

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 974 of 2024

Australian Competition and Consumer Commission

Applicant

and

Woolworths Group Limited (ACN 000 014 675)

Respondent

APPLICANT'S CLOSING SUBMISSIONS

Note: In these submissions, the following short-hand referencing system has been used: “**AOS, [x]**” (Applicant’s Written Opening Submissions, [para.]), “**ROS, [x]**” (Respondent’s Written Opening Submissions, [para.]); “**CB/SCB-x at y**” (Confidential Court Book / Supplementary Court Book - [first page] at [pin point]); “**JBA #x**” (Joint Bundle of Authorities, # [tab]); “**T.xx.P-yy:aa-zz**” (Transcript.[day].P-[page]:[line(s)]).

A. INTRODUCTION

1. These closing submissions are intended to supplement the ACCC's written opening submissions dated 25 March 2026.
2. **Annexure A** contains an updated version of MFI-A, handed up during the ACCC's oral opening. **Annexure B** contains Sample Product narratives for each of the 12 Sample Products.

B. THE REPRESENTATION CONVEYED BY PRICES DROPPED TICKETS

3. The ACCC's primary position is that at least some ordinary reasonable consumers would have understood Prices Dropped Tickets as representing that the relevant product's Prices Dropped price was:

a genuine reduction to, or discount from, the product's previous regular price (the **Prices Dropped Representation**).¹
4. Consumers would understand that Prices Dropped promotions were concerned with reductions in the regular price of a product. Woolworths' established promotional behaviour (using white, yellow, and red and white tickets) was consistent with the shelf price (which is displayed on a white ticket and red and white ticket) being a stable price. The gist of the representation is that there was a reduction or drop from one stable price to a new lower stable price. This is what the ACCC sought to capture by use of the expression a "reasonable period of time".²
5. The ACCC submits, as it did in opening oral submissions,³ that it would be open to the Court to find that the representation made by the Prices Dropped ticket did not include the idea of the "was" price being "regular" or having been in place for a "reasonable period of time". If that was the conclusion reached by the Court, the Court could then determine whether that alternative representation was true on the evidence before it. The focus of the inquiry would be on whether the reduction or discount was genuine.
6. It would also be open to find that both forms of representation would have been conveyed to meaningful segments of the large body of consumers who would have been recipients of the representations.⁴
7. The ACCC submits that a substantial number of the ordinary, reasonable consumers who would have seen the Prices Dropped Ticket during the Relevant Period would have expected the prices to conform to the pricing messages which Woolworths intended to establish and which would have been observed by most individuals who shopped with any frequency at Woolworths. The evidence as to Woolworths' pricing messages is addressed in paragraphs 24 to 41 below.

¹ Concise Statement at [12] (CB10).

² See AOS at [8].

³ T.6:44 to T.7:11; T.8:27 to T.9:5; T.16:40 to T.7:5 (ACCC Opening).

⁴ See T.15:26-46 (ACCC Opening).

8. Woolworths submits that the “high inflation environment” which prevailed during the Relevant Period was such that the hypothetical consumer would not have had “any unreasonable sense of optimism as to price stability” and would be “expecting prices to rise”.⁵ The effect of Woolworths’ evidence as to inflation on the representation made is addressed in paragraphs 43 to 47 below. The evidence does not establish that consumers would have had a different understanding of Prices Dropped Ticket during the Relevant Period as compared with the representation that would have been conveyed during the preceding low inflation period.

C. RELEVANT AUTHORITIES

9. The relevant general principles have been addressed in Section B of the AOS. The ACCC makes the following additional points in closing.
10. **First**, the manner by which a representation may be proved to be false does not control the content or meaning of the representation. The falsity of a representation concerning the quality of a product (or, in this case, discount) may be falsified by reference to specific features of which the consumer would not necessarily have been conscious or aware.⁶
11. **Second**, there is no authority for the proposition that a discount will be a “genuine discount” if it is a discount from a “genuine price”. The term “genuine price” does not appear in *Ascot Four*,⁷ *Prouds*,⁸ *Kogan*,⁹ or in any other ‘Was/Now’ cases which have been identified by the ACCC.
12. “Genuine” is a value-laden term; to describe a price as “genuine” necessitates a consideration of what that term is intended to convey in this context. Is a price “genuine” if the goods are offered for sale for a period of time at that price and some transactions occur? If the supplier did not regard the price as profit-maximising or competitive, but necessary in order to establish a higher “was” price for a pre-planned “drop”, and held the product at the price for the minimum time in accordance with an internal rule, in what sense is the price still “genuine”? A discount or reduction that is said to exist by reference to a price that was not thought to be competitive, not thought to be profit-maximising, and set in advance for the purpose of being a “was” price is not a genuine discount or reduction. In that (relevant) sense, the “was” price is not “genuine”; but that highlights that the framing of the question has the risk of error. The question is about the truthfulness of a representation about a discount or reduction.

⁵ T.43:12-15 (Woolworths Opening).

⁶ *Australian Competition and Consumer Commission v Heinz Company Australia Ltd (Heinz)* [2018] FCA 360, at [88], cited in *Owners – Strata Plan No 87231 v 3A Composites GmbH (No 10)* [2026] FCA 351, at [1639] (Anderson J).

⁷ *Australian Competition and Consumer Commission v Ascot Four Pty Ltd* [2008] FCA 1295; (2008) 250 ALR 467 (*Ascot Four*) (JBA #1).

⁸ *ACCC v Prouds Jewellers Pty Ltd* [2008] FCA 75; (2008) 75 IPR 306 (*Prouds*) (JBA #6).

⁹ *ACCC v Kogan Australia Pty Ltd* [2020] FCA 1004; (2020) 145 ACSR 609 (*Kogan*) (JBA #5).

13. **Third**, the submission by Woolworths that the ACCC’s use of the concept of a “reasonable period” seeks to read *Kogan* “out of context”¹⁰ is incorrect. In *Kogan*, the representations alleged by the ACCC were that:

- “(a) if consumers purchased products during the Tax Time Promotion and used the code “TAXTIME” at checkout, they would receive a 10% discount off the price at which these products were available for sale for a reasonable period before the Tax Time Promotion (**10% Discount Representation**); and
- (b) consumers had a limited opportunity, if they purchased products during the Tax Time Promotion and used the code “TAXTIME” at checkout, to receive a 10% discount off the price at which these products would be available for sale for a reasonable period after the Tax Time Promotion (**Limited Time Discount Representation**)”

[emphasis added].¹¹

14. The representations were found to have been proved in the terms pleaded. From [71] onwards, Davies J explains her reasoning for finding that “the ordinary and reasonable members of the relevant class would have understood the promotional statements to convey the representations alleged”. At [81]-[85], her Honour addresses (and rejects) submissions made on behalf of *Kogan* against the temporal aspect of the representation. Her Honour’s summary of the ACCC’s explanation of the “reasonable period” aspect of the representation in *Kogan* reflects how the ACCC says a consumer would understand the Prices Dropped representation, with a qualification. The qualification is that her Honour noted in *Kogan* that the reduction or discount was from the price “before *and after* the promotion”; in the supermarket context, that reflects the nature of the representation conveyed by a yellow ticket, but the Prices Dropped Representation is backwards looking.

15. **Fifth**, there are some other limited cases that support the proposition that dual pricing tickets are likely to convey to consumers something about the temporal quality of the “was” price. The ACCC’s reliance on these authorities goes no higher than that to say they suggest the attribution of such a reasoning process to consumers would not be extreme or fanciful.

16. In *Trade Practices Commissioner v Cue Design Pty Ltd (Cue)*,¹² the gravamen of each count was that the defendants had used dual-priced swing tags to promote certain clothing products, with the higher price struck out in a manner that would have led a reasonable person to believe that the garment had been offered for sale at the higher price marked on the tag and was not being offered for sale at the lower price.¹³ O’Loughlin J was not required to decide whether the tickets also conveyed a representation about how *long* the higher price had been in place in that case,¹⁴

¹⁰ T.35:40-44 (Woolworths Opening).

¹¹ *Kogan* (JBA #5) at [3], [100] (Davies J).

¹² (1996) ATPR 41-475, Fed Ct (O’Loughlin J).

¹³ *Cue* (1996) ATPR 41-475 at 41,831 to 41,832.

¹⁴ The respondents having pled guilty in circumstances where the garments had not been sold at the higher price *at all*.

but his Honour observed, in the context of considering the respondents' evidence as to its motives for the conduct:

If Ms Rolle truthfully stated that it did not occur to her that members of the buying public would infer from the two prices that the garments had been on sale at the higher prices for any substantial period of time then she is either very naïve or recklessly indifferent to the perceptions of the buying public [emphasis added].¹⁵

17. This passage was cited by Simmonds J in *Walker, Commissioner for Fair Trading v Rugs a Million Pty Ltd (Rugs a Million)*¹⁶ in the context of considering whether there was a serious question to be tried as to the false, misleading or deceptive character of the dual price tickets in that case. His Honour concluded that “a prospective purchaser would, it seems to me, take it from the tickets that the products had been on sale at the higher price for a ‘substantial period of time’” and that there was thus a “strong case” that the ordinary or reasonable consumer would read the dual price tickets in that way.¹⁷ In referring to *Cue*, Simmonds J noted:

While it was only necessary in *Cue* to determine that a prospective purchaser would understand the higher price had been applicable at some previous time, I consider the quoted language to express his Honour's view of the prospective purchaser's understanding of the ticket in that case. That is an understanding that would apply all the more, it seems to me, in this case, as to tickets bearing the heading, for the lower price, of “sale price”.¹⁸

18. **Sixth**, each case will turn on its facts as to both the content of the representation and whether that representation is false.
19. In *Ascot Four*, that the respondent had not sold any products at “anywhere near the strike through price”¹⁹ before the relevant promotion *at all* was the beginning and end of the matter. The Court did not consider any other factor, and no party suggested any other considerations were relevant in determining that the representation was false.
20. In *Kogan*, the respondent pointed to sales volumes in support of its argument that what it had offered was a “real discount” but Davies J held that she “did not find that evidence probative in relation to the 621 affected products, because there was no dispute that Kogan increased the prices

¹⁵ *Cue* 1996) ATPR 41-475 at 41,834.

¹⁶ [2006] WASC 127 (Simmonds J).

¹⁷ *Rugs a Million* [2006] WASC 127 at [43], [48] (Simmonds J). For completeness, it is noted that Simmonds J rejected an argument that the tickets “carried also the meanings that the higher price on the ticket was the usual price, and the lower price on the ticket was a limited time price”: [47]-[48]. However, it is submitted that those conclusions turn on the particular arguments raised therein and that, in any event, the representation relied upon by the ACCC (i.e. of a previous regular price referring to a price at which the product was ordinarily offered for sale “for a reasonable period”) is in line with the meaning which Simmonds J *did* find would likely be given to dual pricing tickets by consumers (even in the absence of any of the other features of the present case, such as the presence of the statement “PRICES DROPPED” and a history of previous grocery price stability).

¹⁸ *Rugs a Million* [2006] WASC 127 at [43] (Simmonds J).

¹⁹ *Ascot Four* (JBA #1) at [114] (Moore J).

of those products on the day before the Tax Time Promotion commenced and decreased the prices of those products on 2 July 2018 after the Tax Time Promotion finished”.²⁰

21. In *Prouds*, sales volumes were considered because:
 - (a) the ACCC alleged a representation to the effect that “there had been a substantial volume of sales, before the sale period” of relevant items at the “was” price (referred to as the “Substantial Volume of Sales Price Representation”); and
 - (b) of Prouds’ argument, “central” to its defence in respect of all alleged representations, that consumers in the context of jewellery sales would have understood the “was” price identified in catalogues as only the price at which products were offered for sale, and not the price at which products were actually sold.²¹
22. The Full Court did not approach the matter differently.²²
23. **Seventh**, the circumstances of the present supermarket discount cases are different to those in earlier authorities in at least three important ways:
 - (a) the representations in other authorities were of a kind more akin to yellow price tickets in supermarkets. The Prices Dropped representation is of a different character;
 - (b) the relevant products in *Ascot Four*, *Prouds*, and *Kogan*, were relatively high-value discretionary items ordinarily purchased on an occasional basis and not household grocery products often purchased regularly as part of a consumer’s everyday life. Both *Ascot Four* and *Prouds* concerned jewellery items promoted via catalogues — in *Ascot Four*, at “was” prices of \$150 to \$5,350 and discounted prices of \$75 to \$2,650 dollars;²³ and, in *Prouds*, at “was” prices of \$59 to \$999 and discounted prices of \$34.50 to \$599.²⁴ The conduct in *Kogan* concerned 621 (at least primarily) electronic products, including iPads, smart phones, and AirPods;²⁵
 - (c) the facts of those earlier cases indicate that the pricing of jewellery and electronic goods of the kind there in question operated differently to the pricing of packaged groceries. In the jewellery context, it was not unusual for there to be very few (if any) sales of a given product in one week, or for actual sales to be made at prices that were lower (sometimes, substantially) than the listed price.²⁶ The markets for both jewellery and electronics were

²⁰ *Kogan* (JBA #5) at [97] (Davies J).

²¹ *Prouds* (JBA #6) at [7], [20] (Moore J).

²² See *Australian Competition and Consumer Commission v Prouds Jewellers Pty Ltd* [2008] FCAFC 199 (**Prouds Full Court**) (JBA #7) at [36], [46] (Black CJ, Ryan and Gordon JJ).

²³ *Ascot Four* (JBA #1) at [2], [12]-[13], [16], [22], [28], [34], [40], [46], [52], [58], [63], [69], [75] (Mansfield J).

²⁴ *Prouds* (JBA #6) at [1], [3]-[4], Schedules 2 and 3 (p. 331) (Moore J).

²⁵ *Kogan* (JBA #5) at [1]-[4], [57], [59]-[60] (Davies J).

