price of \$5.00 on a white ticket for 22 days, in line with the PEP requirements for the product, given the IPI for the product was just 2.9 weeks.<sup>164</sup> During that time, 44,486 units were sold in total (that is, an average of 2,022 per day).<sup>165</sup> On 20 December 2022, the Oreo Sample Product was placed on the Prices Dropped program at the price of \$4.50.<sup>166</sup>

### **G.11 Sakata Rice Cracker Plain 100g (41814-EA)**

81 From 1 January 2021 to 27 July 2022, Sakata Rice Cracker Plain 100g (41814-EA) (**Sakata Sample Product**) was sold on the Prices Dropped program at the price of \$2.00, save for short term specials.<sup>167</sup> On 2 May 2022, the relevant supplier, Smith's, sent a cost price increase request to Woolworths in respect of 29 of Smith's chips and biscuits products.<sup>168</sup> Following negotiations, the first cost price for the Sakata Sample Product was increased by [REDACTED].<sup>169</sup> On 28 July 2022, the Sakata Sample Product was removed from the Prices Dropped program and placed on a white ticket with a price of \$2.75 for 35 days,<sup>170</sup> excluding one day, on 22 August 2022, when the Sakata Sample Product was erroneously placed on the Prices Dropped program. This was quickly reversed on 23 August 2022.<sup>171</sup> During the PEP, 198,605 units were sold (that is, an average of 5,674 per day).<sup>172</sup> The white ticket price of \$2.75 was the supplier's RRP.<sup>173</sup> The duration of the PEP complied with the relevant guidelines, given the IPI was 2.7 weeks.<sup>174</sup> The Sakata Sample Product was placed on the Prices Dropped program on 1 September 2022 at the price of \$2.30.<sup>175</sup>

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<sup>163</sup> MPL.0095.0001.0004 (see native file); Second O'Leary Affidavit, [74] (CB Tab 26, p 673).

<sup>164</sup> 1050794.015.001.0020 (CB Tab 69, p 1080).

<sup>165</sup> SOAF, Annexure C, Row 188 (CB Tab 11, p 245).

<sup>166</sup> SOAF, Annexure C, Row 188 (CB Tab 11, p 245).

<sup>167</sup> SOAF, Annexure C, Row 209 (CB Tab 11, p 252-253).

<sup>168</sup> MPL.0003.0029.9147 (CB Tab 644, p 6839).

<sup>169</sup> Deery Affidavit, [69] (CB Tab 21, p 535).

<sup>170</sup> SOAF, Annexure C, Row 209 (CB Tab 11, p 253).

<sup>171</sup> MPL.0071.0001.2805 (CB Tab 697, p 7182); Second O'Leary Affidavit, [84] (CB Tab 26, p 676).

<sup>172</sup> SOAF, Annexure C, Row 209 (CB Tab 11, p 253).

<sup>173</sup> MPL.0003.0029.9147 (CB Tab 644, p 6840).

<sup>174</sup> 1050794.015.001.0020 (CB Tab 69, p 1061).

<sup>175</sup> SOAF, Annexure C, Row 209 (CB Tab 11, p 253).

## **G.12 Stayfree Pad Ultra-Thin Wing Night 10pk (44861-EA)**

82 From 1 January 2021 until 15 March 2022, the Stayfree Pad Ultra-Thin Wing Night 10pk (44861-EA) (**Stayfree Sample Product**) was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online at the white ticket price of \$4.50, subject to regular yellow ticket specials (i.e. sold on a “high-low” basis).<sup>176</sup> On 6 December 2021, Johnson and Johnson (**J&J**) submitted a cost price increase request in respect of the Stayfree Sample Product (and 19 other products).<sup>177</sup> Following a negotiation between Woolworths and J&J in respect of the cost price increase request as a whole, between 16 March and 3 April 2022, the Stayfree Sample Product was offered for sale at J&J’s RRP of \$5.30 using a white ticket.<sup>178</sup> While this PEP was less than the IPI for the Stayfree Sample Product of 4.4 weeks,<sup>179</sup> at the white ticket price of \$5.30, 7,453 units of the Stayfree Sample Product were sold (equating to approximately 392 units per day).<sup>180</sup> On 4 April 2022, the Stayfree Sample Product was placed on the Prices Dropped program at the price of \$4.80, with J&J contributing funding for this price reduction.<sup>181</sup> While a system error prevented the change from a white ticket to the Prices Dropped Ticket on 4 April 2022, when that error was corrected, the Prices Dropped Ticket accurately stated “*Was \$5.30 03/04/2022*”.<sup>182</sup>

## **H Conclusion**

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83 The ACCC’s case will fail because the alleged representation was not conveyed. The Prices Dropped Tickets were clear and unambiguous. They accurately conveyed that the price of the relevant product was reduced from a previously higher price, and included the date at which that higher price was charged. They made no implied representation as to the duration for which that earlier “was” price was charged.

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<sup>176</sup> SOAF, Annexure C, Row 233 (CB Tab 11, p 273-274). See also Moffatt Affidavit, [17(a)] (CB Tab 25, p 631).

<sup>177</sup> Moffatt Affidavit, [19], [22]-[23] (CB Tab 25, p 632, 633); MPL.0021.0007.7602 (CB Tab 708, p 7309); MPL.0021.0007.7603 (CB Tab 709, p 7311); MPL.0021.0007.7604 (CB Tab 710, p 7312).

<sup>178</sup> SOAF, Annexure C, Row 233, (CB Tab 11, p 274). See also Moffatt Affidavit, [17(b)] and [17(c)] (CB Tab 25, p 631).

<sup>179</sup> 1050794.015.001.0020 (CB Tab 69, p 1062).

<sup>180</sup> SOAF, Annexure C, Row 233 (CB Tab 11, p 274).

<sup>181</sup> SOAF, Annexure C, Row 233 (CB Tab 11, p 274). See also Moffatt Affidavit, [17(c)] and [48]-[49] (CB Tab 25, p 631, 641-642); MPL.0002.0003.3836 (CB Tab 730, p 7425) and MPL.0002.0003.3837 (CB Tab 731, p 7427).

<sup>182</sup> MPL.0050.0007.4677 (CB Tab 740, p 7467). See also Moffatt Affidavit, [17(d)], [50]-[65] (CB Tab 25, p 632, 642-646).

Moreover, in each case, the “was” price was a genuine price — usually the supplier’s RRP — and a price at which substantial volumes were sold over a period of weeks. That being so, if the representation alleged by the ACCC was made, it was not false or misleading. The proceedings should be dismissed.

Robert Yezerki

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