²⁶ See also T.03.P-184:14-19 (Harker Re-XN),

also highly competitive — marked by substantial price variability and frequent discounts;²⁷ and

- (d) in none of those previous cases was the Court asked to consider a situation in which a national retailer of household staples had, over a period of years, established a consistent, pervasive, and highly visible system of colour coded price signals, intended to communicate different messages about value to consumers at a glance.²⁸

D. CONSUMER EXPERIENCE OF GROCERY PRICES FROM 2015 TO 2023

D.1 Woolworths' established pricing messages

- 24. Ordinary reasonable consumers would not expect market prices for packaged grocery products to behave in the same way as market prices for fresh fruit and vegetables or meat. The availability, and therefore prices, of strawberries and bananas might fluctuate depending on factors such as seasonality, bad weather, or blight. The same does not apply to a jar of Vegemite or a packet of dishwashing tablets. This is reflected in the distinction Woolworths draws between “fresh” and “non-fresh” products.²⁹
- 25. Many ordinary reasonable consumers would observe and understand from their experiences of shopping at Woolworths that there are at least two consistent and readily observable patterns in its pricing of packaged goods:
 - (a) there are short-term promotional prices that change relatively frequently, and generally last only for a week or so (yellow ticket Specials); and
 - (b) there are otherwise shelf prices that don't change as frequently, and that tend to stick around for quite a bit longer (white and red ticket prices) — in other words, a product's ‘regular’ price.
- 26. The distinction between these two pricing patterns is something which has existed since at least the introduction of the Prices Dropped Program in around 2015.³⁰
- 27. Woolworths intended consumers to distinguish between different kinds of promotions — with yellow ticket discounts typically involving a deeper discount for a much shorter period, and red ticket programs intended to be “a way for customers to easily identify the value offered by the

²⁷ See *Ascot Four* (JBA #1) at [17]-[19], [23]-[26] (Mansfield J); *Prouds* (JBA #6) at [6] (Moore J); *Kogan* (JBA #5) at [29] (Davies J).

²⁸ Cf. *Harker* at [13]-[15], [20]-22], [26], [50], [54] (CB545).

²⁹ See, e.g., T.02.P-104:9-34 (*Harker XXN*); MPL.0001.0005.0030: “*Commodities products such as meat, fruit and vegetables, which are particularly susceptible to cost price increases, have increased risk of not being able to kept sustained prices...*” (CB1109 at 1112); and the following presentations where data is stated to exclude “*Produce*” / “*Meat, Fruit, Vegetables*”: MPL.0001.0008.0287 (CB1133 at 1141); MPL.0002.0001.0559 (CB2599 at 2644-2646); MPL.0001.0008.0006 (CB2895 at 2931-2933).

³⁰ See SOAF at [25], [31] (CB100 at 105-106).

product”,³¹ and to “highlight” to them that “something has either happened or a commitment is being made around the white ticket shelf price”.³²

28. When a product goes on to Prices Dropped, the Prices Dropped price becomes “the new, standard ‘shelf price’”³³ — with Prices Dropped Tickets being intended call attention to the white ticket price having been reduced from what was its previous white ticket price.³⁴ Whenever a product on a Prices Dropped promotion was placed on a short-term Special involving a “Save” claim, Woolworths’ internal policies provided that the saving advertised must be based off the product’s Prices Dropped price.³⁵
29. Prices Dropped promotions were also distinguished from Low Price promotions, with each intended to convey to consumers a different value message.³⁶ Mr Harker described the comparison between the “dropped” price and the “was” price on Prices Dropped Tickets as a “principal feature” of the Prices Dropped Program.³⁷ There was evidence that at least some suppliers regarded this aspect of the ticket as making Prices Dropped promotions more attractive than Low Price promotions.³⁸
30. When a product was placed onto the Prices Dropped program in-store:
 - (a) its old white ticket was removed and replaced with a new white ticket showing its new Price Dropped price; and
 - (b) a red Prices Dropped Ticket containing the “Was” price (which was the old white ticket price), and the Prices Dropped price, was then placed over or alongside a new white ticket (which contained the same price as the new Prices Dropped price).³⁹
31. Most consumers would understand that Specials are temporary. The power of their marketing message is: “Buy now, before prices go back up”. While a product is on Special, yellow tickets will typically call out the value of the discount on offer by comparing it to the regular price of the product which was in place before the Special began and which, it is implied, will return when the Special is over (e.g. “**1/2 Price \$3.25 Was \$6.50 Save \$3.25**”).⁴⁰

³¹ Harker at [20] (CB545). See also more generally Harker at [13]-[15], [20]-[22], [26], [50], [54] (CB545); SOAF at [31] (CB100 at 106).

³² T.115:34-36 (Harker XXN).

³³ 1050794.001.001.0030 [3.4] (CB799 at 800). In cross-examination, Mr Harker referred to programs such as Prices Dropped as “shelf price reduced campaign[s]”: see T.112:15-30 (Harker XXN).

³⁴ T.116:22-26 (Harker XXN). See also T.113:21-27 (Harker XXN); Harker at [20(b)] (CB545).

³⁵ MPL.0001.0005.0030: “If a ‘save’ claim is made, this must only be by reference to the current “Price Dropped’ price” (CB1109 at 1118); MPL.0001.0005.0063 at [3.6(c)(i)] (CB 2811 at 2815); MPL.0001.0005.0066 at [3.6(c)(i)] (CB2958 at 2962); T.285:42-286:5.

³⁶ Harker at [20] (CB545).

³⁷ Harker at [22] (CB545).

³⁸ T.297:21-35 (McCaig XXN).

³⁹ See AOS at [97]-[98].

⁴⁰ 1050794.0001.0001.0041 (CB p. 810).

32. The point of the Prices Dropped ticket is that the old shelf price has been replaced with a new lower shelf price, and the power of the message depends upon consumers understanding that shelf prices are not transitory. The attraction of the Prices Dropped program to consumers was that “they would not have to wait for a product to go on sale to obtain a low price and could [instead] consistently access lower shelf prices”.⁴¹ That gives meaning to the message of genuine reduction and also to the proposition that this is not a short-term special.
33. The evidence supports the proposition that this would be consistent with consumer experience that white ticket shelf prices (including new lower white ticket shelf prices highlighted by Prices Dropped Tickets) are stable.
34. *First*, with the exception of the P2 period, the price histories of all 266 Affected Products the subject of this proceeding are marked by substantial price stability throughout the Relevant Period. The median duration of the P1 period in each case was 426 days, with the shortest period being 182 days.⁴² The products also typically *returned* to price stability following their temporary price increase to P2.
35. Of the 276 Particularised Promotions identified in Annexure B to the SOAF:
- (a) 41 (~15%) involved P3 periods which lasted for at least 300 days or longer, with a median period of 360 days and a range of 302 to 430 days;⁴³
 - (b) 102 (~37%) involved P3 periods which lasted for at least around 6 to 10 months, with a median period of 241 days and a range of 193 to 288 days;⁴⁴
 - (c) 83 (~30%) involved P3 periods which lasted for at least around 3 to 6 months, with a median period of 144 days and a range of 98 to 175 days;⁴⁵
 - (d) 36 (~13%) involved P3 periods which lasted between at least around 46 days and 3 months, with a median period of 72 days and a range of 46 to 84 days;⁴⁶ and
 - (e) only 14 (~5%) involved a P3 period of 45 days or fewer, with a median period of 36 days and a range of 16 to 43 days.⁴⁷

⁴¹ Harker at [41] (CB545). See also at Harker at [15], [24], [47(e)] (CB545); Woodcock at [75(d)] (CB758); 1050794.001.001.0032 at Item 8: “*The Prices Dropped program provides a sustained drop from the standard shelf price of a product*” (CB794 at 797).

⁴² See AOS at [11], [121].

⁴³ SOAF, Annexure B at rows 8, 9, 11, 12, 22-25, 29, 32-36, 54, 55, 112-114, 162, 164, 166, 187, 201-208, 222-225, 271-276 (CB100 at 118-158).

⁴⁴ SOAF, Annexure B at rows 2-4, 6, 37-39, 42, 46-50, 52, 53, 56, 58-65, 69-72, 83-91, 102, 108-111, 125, 127, 129, 131, 133, 134, 136-138, 141-143, 159-161, 176-186, 190, 193, 196-200, 209-221, 239, 241-252, 265 (CB100 at 118-158).

⁴⁵ SOAF, Annexure B at rows 7, 10, 14-21, 26, 27, 30, 31, 40, 41, 43-45, 51, 57, 73-82, 92, 93, 96, 104-107, 139, 140, 144-150, 172-175, 188, 191, 192, 194, 195, 226-230, 233-238, 240, 253-259, 261-264, 267, 268-270 (CB100 at 118-158).

⁴⁶ SOAF, Annexure B at rows 1, 5, 13, 28, 66-68, 97-101, 103, 115-124, 153-158, 163, 165, 167, 231, 232, 260, 266 (CB100 at 118-158).

⁴⁷ SOAF, Annexure B at rows 94, 95, 126, 128, 130, 132, 135, 151, 152, 168-171, 189 (CB100 at 118-158).

36. The above figures likely understate the duration of the relevant P3 periods, given:
- (a) almost half remained in place on the final day of the period addressed in the SOAF (4 May 2023), and so may have continued after this time — including 8 of the 14 instances of a P3 period shorter than 45 days;⁴⁸ and
 - (b) an additional 16 Particularised Promotions involved instances where the ACCC agreed to cut off a P3 period early on the basis that the data produced by Woolworths indicated that only limited sales for the relevant product continued after a particular date.⁴⁹
37. **Second**, the evidence of Woolworths’ witnesses was that, prior to the “inflationary period”, Woolworths was operating in (to use the words of Mr Deery) a “very stable... period on pricing”.⁵⁰ Mr Harker’s evidence, similarly, was that prices changed “rarely” prior to the inflationary period.⁵¹ In its response to a s 155 notice, Woolworths admitted that at least prior to November 2021 “prices of products on the Prices Dropped Program were generally stable”.⁵²
38. **Third**, the evidence of Mr Harker, Woolworths Supermarkets’ Chief Commercial Officer, was that (at least prior to the Relevant Period) promotions and pricing was typically negotiated and agreed “6 months out for planning purposes”.⁵³ That prices are planned well in advance is consistent with the evidence relating to the Sample Products, which in almost all cases involved suppliers submitting deal sheets covering a 52 week period.
39. **Fourth**, as noted above, the point of the Prices Dropped Program was to “lower the shelf prices offered to consumers”, with the benefit that they “would not have to wait for a product to go on sale to obtain a lower price and could consistently access lower shelf prices”.⁵⁴ This message of consistency was repeated across Woolworths’ material.⁵⁵ The stability of Prices Dropped prices was specifically designed to sit in contrast to “high-low” promotional cycles.⁵⁶
40. **Fifth**, this stability would have been reinforced in the years leading up to the Relevant Period by Woolworths’ Prices Dropped Policies. The policies are discussed at AOS, [102] to [120]. The effect before the change implemented at the beginning of 2022 was that price establishment periods were 8 to 12 weeks and if a product was on Prices Dropped then it would be rested for a minimum of six months before going back on Prices Dropped. The stability and integrity of the

⁴⁸ SOAF, Annexure B at rows 94, 95, 151, 152, 168-171 (CB100 at 118-158).

⁴⁹ SOAF, Annexure B at rows 1, 5, 30, 31, 43-45, 57, 60, 92, 133, 141, 229, 230, 258, 260 (CB100 at 118-158).

⁵⁰ T.04.P-253:19-21 (Deery XXN).

⁵¹ T.127:11-12 (Harker XXN).

⁵² 1050794.003.001.0004 at .0006 (CB883 at 885).

⁵³ Harker at [30(a)] (CB545).

⁵⁴ Harker at [41] (CB545).

⁵⁵ 1050794.001.001.0030 (CB 799 at 800); 1050794.003.001.0004 (CB 883 at 883); MPL.0001.0005.0066 (CB 2958 at 2961); MPL.0001.0005.0063 (CB2811 at 2814); MPL.0002.0022.0969 (CB Tab 163/audio-visual recording, see MFI-D (Joint List of Unresolved Objections), at Schedule B, Item 163, [01:32:37] to [01:34:29]). See also SOAF at [25] (CB100 at 105).

⁵⁶ Harker at [40] (CB545). See also SOAF at [25] (CB100 at 105); 1050794.001.001.0023 (CB794 at 797); 1050794.003.001.0004 (CB883 at 883); T.281:27-33.

prices shown on white tickets and on Prices Dropped Tickets would have been protected by these policies.

41. One additional point should be made about the price establishment periods and resting periods. Mr Harker gave evidence that the reason that the periods of time for an establishment period and rest period were set in the 2020 Guidance was predominantly directed at preventing gaming by suppliers.⁵⁷ In support of this evidence, he said in cross-examination that he could recall a discussion that had occurred in around March 2020 at which he was one of the two people who needed to agree with the guidelines.⁵⁸ That assertion of a discussion and agreement by him does not appear in his affidavit and does not appear to be consistent with the evidence he gave at [39], [42], [43], or the opening words of [47(e)] of his affidavit. It is sufficient to say that: (a) the contemporaneous documents put into evidence by Woolworths do not record any purpose of preventing “gaming” as motivation for the time periods chosen in the 2020 guidelines; (b) nor do the later contemporaneous documents put into evidence by Woolworths support the proposition that a reduction in concern about “gaming” explained the change in time periods that came into effect in the 2022 guidelines; and (c) Mr Harker’s evidence as to what he could recall is not sufficiently persuasive to displace the conclusion that would be reached on the documents.

D.2 Evidence as to inflation

42. Woolworths’ evidence as to inflation does not affect the representation made.
43. The evidence adduced by Woolworths in this proceeding suggests that at least some ordinary reasonable consumers were likely to have noticed that the price of a basket of groceries was becoming more expensive during the Relevant Period than had been the case in the past. That proposition has limited relevance; it is difficult to see how it could inform how consumers would understand the Prices Dropped message.
44. While the compounded effect of inflation over a period of years would have been felt by many ordinary reasonable consumers, the limited available evidence indicates that what was being experienced was largely a gradual, sustained, increase in prices over time, not a drastic shift likely to prompt a change in how consumers understood messages about reductions in prices.⁵⁹
45. The evidence of inflation does not seem capable of affecting what representation was conveyed to consumers because it does not establish: (a) some change in consumer perceptions of the stability of grocery prices during the Relevant Period, and (b) the likelihood that that this change in perceptions of stability would inform how ordinary reasonable consumers understood a message of “Prices Dropped”.

⁵⁷ Harker at [47(e)] (CB545).

⁵⁸ T.127:1 to T.128:38. See also T122:42 to T124:40.

⁵⁹ See, for example, MPL.0002.0020.0497 (CB3758 at 3763). Note that it is the figures in the ‘ASP’ column which are most relevant, as the lines in the graphs on this page again compare the position against the previous year, or the 3 year ‘Compound Annual Growth Rate’, rather than changes on a month-to-month basis.

46. Nor does the evidence of inflation prove the truth of the Prices Dropped message (though this is addressed further below).
47. Rather, what the evidence as to macroeconomic conditions suggests is that a marketing program that depended upon conveying a message to consumers that prices were *reducing* might have been commercially unsuited to a period when costs were *rising* in circumstances where Woolworths was also intent on passing on cost increases to consumers and maintaining its profit margin. The criticism of Woolworths is not for deciding to pass on cost increases or maintaining its profit; the criticism is misleading consumers as to what was happening to the prices they were paying for products.

E. THE REPRESENTATIONS MADE BY WOOLWORTHS WERE MISLEADING

48. The ACCC's case is that the representations made by Woolworths to consumers via Prices Dropped Tickets were false, misleading, or deceptive because:
 - (a) in all cases, the relevant product was not offered for sale at P2 for a sufficient period to be an appropriate benchmark price having regard to the nature of the Prices Dropped promotion; and
 - (b) in the case of all but three Sample Products, P2 was not a price set on the basis of being a long-term shelf price but rather a price set with the intention that it would be a "was" price for a later Prices Dropped ticket. The three exceptions are the Bragg, Essentials, and Kleenex Sample Products (but, in respect of the Kleenex Sample Product, only if relevant evidence of Mr Moffatt is accepted — see paragraphs 55 to 56 below).
49. The ACCC's case with respect to the duration of the P2 period is addressed in detail at AOS, [167] to [194].
50. The ACCC submits that a representation that the price of a product has reduced is rendered false or misleading in circumstances in which the product had been offered at a price higher than the "dropped" price for only weeks before the "dropped price" and offered at a price that was the same or lower than the "dropped" price for many months or years before that short increase. The ACCC makes the following additional points with respect to Step 4 of the *Self Care* analysis.
51. **First**, the prices consumers were paying for the Sample Products had *not* been reduced. In the case of all except the Essentials Pasta Sample Product, consumers were paying between 7% to 33% more for each product than they had weeks earlier. In the case of the Essentials Pasta Sample Product, the price of the product remained precisely the same as what it had been for over a year beforehand — save for a brief period of 45 days where it was offered for sale at \$1.00.

52. **Second**, for all but the three products identified above:
- (a) the evidence demonstrates it was always intended by Woolworths that the product would be sold on Prices Dropped on an ongoing basis (subject to any changes that might be necessitated by unforeseen circumstances);⁶⁰
 - (b) there is no evidence from Woolworths that the price set at P2 were based on a consideration of the factors identified by Mr Harker in paragraph [12(b)] of his affidavit and addressed further below at paragraph 54 of these submissions;
 - (c) there is no evidence from Woolworths that the products were sold for the period of the P2 price for any reason other than to comply with the price establishment rules in Woolworths' Prices Dropped Policies⁶¹ — and the products were sold at P2, in the case of most (if not all) Sample Products, for the minimum period permitted by the Prices Dropped Policies, or shorter;⁶²
 - (d) it follows that there is no evidence from Woolworths that the P2 price or period were akin to the usual white ticket prices that it used for other products; and
 - (e) the evidence from Woolworths' witnesses on these nine products⁶³ is in contrast to the evidence from Mr Moffatt in relation to the Kleenex Sample Product as to what he considered an appropriate approach to take, in accordance with his usual practice, if he was setting a white ticket price (see paragraphs 55 to 58 below).
53. It follows that there was no “genuine discount” from P2 to P3 in the case of all except the Bragg and Essentials (and, potentially, Kleenex) Sample Products because:
- (a) P3 was always the price at which Woolworths intended the product to be sold on an ongoing basis; and
 - (b) P2 was intended to be a temporary price: a “was” price set in advance to be used on the Prices Dropped ticket.
54. Mr Harker's evidence was that, when ordinarily setting the retail prices of products, Category Managers were expected to:
- (a) decide the retail price for themselves (rather than merely following a supplier's RRP);⁶⁴

⁶⁰ See the facts and evidence outlined in the Sample Product Narratives at **Annexure B** to these submissions in respect of the Tim Tam, Tiny Teddy, Carman's, Fab, Kleenex, Lucky Dog, Nestle, Oreo, Sakata, and Stayfree Sample Products.

⁶¹ See the facts and evidence outlined in the Sample Product Narratives at **Annexure B** to these submissions in respect of the Tim Tam, Tiny Teddy, Carman's, Fab, Kleenex, Lucky Dog, Nestle, Oreo, Sakata, and Stayfree Sample Products.

⁶² See AOS, [108]-[111], [117]-[120], [142]-[148], Annexure A.

⁶³ See T.190:29-41; T.193:25 to T.194:4 (Woodcock XXN); T.229:24 to T.230:40 (O'Leary XXN); T258:15-17; T259:45 to T.260:5 T.267:23 to T.268:45; T.272:4-30 (Deery XXN); T.283.11to T.284:12 (McCaig XXN); T.314:31 to T.315:9; T.316.29-35; T.320:36-38 (Davies XXN).

⁶⁴ Harker at [12(a)], [12(b)] (**CB545**); T.107:29-42.

- (b) have regard to a range of matters, such as “nature of the product (including its past sales performance), annual sales and profitability targets for their category, the supplier’s RRP and competitors’ pricing”;⁶⁵
 - (c) seek to set prices that were competitive on a “weighted basket” basis;⁶⁶
 - (d) have regard to “the portfolio of products in the category or sub-category” and the “price hierarchy” (i.e. “good”, “better” and “best”);⁶⁷ and
 - (e) if setting a price for a “sustained period of time”, set a price that would be both competitive in the market and profitable for Woolworths.⁶⁸
55. Mr Moffatt’s evidence in cross-examination as to what would have been his usual practice for setting white ticket prices and his belief that he applied the usual practice in arriving at a price of \$3 for the Kleenex Sample Product distinguishes that product from most of the other Sample Products.⁶⁹
56. Given an RRP of \$3.30 by the supplier of the Kleenex Sample Product, Mr Moffatt nonetheless chose to set the P2 price at \$3.00 due to concerns that the RRP was over-inflated.⁷⁰ In an email to the supplier, Mr Moffatt specifically stated, “I do not believe showing a save of 70c is a fair representation to our Customers”.⁷¹ Similar concerns were raised about the fairness to consumers of a proposed Prices Dropped promotion for another range of products, “Kleenex 200s Everyday”.⁷² Mr Moffatt’s evidence was to the effect that, while he did not have a specific memory of modelling the impacts of selling the Kleenex Sample Product at \$3.00 on an ongoing basis, he expects he would have done so as he “would never rely on the modelling of a supplier” and would instead have created his own modelling, as he did “with every CPI or promotional change”.⁷³ Although he conceded that he was not aware of any documents setting out his modelling or reasons for making the decision,⁷⁴ Mr Moffatt stated that he had an actual recollection of deciding to set the white ticket price lower than the supplier’s RRP “to better represent the value of the product and the appropriate price point at which Woolworths would sell the product if it was not on the Prices Dropped Program or any promotion”.⁷⁵
57. In contrast, for example, the evidence of Mr Deery was that Woolworths would not have done any modelling on sales at P2 on an ongoing basis for either the Tiny Teddy or the Sakata Sample

⁶⁵ Harker at [12(b)] (CB545); T.107:44 to T.108:18. See also T.132:5-18.

⁶⁶ Harker at [12(c)] (CB545); see T.108:20 – T.109:13.

⁶⁷ T.108:6-13; T.152:19-21; T.164:9-20; Harker at [12(d)] (CB545); see T.109:15-20.

⁶⁸ T.164:9-20.

⁶⁹ T.336:45 to T.337:23; T.338:26-36; T.339:40-46; T.340:16-30; T.341:35-39 (Moffatt XXN).

⁷⁰ Moffatt at [73]-[75] (CB627).

⁷¹ Moffatt at [72]-[73] (CB627); MPL.0002.0003.3290 (CB6257 at 6260).

⁷² MPL.0002.0003.3290 (CB6257 at 6260-6261).

⁷³ T.337:1-4; T.341:35-39 (Moffatt XXN). See also at T.336:45 to T.337:23; T.338:26-36.

⁷⁴ T.337:8-10; T.340:32-33.

⁷⁵ Moffatt at [75] (CB627); T.340:16-30. See also T.339:40-46.

Product,⁷⁶ and that he had no recollection of having had any discussions with Ms Pipan about the appropriateness of selling the Tiny Teddy Sample Product at \$6.50.⁷⁷ Mr McCaig’s evidence was that it was unlikely he would have done any other modelling for the Lucky Dog Sample Product other than for sales at P3.⁷⁸ The evidence of Mr Davies was that he did not regard the application of a price establishment period as “being likely to be consequential to the overall evaluation of the commercials of the deal”,⁷⁹ that he thought the price for the Fab Sample Product “would be competitive when it was at \$8 on Prices Dropped”,⁸⁰ and that it was “highly unlikely” that he “would have ever sold the product for \$14 for a 52-week period of time”.⁸¹

58. Mr Moffatt’s evidence as to what would be his usual practice is not disputed. However, the ACCC submits that the Court could not be satisfied in this case that he followed his usual practice in arriving at a price of \$3 for the Kleenex Sample Product, given that Woolworths has not tendered any of the modelling that Mr Moffatt’s evidence indicates would have existed if his usual practice had been followed, Mr Moffatt has himself acknowledged that he is not aware of any documents which would confirm his oral evidence,⁸² and his affidavit did not address the matters he asserted in cross-examination.
59. *Third*, the general inflation evidence adduced by Woolworths does not affect whether it is true that the price at which Woolworths is offering a particular product to consumers has fallen.
60. *Fourth*, while receipt of a CPI Request from the supplier was, for most of the sample products, the *impetus* for Woolworths’ changing the price of the product, that does not affect whether the representation that the price of the product has fallen is true.
61. The fact that Woolworths’ costs have increased does not have the logical consequence of making true the representation to consumers that the price that consumers are being charged has fallen.
62. In addition, it could not even be said that what had occurred was that the P3 price paid by consumers had been increased from the P1 price by the amount of a cost increase that Woolworths was paying to the relevant supplier. Rather, the price increase was far greater because Woolworths had at least maintained and in many cases increased its profit margin on the product.

Michael Hodge, Sarida McLeod, and Finian Cullity

Counsel for the ACCC

29 April 2026

⁷⁶ T.259:45 to T.260:1; T.270:25-35 (Deery XXN).

⁷⁷ T.258:15-17 (Deery XXN).

⁷⁸ T.283:11-26 (Davies XXN).

⁷⁹ Davies 1 at [31] (**CB486**). See also Moffatt [36] (**CB627**); T.334:37 to T.335:2 (Moffatt XXN).

⁸⁰ T.315:1-2 (Davies XXN).

⁸¹ T.315:4-9 (Davies XXN).

⁸² See T.337:8-10; T.340:32-33 (Moffatt XXN).

ANNEXURE A - OVERVIEW OF SAMPLE PRODUCT COST AND RETAIL PRICE CHANGES⁸³

#	Sample Product	P1				P2				P3			
		NCP	RP	GP: \$	GP: %	NCP	RP	GP: \$	GP: %	NCP	RP	GP: \$	GP: %
1	Tim Tam (84628)		\$ 4.50			\$ 6.00				\$ 5.50			
2	Tiny Teddy (641537)		\$ 5.00			\$ 6.50				\$ 5.50			
3	Bragg (476910)		\$12.95			\$16.95				\$16.00			
4	Carman's (31158)		\$ 9.00			\$11.00				\$10.00			
5	Essentials (188800)		\$ 0.80			\$ 1.00				\$ 0.80			
6	Fab (657424)		\$ 7.00			\$14.00				\$ 8.00			
7	Kleenex (79502)		\$ 2.20			\$ 3.00				\$ 2.60			
8	Lucky Dog (433643)		\$ 4.50			\$ 6.50				\$ 6.00			
9	Nestle (3792278) ⁸⁴		\$ 5.00			\$ 6.50				\$ 6.00			
10	Oreo (73032)		\$ 3.50			\$ 5.00				\$ 4.50			
11	Sakata (41814)		\$ 2.00			\$ 2.75				\$ 2.30			
12	Stayfree (44861) ⁸⁵		\$ 4.50			\$ 5.30				\$ 4.80			

⁸³ 'NCP' = Net Cost Price (inclusive of rebates and deferred deals); 'RP' = Retail Price; 'GP' = Gross Profit Margin (calculated as RP – NCP).

⁸⁴ Figures relating to the Nestle Sample Product in this aide memoire are exclusive of GST.

⁸⁵ Figures relating to the Stayfree Sample Product in this aide memoire are exclusive of GST.

#	Sample Product	P2 vs P1				P3 vs P1			
		NCP Δ	RP Δ	GP Δ: \$	GP Δ: %	NCP Δ	RP Δ	GP Δ: \$	GP Δ: %
1	Tim Tam (84628)		\$ 1.50			\$ 1.00			
2	Tiny Teddy (641537)		\$ 1.50			\$ 0.50			
3	Bragg (476910)		\$ 4.00			\$ 3.05			
4	Carman's (31158)		\$ 2.00			\$ 1.00			
5	Essentials (188800)		\$ 0.20			\$ -			
6	Fab (657424)		\$ 7.00			\$ 1.00			
7	Kleenex (79502)		\$ 0.80			\$ 0.40			
8	Lucky Dog (433643)		\$ 2.00			\$ 1.50			
9	Nestle (3792278)		\$ 1.50			\$ 1.00			
10	Oreo (73032)		\$ 1.50			\$ 1.00			
11	Sakata (41814)		\$ 0.75			\$ 0.30			
12	Stayfree (44861)		\$ 0.80			\$ 0.30			

#	Sample Product	Cost vs GP Margin: P2 vs P1				Cost vs GP Margin: P3 vs P1					
		RP Δ	Cost: \$	Cost: %	GP: \$	GP: %	RP Δ	Cost: \$	Cost: %	GP: \$	GP: %
1	Tim Tam (84628)	\$ 1.50					\$ 1.00				
2	Tiny Teddy (641537)	\$ 1.50					\$ 0.50				
3	Bragg (476910)	\$ 4.00					\$ 3.05				
4	Carman's (31158)	\$ 2.00					\$ 1.00				
5	Essentials (188800)	\$ 0.20					\$ -				
6	Fab (657424)	\$ 7.00					\$ 1.00				
7	Kleenex (79502)	\$ 0.80					\$ 0.40				
8	Lucky Dog (433643)	\$ 2.00					\$ 1.50				
9	Nestle (3792278)	\$ 1.50					\$ 1.00				
10	Oreo (73032)	\$ 1.50					\$ 1.00				
11	Sakata (41814)	\$ 0.75					\$ 0.30				
12	Stayfree (44861)	\$ 0.80					\$ 0.30				

EVIDENCE REFERENCES**Tim Tam Sample Product (84628)**

SOAF, Annexure B, at row 10 (**CB p. 120**); O'Leary Affidavit, at [16], [34]-[35], [42], [47]-[48], [55]-[56], [60]-[61] (**CB pp. 657, 661, 663, 666, 668-669**); MPL.0003.0027.6069 (**CB p. 4363**); MPL.0003.0027.6071 (**CB Tab 207, native file**); MPL.0128.0001.0001 (**SCB Tab 756, native file**).

Tiny Teddy Sample Product (641537)

SOAF, Annexure B, at row 11 (**CB p. 120**); Deery Affidavit, at [27]-[34], [38]-[49], [52]-[54] (**CB pp. 522-531**); MPL.0002.0002.6310 (**CB Tab 236, native file**); MPL.0094.0001.0002 (**CB Tab 257, native file**); MPL.0094.0001.0001 (**CB Tab 285, native file**).

Bragg Sample Product (476910)

SOAF, Annexure B, at row 13 (**CB p. 120**); Jordan Affidavit, at [50]-[51], [63], [65] (**CB pp. 585, 588-589**); MPL.0055.0011.0788 (**CB p. 4871**); MPL.0055.0011.0789 (**CB p. 4873**); MPL.0055.0011.0809 (**CB p. 4874-4877**); MPL.0055.0011.3663 (**CB p. 4786**).

Carman's Sample Product (31158)

SOAF, Annexure B, at row 22 (**CB p. 121**); Woodcock Affidavit, at [65]-[66], [75], [100]-[102], [105]-[106], [110] (**CB pp. 774-777, 784-787**); MPL.0002.0004.9106 (**CB p. 5218**); MPL.0002.0004.8609 (**CB p. 5259**); MPL.0002.0016.5763 (**CB p. 5757**).

Essentials Sample Product (188800)

SOAF, Annexure B, at row 66 (**CB p. 127**); First Rojas Affidavit, at [31]-[32] (**CB pp. 725-726**); MPL.0069.0001.0001 (**CB p. 5808**).

Fab Sample Product (657424)

SOAF, Annexure B, at row 80 (**CB p. 130**); First Davies Affidavit, at [21], [27]-[28], [36] (**CB pp. 491, 493-494, 496**); MPL.0018.0003.9135 (**CB p. 6051**); MPL.0015.0006.3192 (**CB Tab 506, native file**); MPL.0081.0001.0382 (**CB p. 6167**).

Kleenex Sample Product (79502)

SOAF, Annexure B, at row 98 (**CB p. 133**); Moffatt Affidavit, at [68]-[70], [74], [76]-[77], [82] (**CB pp. 646-651**); MPL.0021.0015.4521 (**CB Tab 536, native file**); MPL.0081.0001.0461 (**CB p. 6296**).

Lucky Dog Sample Product (433643)

SOAF, Annexure B, row 108 (**CB p. 134**); McCaig Affidavit, at [20]-[23], [65]-[69], [76], [81] (**CB pp. 601-602, 616-621**); MPL.0008.0010.1832 (**CB p. 6309**); MPL.0002.0005.1739, at “DD Change Assortments – 02.03” Tab (**CB Tab 582, native file**); MPL.0002.0005.1727, at “DD Change Assortments – 02.03” Tab (**CB Tab 587, native file**); MPL.0002.0005.1713 (**CB Tab 589, native file**).

Nestle Sample Product (379228)

SOAF, Annexure B, at row 168 (**CB p. 142**); Robinson Affidavit, at [29]-[34], [40]-[42], [52]-[54], [58]-[59] (**CB pp. 705-706, 708-709, 712-714**); MPL.0002.0009.7464 (**CB Tab 607, native file**); MPL.0002.0009.7179 (**CB Tab 611, native file**).

Oreo Sample Product (73032)

SOAF, Annexure B, row 188 (**CB p. 142**); First O’Leary Affidavit, at [71], [74], [76] (**CB pp. 671, 673, 675**); MPL.003.0027.4586 (**CB p. 6759**); MPL.0062.0001.0013, at “Plans – sims” Tab (**CB Tab 622, native file**); MPL.0002.0002.5293 (**CB p. 6795**); MPL.0095.0001.0004 (**CB Tab 631, native file**).

Sakata Sample Product (41814)

SOAF, Annexure B, at row 209 (**CB p. 147**); Deery Affidavit, at [60]-[64], [88]-[90] (**CB pp. 532-533, 541-542**); First O’Leary Affidavit, [84]-[86] (**CB pp. 676-677**); MPL.0003.0029.9147 (**CB p. 6839**); MPL.0002.0002.6126 (**CB Tab 647, native file**); MPL.0002.0002.6575 (**CB p. 7031**); MPL.0002.0002.6576 (**CB Tab 680, native file**); MPL.0002.0002.6571 (**CB p. 7054**); MPL.0002.0002.5478 (**CB pp. 7189-7190**).

Stayfree Sample Product (44861)

SOAF, Annexure B, at row 233 (**CB p. 151**); Moffatt Affidavit, at [20]-[23], [26]-[27], [38], [43]-[49], [52] (**CB pp. 632-635, 638, 640-642**);

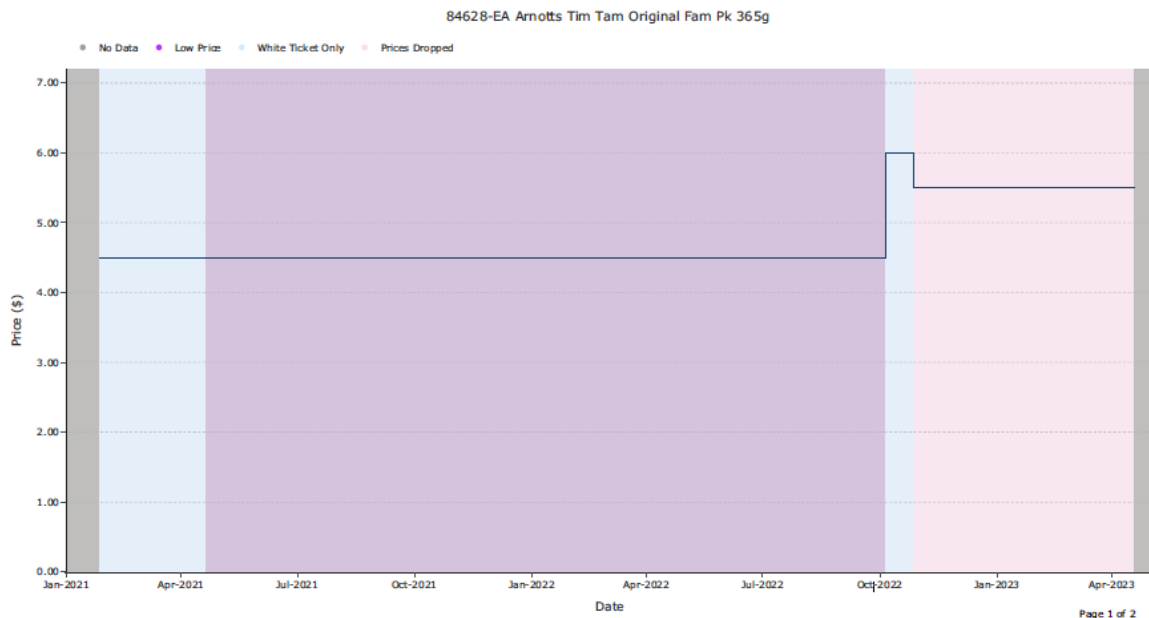
MPL.0021.0007.7604 (**CB p. 7316**); MPL.0081.0001.0198 (**CB p. 7413**); MPL.0002.0003.3837 (**CB p. 7432**); MPL.0002.0014.3286, at “Proposed Promo Plan” Tab, rows 35 to 44 (**CB Tab 721, native file**).

ANNEXURE B - SAMPLE PRODUCT NARRATIVES

TIM TAM'S SAMPLE PRODUCT (84628)

Arnotts Tim Tam Original Fam Pk 365g

27 JANUARY 2021 TO 18 APRIL 2023 (~2 YEARS, 3 MONTHS)¹



What consumers saw

1. For 617 consecutive days, consumers shopping at Woolworths in-store and online would have seen the Tim Tam Sample Product offered for sale at a price of \$4.50 (**P1**). For around the first 3 months (from 27 January 2021 to 20 April 2021) the \$4.50 was identified as a white ticket price. Then, for the rest of that period (from 21 April 2021 to 5 October 2022), the \$4.50 was promoted to consumers on a red ticket as a “Low Price”.²
2. On 6 October 2022, Woolworths increased the price of the Tim Tam Sample Product by 33% and began offering it for sale at a white ticket price of \$6.00 (**P2**). That price stayed on shelves (and online) for 21 days.³
3. Then, on 27 October 2022, Woolworths “dropped” the price of the product to \$5.50 (**P3**) and started promoting it to consumers using a red Prices Dropped Ticket, showing a discount from a ‘Was’ price of \$6.00.⁴

¹ Graph extracted from Wright Report, Annexure F1 (CB354 at 422).

² SOAF, Annexure C, at row 10 (CB100 at 164).

³ Ibid; AOS, Annexure A, row 1.

⁴ SOAF at [32]-[35], Annexure A, Annexure C, row 10 (CB100 at 106, 109, 113, 164); AOS at [97].

4. Woolworths’ “discounted” Prices Dropped price of \$5.50 was \$1.00 higher than the price that consumers had been paying for the same product just three weeks ago — an effective price rise of 22%.⁵
5. Woolworths continued promoting the Tim Tam Sample product at a Prices Dropped price of \$5.50 for 174 consecutive days, until 18 April 2023.⁶

Events sitting behind the price changes

6. On 13 July 2022, Woolworths received a CPI request from Arnott’s. In respect of the Tim Tam Sample Product, Arnott’s proposal was that:
 - (a) the net cost price to Woolworths would be increased from \$█ to \$█; and
 - (b) the product would be sold on:
 - (i) “Shelf”, at a price of \$6.00 for 4 weeks – with estimate sales volumes of 35,000 per week and a gross profit to Woolworths of █%; and
 - (ii) “Promo Level 1”, at an “RRP / Unit (inc GST)” of \$5.50, for 48 weeks — with estimated sales volumes of 55,000 units per week and a gross profit to Woolworths of █%.⁷
7. Mr O’Leary’s evidence was that this suggested Arnott’s was proposing a Prices Dropped price of \$5.50 for 48 weeks, following “a price establishment period at the Shelf price of \$6.00 on a white ticket for 4 weeks”.⁸
8. Mr O’Leary gave evidence that the Arnott’s proposal didn’t make much sense because, on a grammage basis, it would have required Woolworths to pay more for the larger Tim Tam’s pack than the smaller Tim Tam’s pack. Arnott’s reason for this was to enable it to invest more in promotions of the smaller Tim Tam pack (i.e. a different product). Woolworths attempted to address this issue in the negotiations, but never obtained “parity”.⁹
9. Negotiations between Woolworths and Arnott’s continued until, at the latest, 3 October 2022.¹⁰ During the course of those negotiations, on 23 September 2022, Ms Pipan, the Category Manager, wrote to Arnott’s and said, among other things:

Some other points to ensure we are aligned on are... We need to ensure, post an RRP increase, that we are allowing time for the new price to be established to ensure we

⁵ AOS, Annexure A, row 1.

⁶ SOAF, Annexure C, at row 10 (CB100 at 164).

⁷ O’Leary at [14]-[16] (CB654); MPL.0003.0028.9581 (CB4224); MPL.0003.0028.9582 (CB Tab 174/.xlsx).

⁸ O’Leary at [17] (CB654).

⁹ T.224:5-41 (O’Leary XXN).

¹⁰ O’Leary at [29]-[61] (CB654).

are not misleading customers. A minimum period of 3 weeks baseline is needed to meet this.¹¹

10. At some point between 30 September 2022 and 3 October 2022, Woolworths accepted the proposal which was set out in deal sheets sent by Arnott's to Woolworths on 30 September 2022.¹² In respect of the Tim Tam Sample Product, those deal sheets recorded the net cost price to Woolworths would be increased from \$█ to \$█ (reflecting a deferred deal of █%). The plan to sell the product at a "Standard Shelf" price of \$6.00 for 4 weeks, followed by a Prices Dropped price of \$5.50 (inc. GST) for the rest of the year, remained unchanged.¹³
11. Throughout the negotiations concerning Arnott's CPI request and the promotional plan for the Tim Tam Sample Product, which lasted almost 3 months:
 - (a) at no point did either party put forward a proposal which involved the Tim Tam Sample Product being sold at something other than a Prices Dropped Price at \$5.50 after a four week establishment period for the \$6.00 price¹⁴ — with negotiations instead focusing on the cost impact on Woolworths and its margin;
 - (b) the initial sale of the Tim Tam Sample Product at \$6.00 for a period of time before placing it on Prices Dropped at \$5.50 was only discussed in the context of complying with Woolworths' internal price establishment requirements, and not as something which relevant individuals at Arnott's and Woolworths otherwise wished to occur for any other reason, or about which those individuals had any independent views.¹⁵
12. Further, during his cross-examination, Mr O'Leary's evidence was that:
 - (a) he did not recall forming a view, or having any discussions with the Category Manager (Ms Pipan) as to whether she had formed a view, as to whether \$6.00 or \$5.50 was a competitive price for the Tim Tam Sample Product;¹⁶ and
 - (b) he did not recall any discussion with Ms Pipan (the Category Manager) as to whether she had assessed the competitiveness of the product at a \$6.00 price.
13. As noted above, the price of the Tim Tam Sample Product was increased to \$6.00 on 6 October 2022 before being "dropped" to \$5.50 and promoted using red Prices Dropped Tickets.
14. Later in 2023, Woolworths ultimately reduced the price of the product to \$5.00 and placed it on the EDLP program, after Mr O'Leary identified ALDI was selling it for that price.¹⁷

¹¹ O'Leary at [50]-[51] (CB654); MPL.0003.0002.7208 (CB4341).

¹² O'Leary at [55]-[61] (CB654); MPL.0003.0027.6069 (CB4363); MPL.0003.0027.6070 (CB4364); MPL.0003.0027.6071 (CB Tab 207/.xlsx).

¹³ O'Leary at [55], see also [47] (CB654); [MPL.0003.0027.6071] (CB4371).

¹⁴ T.228:12 to T.229:3 (O'Leary XXN).

¹⁵ T.228:39 to T.229:3 (O'Leary XXN).

¹⁶ T.230:17-40 (O'Leary XXN).

¹⁷ O'Leary at [63]-[66] (CB654); T.234:34 to T.235:28.

15. The changes in net cost price and gross profit margin associated with each of the P1, P2, and P3 periods discussed above is set out in **Annexure A** to the ACCC’s closing submissions.

Key points

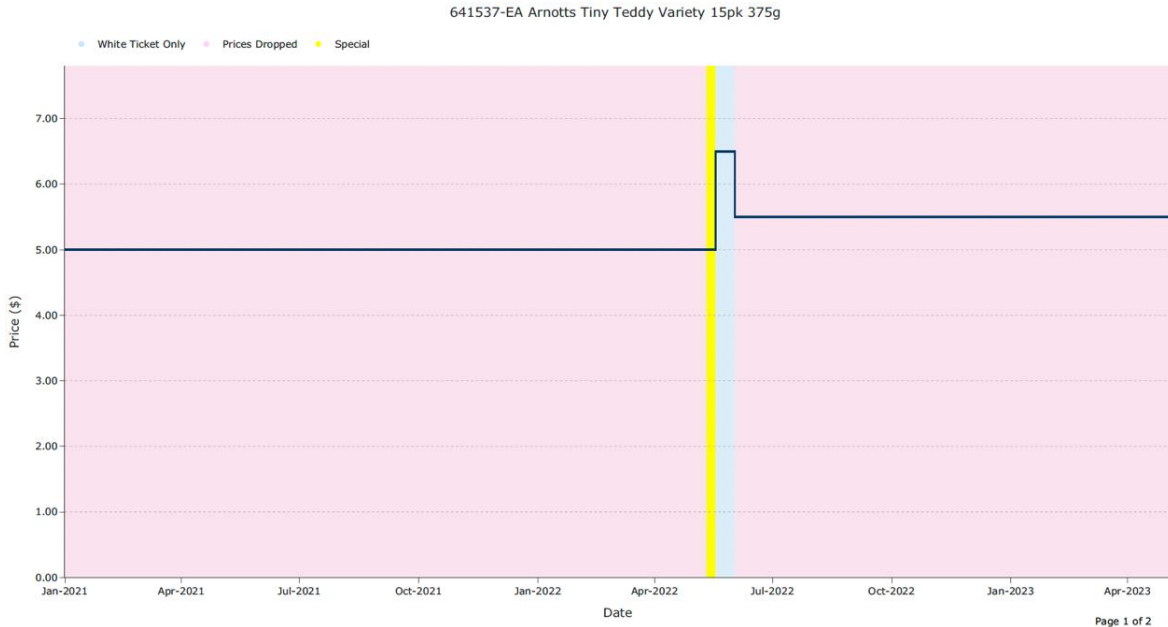
16. The following key points emerge in relation to the Tim Tam Sample Product.
17. **First**, the product was only sold at P2 for three weeks because that is what was required by Woolworths’ internal policies to promote P3 as a Prices Dropped price. The deal sheets recorded a 4-week period of sales at \$6.00 but the product was placed on its \$5.50 Prices Dropped price after only 3 weeks at \$6.00 because that was the minimum period required by Woolworths’ internal rules. That was consistent with Ms Pipan’s email to Arnott’s of 23 September 2022. It was also consistent with Mr O’Leary’s evidence.¹⁸
18. **Second**, there is no evidence that Woolworths formed the view that \$6.00 would have been a competitive price for it to charge for the Tim Tam Sample Product on an ongoing basis. Some 6 months later, Woolworths decided to charge \$5.00 for the product to ensure it was competitive with ALDI.
19. **Third**, there is no evidence of any assessment, modelling, or other consideration having been conducted by Woolworths as to whether it was commercially sensible for the Tim Tam Sample Product to be sold at \$6.00 for longer than the required price establishment period.
20. **Fourth**, the increase in the Net Cost Price for the Tim Tam Sample Product does not account for the whole of the change in retail price. Of the \$1.50 retail price increase from P1 to P2, \$█ (█%) was attributable to a change in net cost and \$█ (█%) was attributable to margin maintenance / improvement. Of the \$1 retail price increase from P1 to P3, \$█ (█%) of that was attributable to a change in net cost and \$█ (█%) was attributable to margin maintenance / improvement.

¹⁸ T.228:26 to T.229:3 (O’Leary XXN); O’Leary at [17], [35] (CB654).

TINY TEDDY SAMPLE PRODUCT (641537)

Arnott's Tiny Teddy Variety 15pk 375g

1 JANUARY 2021 TO 4 MAY 2023 (~2 YEARS, 4 MONTHS)¹



What consumers saw

1. For 495 consecutive days from 1 January 2021 until 10 May 2022, consumers shopping at Woolworths in-store and online would have seen the Tiny Teddy Sample Product offered for sale at Prices Dropped price of \$5.00 (P1).
2. There is conflicting evidence about what happened between 11 May 2022 and 17 May 2022:
 - (a) The agreed facts recorded in Annexure C to the SOAF are that, during this 7-day period, the product continued to be sold at \$5.00 — but with that price now being promoted as a “Special”.² It is clear that this occurred on at least 11 and 12 May 2022, with the promotion of the product on “Special” appearing to have been the result of some internal error.
 - (b) Woolworths argues that the Court should infer from certain internal documents that the issue was rectified on 13 May 2022 and that, from this date onwards, the product commenced being sold at a white ticket price of \$6.50 (P2).³ The ACCC’s position is that while the documents undeniably show attempts by Woolworths staff to have the ticket for the product changed, they are silent on when that change was in fact implemented online and in-store (as distinct from merely being recorded in Woolworths’ internal systems) or what the product ticket was changed to.

¹ Graph extracted from Wright Report, Annexure F2 (CB354 at 424).

² SOAF, Annexure C, row 11 (CB100 at 164).

³ See Affidavit of Peta Carter Stevenson affirmed 20 April 2026 (Stevenson Affidavit) (read on Woolworths’ s 191 application), at [13]-[22].

Annexure B – Tiny Teddy Sample Product

- (c) None of the individuals involved in relevant events have been called. While Woolworths has explained that Ms Pipan (the relevant Category Manager at the time) is no longer in its employ, there is no evidence of any attempt made to contact her. No explanation has been provided for Woolworths' failure to call Ms Nevoa, the Assistant Category Manager who appears to have been primarily responsible for dealing with the issue (at Ms Pipan's direction),⁴ nor its failure to call any of the other individuals who presumably would have needed to be involved in implementing a product ticket change (such as the "steph or susan" referenced in Ms Pipan and Ms Nevoa's discussions⁵). The only witness called by Woolworths in respect of the Tiny Teddy Sample Product, Mr Deery, gives no evidence on the subject. The Court should therefore infer that the evidence of these witnesses would not have assisted Woolworths' case.⁶
- (d) For the position which Woolworths now advances to be correct, Ms Pipan and Ms Nevoa would have needed to, amongst other things, arrange for product tickets to be physically changed at over 1,000 Woolworths Supermarkets nationwide⁷ within a space of less than 24 hours from when the issue was first discovered, in circumstances where Woolworths has elsewhere stated that promotions are "unlikely to be removed, introduced or otherwise altered" in the middle of the Wednesday to Tuesday promotional week.⁸ Given the dearth of direct evidence and absence of any witness giving evidence about what occurred, it is inherently more probable that the agreed facts recorded in the SOAF are correct and that, while steps were taken internally to have the Tiny Teddy Sample Products removed from "Special" on 12 May 2022, any changes made were not fully implemented until 18 May 2022. This scenario would also be consistent with Ms Pipan confirming with Arnott's on 18 May 2022 that the product would be price established for two weeks before "relaunching" on Prices Dropped.⁹
3. In any event, by no later than 18 May 2022, Woolworths increased the price of the Tiny Teddy Sample Product by 30% and began offering it for sale at a white ticket price of \$6.50. That price stayed on shelves (and online) for 15 days.¹⁰

⁴ Crawford at [21]-[23] (**CB466**); Stevenson Affidavit, [14]-[17].

⁵ See the Google Chat messages sent by Ms Pipan and Ms Nevoa between 10.49am and 11.04am on 12 May 2022, extracted at Stevenson Affidavit, [16].

⁶ *Jones v Dunkel* (1959) 101 CLR 298, 320-321.

⁷ SOAF at [9] (**CB100**).

⁸ See Woolworths s 155(1)(a) response (**CB839** at 840): "*Woolworths' promotional calendars are generally set on a Wednesday to Tuesday weekly basis and promotions are unlikely to be removed, introduced or otherwise altered in the middle of the week*".

⁹ MPL.0002.0015.1119 (**CB4717**).

¹⁰ SOAF, Annexure C, row 11 (**CB100** at 164); AOS, Annexure A, row 2.

Annexure B – Tiny Teddy Sample Product

- On 2 June 2022, Woolworths “dropped” the price of the product to \$5.50 (P3) and started promoting it to consumers using a red Prices Dropped Ticket, showing a discount from a ‘Was’ price of \$6.50.¹¹
- In-store and online, consumers would have seen Prices Dropped Tickets which looked like the below:¹²



- Woolworths’ “discounted” Prices Dropped price of \$5.50 was \$0.50 higher than the price that consumers had been paying for the same product just a little over two weeks ago — an effective price rise of 10%.¹³
- Woolworths continued promoting the Tiny Teddy Sample product at a Prices Dropped price of \$5.50 for at least 337 consecutive days, until 4 May 2023.¹⁴

Events sitting behind the price changes

- On 1 February 2022, Arnott’s sent Woolworths a presentation titled ‘Cost Recovery Program Detail’ as part of discussions preceding the formal submission of a CPI request. That presentation outlined a ‘Renewed Promotional Program’ across various different products, including ‘AU Sweet MP VAR’ (which included the Tiny Teddy Sample Product). The program outlined for these products was to sell them at a consistent “Shelf” price of \$5.50 for 52 weeks.¹⁵

¹¹ SOAF at [32]-[35], Annexure C, row 11 (CB100 at 106, 109, 164); AOS at [97].

¹² SOAF, Annexure A (CB100 at 113).

¹³ AOS, Annexure A, row 2.

¹⁴ Ibid.

¹⁵ MPL.0002.0002.6416 (CB4427 at 4435); Deery at [26] (CB517).

Annexure B – Tiny Teddy Sample Product

9. On 2 February 2022, Woolworths received the foreshadowed CPI request from Arnott's.¹⁶ In respect of the Tiny Teddy Sample Product, Arnott's proposal was that:
- (a) the net cost price to Woolworths would be increased from \$█ to \$█ (inclusive of a deferred deal of approximately █% in each case); and
 - (b) the product would be sold on "Promo Level 1", at an "RRP / Unit (inc GST)" of \$5.50, for 52 weeks — with estimated sales volumes of 29,000 units per week and a gross profit to Woolworths of █%.¹⁷
10. Arnott's proposal also recorded a "Shelf" price of \$6.50 in the column headed "RRP / Unit (incl GST)". However, the proposed "Frequency" at this price was recorded as "0" weeks, and no forecasted volume or gross profit figures were supplied for sales at \$6.50.¹⁸ This was the first time an RRP of \$6.50 had been mentioned by Arnott's.¹⁹
11. When asked by Mr Deery whether Arnott's proposal was that the product be sold on Woolworths' Low Price program (which did not require a price establishment period), Arnott's response was: "Ideally, this would be a Prices Dropped activation. What would need to be true to do this?".²⁰ It was at this point that Mr Deery explained to Arnott's "that there would be an approximately 4 week window to 'establish price', linked to the inter-purchase interval (IPI) of the product" before the product could be promoted on Prices Dropped.²¹
12. Negotiations between Woolworths and Arnott's continued until sometime before 18 May 2022, when the Tiny Teddy Sample Product was taken off Prices Dropped and began being sold at P2 (\$6.50). It may be inferred from emails exchanged between Ms Pipan and Arnott's on 16 and 18 May 2022 (see paragraph 16 below) that agreement on Arnott's CPI request and "relaunch[ing]" the product on Prices Dropped was reached at or around the same time — albeit with the required price establishment period not finalised until 18 May 2022.
13. Woolworths has not adduced the final deal sheet approved with respect to the Tiny Teddy Sample Product. However, internal records discussed in Mr Deery's affidavit indicate the final agreement involved:
- (a) an increase in net cost from \$█ to \$█ per unit (inclusive of an increased deferred deal of █%, up from █%); and
 - (b) the Tiny Teddy Sample Product being sold at a "Standard Shelf" price of \$6.50 for 4 weeks, followed by a Prices Dropped Price of \$5.50 for 48 weeks.²²

¹⁶ Deery at [27] (CB517); MPL.0002.0002.6771 (CB4444).

¹⁷ MPL.0002.0002.6772 (CB Tab 224/.xlsx); Deery at [27] (CB517).

¹⁸ Mr Deery accepted in cross-examination that the consequence of recording the product at \$6.50 for "0" weeks was that it had no bearing on the calculation of gross profit margin: T.254:41-43 (Deery XXN).

¹⁹ T.257:45 to T.258:10 (Deery XXN).

²⁰ Deery at [28]-[30] (CB517); MPL.0002.0002.6726 (CB4475).

²¹ Deery at [31] (CB517); MPL.0002.0002.6717 (CB4484 at 4485).

²² Deery at [46]-[51] (CB517).

Annexure B – Tiny Teddy Sample Product

14. The Tiny Teddy Sample Product’s P3 Prices Dropped price of \$5.50 reflected Arnott’s original proposal of 2 February 2022 that the product be sold on Prices Dropped at \$5.50 for 52 weeks. The product’s P2 white ticket price of \$6.50 was the price recorded in Arnott’s proposal as the “Shelf” price (originally proposed for “0” weeks).
15. Throughout the negotiations concerning Arnott’s CPI request and the promotional plan for the Tiny Teddy Sample Product, which lasted over 3 months:
 - (a) at no point did either party discuss a proposal which involved the Tiny Teddy Sample Product being sold at something other than a Pries Dropped Price at \$5.50 after the requisite price establishment period (save for the initial miscommunication discussed above) — with negotiations instead focusing on the quantum of the deferred deal to be provided by Arnott’s and other products affected by Arnott’s CPI request;
 - (b) at no point did Arnott’s suggest that it would withdraw the deferred deal that existed (and was proposed to continue) for the Tiny Teddy Sample Product, or Woolworths raise any concerns that it would do so; and
 - (c) the initial sale of the Tiny Teddy Sample Product at \$6.50 for a period of time before placing it on Prices Dropped at \$5.50 was exclusively discussed in the context of complying with Woolworths’ internal price establishment requirements, and not as something which relevant individuals at Arnott’s and Woolworths otherwise wished to occur for any other reason, or about which those individuals had any independent views.
16. On 16 May 2022, Ms Pipan sent an email to Arnott’s, asking it to confirm that the IPI it had for ‘BISCUITS’ was also 1.76 weeks (to be rounded up to 2 weeks), “[t]o ensure we are aligned on when we should relaunch the below products back onto PRICES DROPPED”. Later the same day, Arnott’s responded, “Yes aligned with 2 weeks”, to which Ms Pipan replied on 18 May 2022, “Great, that means we only need to wait two weeks before launching back onto Prices Dropped”.²³
17. As noted above, the agreement between Ms Pipan and Arnott’s was then implemented, with the Tiny Teddy Sample Product being sold at P2 for 15 days, from 18 May 2022 to 1 June 2022, before being promoted on Prices Dropped at P3 from 2 June 2022 until 4 May 2023.
18. The changes in net cost price and gross profit margin associated with each of the P1, P2, and P3 periods discussed above is set out in **Annexure A** to the ACCC’s closing submissions.

Key points

19. The following key points emerge in relation to the Tiny Teddy Sample Product.
20. **First**, the product was only sold at P2 because that is what was required by Woolworths’ internal policies to promote P3 as a Prices Dropped price. Arnott’s only updated its proposal to include 4 weeks of sales at P3 after being told about price establishment requirements by Mr Deery, and

²³ MPL.0002.0015.1119 (CB717); Deery at [54] (CB517).

Annexure B – Tiny Teddy Sample Product

by the comment in Ms Pipan’s email of 18 May 2023, “Great, that means we only need to wait two weeks before launching back onto Prices Dropped”. During cross examination, Mr Deery accepted that, during the negotiations with Arnott’s, what they were “anticipating was that the price at which the product would be sold on an ongoing basis into that foreseeable future was \$5.50”.²⁴

21. **Second**, there is no evidence of, and Mr Deery did not recall, any assessment, modelling, or other consideration having actually been conducted by Woolworths or Arnott’s as to whether it was commercially sensible for the Tiny Teddy Sample Product to be sold at \$6.50 for longer than the required price establishment period.²⁵ — noting forecast volumes estimated that sales at P2 (of 30,000 units per week) would be less than half of that at P3 (of 63,000 units per week).
22. **Third**, given the difference in forecast sales between P2 and P3, P3 was the commercially more attractive scenario for Woolworths with or without a deferred deal from Arnott’s:
 - (a) inclusive of the █████% per unit deferred deal, Woolworths’ weekly gross profit would have been \$█████ at P2 vs \$█████ at P3²⁶ — a difference of \$█████ per week; and
 - (b) even removing the █████% per unit deferred deal (but maintaining the █████% volume rebate not specific to Prices Dropped),²⁷ Woolworths’ weekly gross profit would have been \$█████ at P2 vs \$█████ at P3²⁸ — a difference of \$█████ per week.
23. **Fourth**, there is no evidence that Arnott’s in fact ever suggested that it might withdraw the deferred deal that existed (and was proposed to continue) for the Tiny Teddy Sample Product or that Woolworths raised any concerns with Arnott’s about whether it might do so.
24. **Fifth**, insofar as Woolworths relies upon the receipt of a CPI request from Arnott’s as justification for its conduct, the increase in the Net Cost Price for the Tiny Teddy Sample Product does not fully account for its change in retail price. As noted in row 2 of the table on page 17 (Annexure A), of the \$1.50 retail price increase from P1 to P2, \$█████ (████%) was attributable to a change in net cost and \$█████ (████%) was attributable to margin maintenance / improvement. Of the \$█████ retail price increase from P1 to P3, \$█████ (████%) of that was attributable to a change in net cost and █████ (████%) was attributable to margin maintenance / improvement.
25. **Sixth**, the P2 Period for the Tiny Teddy Sample Product was so short that it breached even Woolworths’ revised January 2022 CPI Guidance. The sale of the product at P2 for 15 days was both 10 days short of the required minimum 25-day price establishment period based on the product’s IPI of 3.7 weeks, and 6 days short of the minimum 21-day period required for all

²⁴ T.254:1-3; T.259:10-25 (Deery XXN).

²⁵ T.258:15-17; T.259:45-260:1; T.261:4-5 (Deery XXN).

²⁶ P2: $(\$6.50 - \$█████) \times 30,000 = \$█████$. P3: $(\$5.50 - \$█████) \times 63,000 = \$█████$.

²⁷ Resulting in a Net Cost Price (exc. GST) of \$█████, being the Invoice Cost of \$█████ - \$█████ (the █████% volume rebate), and a Net Cost Price (inc. GST) of \$█████.

²⁸ P2: $(\$6.50 - \$█████) \times 30,000 = \$█████$. P3: $(\$5.50 - \$█████) \times 63,000 = \$█████$.

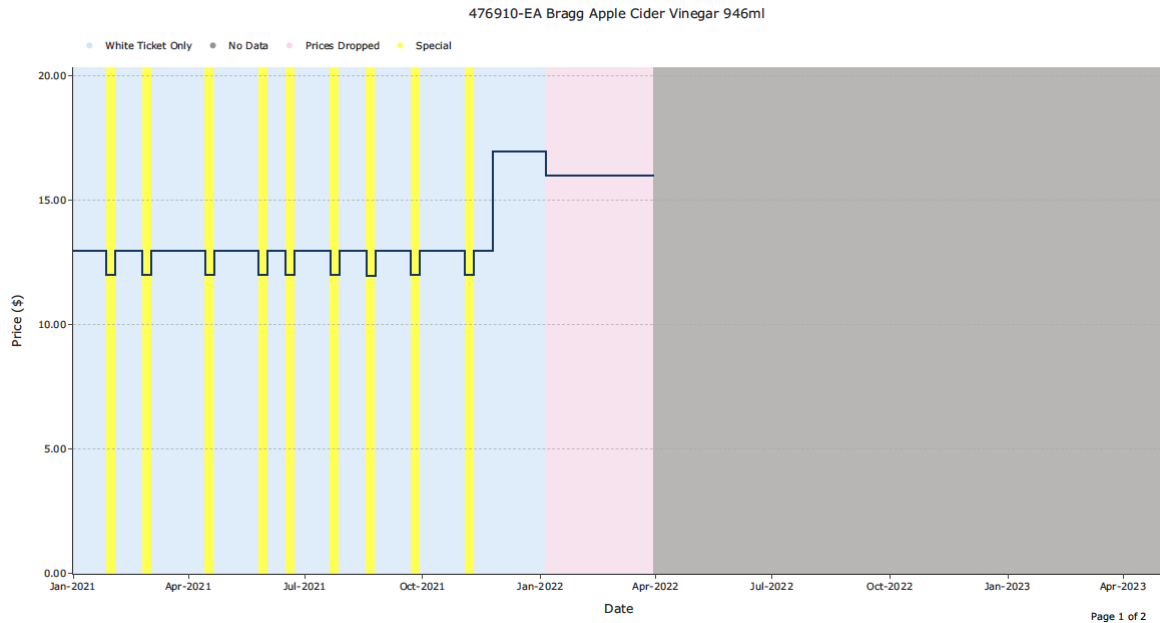
Annexure B – Tiny Teddy Sample Product

products whose prices were being increased while already on Prices Dropped. Even if one were to assume that Woolworths commenced selling the product at P2 on 13 May 2022, that would still only result in a price establishment period of 20 days.

BRAGG SAMPLE PRODUCT (476910)

Bragg Apple Cider Vinegar 946ml

1 JANUARY 2021 TO 29 MARCH 2022 (~14 MONTHS)¹



What consumers saw

1. For 10 and a half months from 1 January 2021 until 24 November 2021, consumers shopping at Woolworths in-store and online would have seen the Bragg Sample Product offered for sale by Woolworths in-store and online at a white ticket price of \$12.95 (**P1**) — interspersed, now and then, with short-term Specials at \$12.00² which lasted 7 days at a time.³ These Specials occurred at irregular intervals ranging from 2 to 6 weeks. On each occasion, consumers shopping in-store would have seen yellow ‘Specials’ tickets on top of the product’s white tickets for the duration of the promotion.⁴ After 7 days, the yellow tickets were removed and the product returned to its white ticket price of \$12.95.
2. On 25 November 2021, Woolworths increased the price of the Bragg Sample Product by 31% and began offering it for sale to consumers at a new white ticket price of \$16.95 (**P2**). That price stayed on shelves (and online) for 41 days.⁵
3. On 5 January 2022, Woolworths replaced the white ticket price of \$16.95 with a new white ticket price of \$16.00 (**P3**). It also applied a red and white Prices Dropped Ticket over that new white

¹ Graph extracted from Wright Report, Annexure F3 (**CB354** at 428).

² Or, in one instance from 18 to 24 August 2021, at \$11.95: SOAF at Annexure B, row 13 and Annexure C, row 13 (**CB100** at 120, 164-165).

³ SOAF, Annexure C, at row 13 (**CB100** at 164-165).

⁴ Those shopping online would have seen a green and white roundel or yellow rectangle displaying the relevant promotional information. See SOAF, [19], [46]-[47] (**CB 100** at 103, 109).

⁵ SOAF, Annexure C, row 13 (**CB100** at 164-165); AOS, Annexure A, row 3.

ticket — calling out to consumers that the price of the product had been “DROPPED” from a “Was” price of \$16.95 down to \$16.00.⁶

4. In-store and online, consumers would have seen Prices Dropped Tickets which looked like the below:⁷



5. Woolworths’ “discounted” Prices Dropped price of \$16.00 was \$3.05 higher than the price that consumers had been paying for the same product just six weeks ago — an effective price rise of 24%.⁸
6. Woolworths continued to promote the product at \$16.00 using Prices Dropped Tickets for at least the next 12 weeks, until 29 March 2022.⁹

Events sitting behind the price changes

7. As part of preparations for a Health Foods Pantry Range Review to be conducted in November 2021, Mr Jordan (the relevant Category Manager) analysed the performance of various products,

⁶ SOAF at [32]-[35], Annexure A, Annexure C, row 13 (CB100 at 106, 109, 113, 164-165); AOS at [97].

⁷ SOAF, Annexure A (CB100 at 113).

⁸ AOS, Annexure A, row 3.

⁹ SOAF at Annexure C, row 13 (CB100 at 164-165).

including the Bragg Sample Product.¹⁰ He concluded that the product was performing well.¹¹ As at October 2021, its gross profit margin was █████% for the previous 52 weeks.¹²

8. On 23 November 2021, Mr Jordan received an email from the product’s supplier, Unique Health Products (**UHP**), attaching a presentation in advance of a range review meeting which had been scheduled for later the same day.¹³ There was a slide in the presentation which relevantly stated in respect of the Bragg Sample Product: “RRP: \$16.95”, “Woolworths current price: \$12.95”.¹⁴ Mr Jordan was not aware that the product’s RRP was \$16.95 until that time.¹⁵
9. After seeing UHP’s presentation, Mr Jordan “quickly decided to increase Woolworths’ shelf price to [the] RRP”. Mr Jordan’s evidence is that, in doing so, he took into account the fact the product was not ranged at Coles, that he “believe[s] he would have” checked the shelf price at other competitors but does not actually recall having done so, and it was his view that the “price increase was unlikely to reduce sales volumes because [he] believed that the customers were loyal to the product, and alternative options were already available in Woolworths’ range at significantly cheaper prices”.¹⁶
10. This change in white ticket price from \$12.95 to \$16.95 was implemented on 25 November 2021. Mr Jordan did not discuss the decision to increase the product’s retail price with UHP.¹⁷
11. On 26 November 2021, Mr Jordan received an email from UHP, providing updated promotional pricing options for the Bragg Sample Product. Mr Jordan’s evidence is that the deal sheets appeared to indicate that UHP was proposing a cost price increase, which came as a surprise to him. However, he does not appear to have done anything to progress the matter other than to forward it to Ms Harker, one of his Assistant Category Managers.¹⁸
12. Prior to 25 November 2021, Mr Jordan had also received a number of internal requests to nominate products for inclusion in an upcoming Prices Dropped on Healthier Products campaign.¹⁹ On 7 December 2021, Mr Jordan informed his Merchandise Manager, Ms Gupta, that he had just increased the price of the Bragg Sample Product up to its RRP two weeks ago, and asked if Woolworths could drop the price of the product and include it in the campaign.²⁰ Ms Gupta responded the same morning, “There’s a few conversations around moving up to drop atm but let me ask!”.²¹ Mr Jordan understood from this conversation that Ms Gupta would raise

¹⁰ Jordan at [34]-[44] (**CB574** at 583-584).

¹¹ Jordan at [44] (**CB574** at 584).

¹² Jordan at [35]-[40] (**CB574** at 582-583); MPL.0081.0001.0005 (**CB Tab 289/.xlsx**).

¹³ Jordan at [47]-[48] (**CB574** at 585).

¹⁴ MPL.0055.0001.3663 (**CB4783** at 4786).

¹⁵ Jordan at [50] (**CB574** at 585).

¹⁶ Jordan, [51] (**CB574** at 585-586).

¹⁷ Jordan at [52]-[53] (**CB574** at 586).

¹⁸ Jordan at [19], [54]-[56] (**CB574** at 578, 586-587).

¹⁹ Jordan at [57]-[59] (**CB574** at 587-588).

²⁰ Jordan at [60] (**CB574** at 588); MPL.0091.0001.0003 (**CB4936** at 4937).

²¹ MPL.0091.0001.0003 (**CB4936** at 4937).

the question with the Commercial Director, Ewan Shearer, but that “in the meantime” the Bragg Sample Product could be added to the campaign.²²

13. Mr Jordan did not discuss his proposal to include the Bragg Sample Product in the Prices Dropped program with UHP. Mr Jordan’s evidence is that this was because he “considered that the gross margin on the product was sufficient not to require supplier funding for its inclusion in a seasonal Prices Dropped program” and that, although he knew “Woolworths would likely earn less margin” on the product while it was on Prices Dropped, “this was in the interest of achieving the overall strategy for the Prices Dropped on Healthier Products campaign of being able to claim there were hundreds of healthy products with lower prices”.²³
14. The Bragg Sample Product was included in the Prices Dropped on Healthier Products campaign and sold at a Prices Dropped price of \$16.00 from 5 January 2022, until 29 March 2022.²⁴
15. On 14 January 2022, Mr Jordan received an email from UHP referring to the fact that Woolworths had updated its price for the Bragg Sample Product and proposing a new cost structure.²⁵ Thereafter followed a series of emails in which the parties discussed UHP’s proposed cost price increase — with UHP contending that the matter had been discussed during the Health Foods Pantry Range Review, but Mr Jordan maintaining it had not.²⁶ As at August 2022, the issue remained unresolved.²⁷
16. On 30 March 2022, the Bragg Sample Product returned to a white ticket price of \$16.95.²⁸
17. The changes in net cost price and gross profit margin associated with each of the P1, P2, and P3 periods discussed above is set out in **Annexure A** to the ACCC’s closing submissions.

Key points

18. **First**, unlike with many of the other Sample Products, the increase in price from P1 to P2 here was not preceded by any cost price increase from the supplier. It was, rather, prompted by the Category Manager learning of the “RRP” of the Sample Product and, in effect, his views as to the likely price elasticity of relevant customers. Woolworths’ margins improved accordingly — from █████% (P1) to █████% (P2) / █████% (P3).²⁹
19. **Second**, Woolworths made the decision to promote the product on Prices Dropped after it had already decided to increase the price of the product to \$16.95 (P2).³⁰ That is, the ACCC accepts

²² Jordan at [62] (CB574 at 588).

²³ Jordan at [65] (CB574 at 589).

²⁴ Jordan at [68]-[69] (CB574 at 590).

²⁵ Jordan at [71] (CB574 at 590).

²⁶ Jordan at [72]-[82] (CB574 at 590-593).

²⁷ See Jordan at [82] (CB574 at 593).

²⁸ Jordan at [68]-[69] (CB574 at 590).

²⁹ ACCC’s Closing Submissions, Annexure A.

³⁰ Jordan at [63] (CB574 at 588-589).

the Prices Dropped promotion for the Bragg Sample Product was not pre-planned — unlike most Sample Products.

20. **Third**, the Bragg Sample Product provides an example of a Woolworths Category Manager choosing to promote a product on Prices Dropped without seeking supplier funding on the basis that he considered Woolworths’ gross product margin to already be sufficient, and recognised the benefits to Woolworths in conducting a successful Prices Dropped on Healthier Products campaign. This re-affirms the discretion Woolworths had at all times in relation to the pricing and promotion of its products. It was not compelled to pass on cost price increases to consumers in order to maintain / improve its margins — nor, having done so, to tell consumers that those increased prices had “DROPPED”.
21. **Fourth**, the Bragg Sample Product was subject to, and in breach of, the 2020 Guidance as its P2 period was only 41 days, being 15 days short of the minimum 56-day period required for all products.³¹ As at the time the product was placed on the Prices Dropped program on 5 January 2022, the 2022 CPI Guidance had not yet been placed before Mr Harker for approval.³²

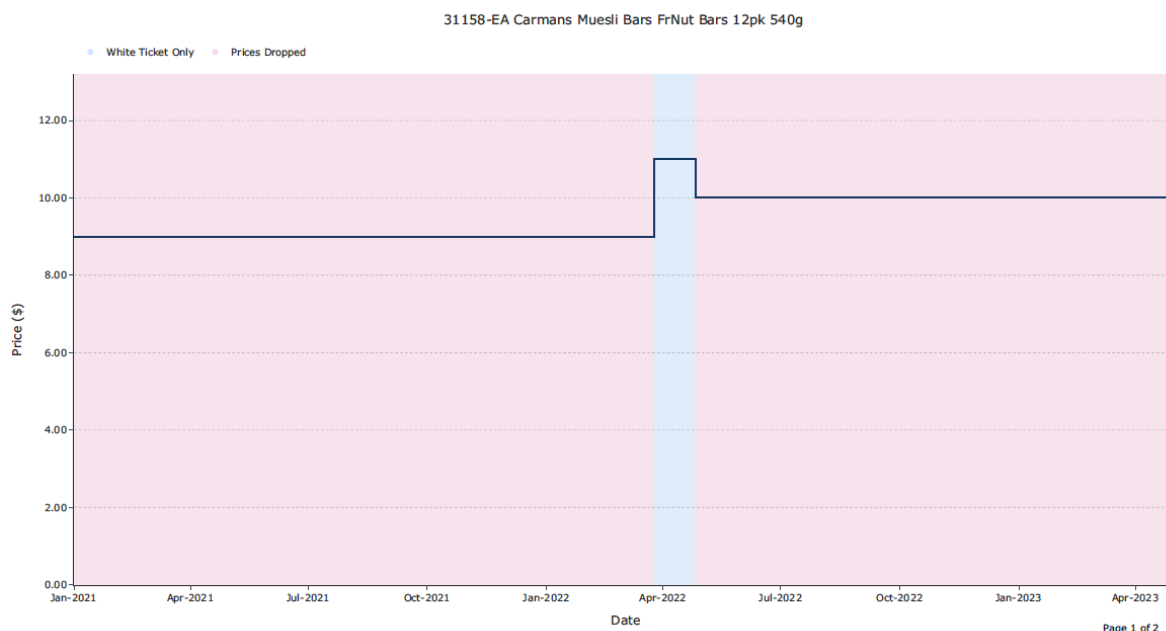
³¹ See AOS, Annexure A, row 3, footnote 4.

³² Harker at [59] (CB545 at 568).

CARMAN'S SAMPLE PRODUCT (31158)

Carman's Muesli Bars FrNut Bars 12pk 540g

1 JANUARY 2021 TO 4 MAY 2023 (~2 YEARS, 4 MONTHS)¹



What consumers saw

1. For 448 consecutive days, from 1 January 2021 to 24 March 2022, consumers shopping at Woolworths in-store and online would have seen the Carman's Sample Product was offered for sale by Woolworths at a Prices Dropped price of \$9.00 (**P1**).²
1. On 25 March 2022, Woolworths increased the price of the Carman's Sample Product by 22% and began offering it for sale at a white ticket price of \$11.00 (**P2**). That price stayed on shelves (and online) for 32 days.³
2. On 26 April 2022, Woolworths "dropped" the price of the product to \$10.00 (**P3**) and started promoting it to consumers using a red Prices Dropped Ticket, showing a discount from a "Was" price of \$11.00.⁴
3. In-store and online, consumers would have seen Prices Dropped Tickets which looked like the below:⁵

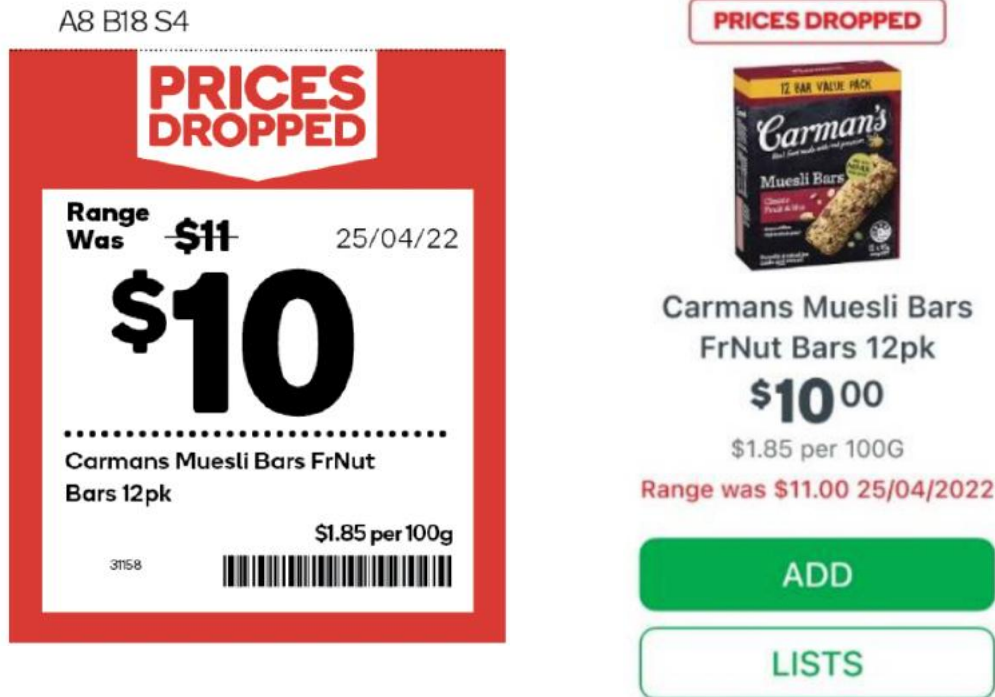
¹ Graph extracted from Wright Report, Annexure F9 (**CB354** at 446).

² SOAF at Annexure B, row 22 and Annexure C, row 22 (**CB100** at 117, 159).

³ Ibid; AOS, Annexure A, row 4.

⁴ SOAF at [32]-[35], Annexure C, row 22 (**CB100** at 106, 109, 113, 159); AOS at [97].

⁵ SOAF, Annexure A (**CB100** at 113).



4. Woolworths’ “discounted” Prices Dropped price of \$10.00 was \$1.00 higher than the price that consumers had been paying for the same product less than five weeks ago — an effective price rise of 11%.⁶
5. Woolworths continued promoting the Carman’s Sample Product at a Prices Dropped price of \$10.00 for 374 consecutive days, until 4 May 2023.⁷

Events sitting behind the price changes

6. On 21 December 2021, Carman’s first advised Woolworths of a proposed cost price increase for the majority of its products to be effective from 21 March 2022.⁸ The proposal for the Sample Product was that:
 - (a) its net cost price would increase from \$█ to \$█;
 - (b) its RRP would increase from \$10 (its current “Range Was Price”) to \$11; and
 - (c) at some point after these increases were implemented, it would return to Prices Dropped at a lower price.⁹
7. On 20 January 2022, Carman’s sent through its cost price increase and promotional plan deal sheets, including for the Sample Product. These were consistent with its 21 December 2021

⁶ AOS, Annexure A, row 4.

⁷ Ibid; Annexure C, row 22 (CB100 at 159).

⁸ Woodcock at [64] (CB759).

⁹ Woodcock at [64]-[67] (CB759); MPL.0002.0004.9106 (CB Tab 358/.xlsx); see also T.189:20-40 (Woodcock XXN).

Annexure B – Carman’s Sample Product

proposal, but also noted that Carman’s was recommending a new Prices Dropped price of \$10.¹⁰ Under cross-examination, Mr Woodcock agreed that he was happy with Carman’s proposal for the Sample Product throughout the whole time that the parties were negotiating Carman’s CPI and promotional plan.¹¹

8. Negotiations thereafter continued, with Mr Woodcock raising concerns with Carman’s about their CPI request and promotional plan considered as a whole, across the various products to which it applied.¹²
9. On 8 March 2022, Mr Woodcock ultimately proposed two options to Carman’s:
 - (a) extending the effective date for the cost price increase to allow more time to negotiate; or
 - (b) Woolworths accepting the cost price increase but not the promotional plan, which Mr Woodcock considered a “worst case” because “it would mean consumers would pay more for Carman’s products, Woolworths’ pricing would be uncompetitive in the marketplace, and this would be bad for Carman’s”.¹³
10. On 11 March 2022, Carman’s made a further proposal to Woolworths. The proposal for the Sample Product:
 - (a) was unchanged insofar as its net cost price would increase from its current \$█ to \$█;
 - (b) recorded that the product would be offered for sale:
 - (i) at a “Shelf” price of \$11.00 for 4 weeks; and
 - (ii) at a “Promo Level 1” price of \$10.00 for 48 weeks.¹⁴
11. Mr Woodcock’s evidence was that he did not understand this to be a change from the proposal as it had been up until that point.¹⁵
12. On 16 March 2022, Mr Woodcock informed Carman’s that this “worst case” option was what he was going to propose to his superiors.¹⁶ He signed off the email in which he did so as follows: “...even after accepting the list price as per your request I do still think we can structure a plan to get there – so happy to keep working with you over the coming weeks to get there”.¹⁷
13. Two days later, on 18 March 2022, Mr Woodcock presented his proposal to his superiors and noted that one of his “next steps” was to “re-engage with Carman’s once the penny has

¹⁰ Woodcock at [75(d)], [93] (CB759); MPL.0002.0004.8609 (CB Tab 371/.xlsx).

¹¹ T.189:34-40 (Woodcock XXN).

¹² Woodcock at [80], see also at [77]-[86] (CB759); MPL.0003.0006.6876 (CB5327).

¹³ Woodcock at [90] (CB759); MPL.0049.0003.1693_N (CB5588).

¹⁴ Woodcock at [91]-[92] (CB759); MPL.0002.0004.8791 (CB Tab 422/.xlsx).

¹⁵ Woodcock at [93] (CB759).

¹⁶ Woodcock at [95]-[97] (CB759); MPL.0003.0006.1039 (CB5562).

¹⁷ MPL.0003.0006.1039 (CB5563).

Annexure B – Carman’s Sample Product

dropped”.¹⁸ Woolworths then accepted the cost price increase without having agreed the promotional plan.¹⁹ In cross-examination, Mr Woodcock accepted this was, in part, a “negotiation tactic”, although it also ensured that Carman’s products would continue being supplied to Woolworths — and that it was his expectation that the Carman’s Sample Product would ultimately, after the negotiations over the promotional plan concluded, go onto Prices Dropped.²⁰

14. On 25 March 2022, the cost price increase came into effect, and, as noted above, the Carman’s Sample Product was removed from the Prices Dropped program, and increased to a white ticket price of \$11.00.²¹
15. Ultimately, a promotional plan was agreed between Woolworths and Carman’s on 6 April 2022. There were no changes to the plan insofar as it concerned the Carman’s Sample Product, save for a reduction in the net cost to Woolworths from \$█ to \$█.²²
16. On 26 April 2022, the Carman’s Sample Product was moved to the Prices Dropped program at its P3 price of \$10.00 on 26 April 2022.²³

Key points

17. The following key points emerge in relation to the Carman’s Sample Product.
18. **First**, while the price of the Carman’s Sample Product was increased to \$11.00 before the promotional plan had been fully agreed, the parties were at all times in agreement on their intention that the product be sold on Prices Dropped at \$10.00 (after the necessary price establishment period), and the dispute was really about the quantum of the net cost price to Woolworths.
19. **Second**, Mr Woodcock also conceded in cross-examination the following matters:
 - (a) he could not determine whether the \$11.00 sale price for the Sample Product, at the time he told the supplier he would accept their cost price increase but not their promotional plan (i.e. 16 March 2022), would be a competitive price.²⁴ Mr Woodcock was also of the view that, when the cost price increase was looked at as a whole, Carman’s prices were probably not competitive;²⁵

¹⁸ Woodcock at [99] (CB759); MPL.00081.0001.0547 (CB5749).

¹⁹ Woodcock at [100] (CB759).

²⁰ T.190:42-47; T.191:1-20 (Woodcock XXN).

²¹ Woodcock at [100], [102] (CB759).

²² Woodcock at [105]-[110] (CB759); MPL.0002.0016.5763 (CB Tab 441/.xlsx).

²³ Annexure C, row 22 (CB100 at 159).

²⁴ T.190:29-35 (Woodcock XXN).

²⁵ T.190:37-41 (Woodcock XXN).

Annexure B – Carman’s Sample Product

- (b) while he “would have” considered the competitiveness of the \$11.00 price, it was ultimately the Prices Dropped price (i.e. the \$10.00 sale price) which he concluded was the competitive price for the product as compared with Coles;²⁶ and
 - (c) when he was looking at the RRP of the product, he was assuming it was going to go back onto Prices Dropped at some point, and so what was important was that it was higher than the future Prices Dropped price.²⁷
20. **Third**, the increase in the net cost price for the Carman’s Sample Product does not fully account for its change in retail price. Of the \$2.00 retail price increase from P1 to P2, \$█ (█%) was attributable to a change in net cost and \$█ (█%) was attributable to margin maintenance / improvement. Of the \$1.00 retail price increase from P1 to P3, \$█ (█%) of that was attributable to a change in net cost and \$█ (█%) was attributable to margin maintenance / improvement.

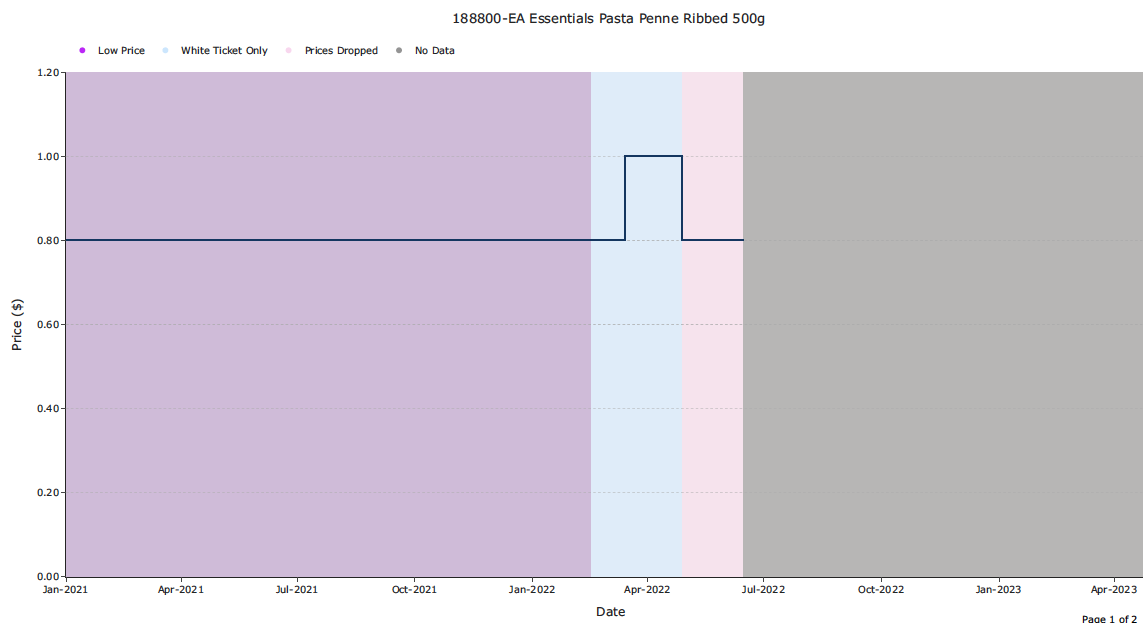
²⁶ T.193:25-T.194:4 (Woodcock XXN).

²⁷ T.194:33-42 (Woodcock XXN).

ESSENTIALS SAMPLE PRODUCT (188800)

Essentials Pasta Penne Ribbed 500g

1 JANUARY 2021 TO 14 JUNE 2022 (~17 MONTHS)¹



What consumers saw

1. For all except six and half weeks during the approximately 17 month period from 1 January 2021 to 14 June 2022, the Essentials Sample Product was offered for sale by Woolworths at \$0.80.²
2. For over a year from 1 January 2021 to 15 February 2022, consumers would have seen the product's price of \$0.80 (**P1**) promoted by Woolworths as a red ticket "Low Price". After that, consumers would have seen the price remain at \$0.80, but changed to a white ticket, for another 26 days.³
3. On 14 March 2022, Woolworths increased the price of the Essentials Sample Product by 25% and began offering it for sale at a white ticket price of \$1.00 (**P2**). That price stayed on shelves (and online) for 45 days.⁴
4. On 28 April 2022, Woolworths returned the price of the product back to its original white ticket price of \$0.80 (**P3**) — but this time, with a red Prices Dropped Ticket advertising that the price of the product had been "DROPPED" from \$1.00 to \$0.80.⁵

¹ Graph extracted from Wright Report, Annexure F5 (CB354 at 434).

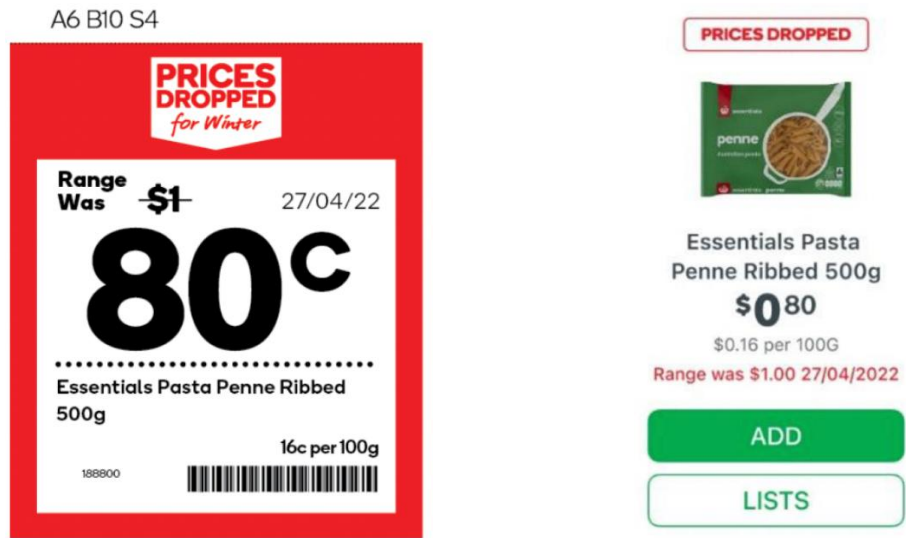
² SOAF, Annexure C, row 66 (CB100 at 185).

³ SOAF, Annexure C, row 66 (CB100 at 185).

⁴ SOAF, Annexure C, row 66 (CB100 at 185); AOS, Annexure A, row 5.

⁵ SOAF at [32]-[35], Annexure C, row 66 (CB100 at 106, 109, 185); AOS at [97].

5. In-store and online, consumers would have seen Prices Dropped Tickets which looked like the below:⁶



6. Woolworths’ “discounted” Prices Dropped price of \$0.80 was the same price that consumers had been paying for the same product just over six weeks ago.⁷
7. Woolworths continued to promote the Essentials Sample Product using this Prices Dropped Ticket for 48 days, until 14 June 2022.⁸

Events sitting behind the price changes

8. The Essentials Sample Product is an Own Brand product, meaning that it was manufactured and supplied by Woolworths in accordance with its product specifications by a third-party supplier.⁹ Own Brand products were included in the Prices Dropped program without any form of supplier funding.¹⁰
9. Between around November 2021 and January 2022, Woolworths participated in negotiations with its existing supplier of the Essentials Sample Product, **Rinoldi**, about Rinoldi’s request for a cost price increase from \$█ to \$█.¹¹ As part of considering Rinoldi’s request, Woolworths sought pricing from a potential alternative supplier, **San Remo**. However, San Remo’s proposed indicative cost for supplying the product was \$█ per unit.¹²

⁶ SOAF, Annexure A (CB100 at 114).

⁷ AOS, Annexure A, row 5.

⁸ SOAF, Annexure C, row 66 (CB100 at 185).

⁹ SOAF at [23(a)], [24] (CB100 at 104-105).

¹⁰ SOAF at [23(d)], [24], [41] (CB100 at 105, 108).

¹¹ Ortolani at [26]-[61] (CB680 at 686-695). As to the specific quantum of Rinoldi’s CPI request, see: Ortolani at [35]-[36] (CB680 at 688-689); MPL.0059.0001.0007 (CB5973 at 5973); MPL.0081.0001.0321 (CB6048 at 6048).

¹² Ortolani at [33], [42]-[43] (CB680 at 688, 690-691); MPL.0057.0002.4040 (CB5955); MPL.0057.0002.4022 (CB5967).

Annexure B – Essentials Sample Product

10. The evidence of Mr Ortolani and Mr Rojas is that a cost price increase to \$■■■■ was ultimately approved on 28 January 2022.¹³ However, Woolworths' PartnerHub system records the final net cost per unit as \$■■■■.¹⁴ There is therefore uncertainty as to which net cost price was ultimately charged to Woolworths.
11. Mr Rojas gives evidence that he conducted pricing analysis in November 2021 with respect to the Essentials Sample Product, assuming a net cost price increase from \$■■■■ to \$■■■■. That analysis showed that an increase to the sell price of \$1.00 was necessary to maintain Woolworths' gross profit at around its existing margin of ■■■■% (with margin being ■■■■% at \$1.00).¹⁵
12. After the CPI request was approved on 28 January 2022, Mr Rojas directed that the Essentials Sample Product be removed from the Low Price program, which ultimately occurred on 15 February 2022.¹⁶ The Essentials Sample Product was then moved to a \$1.00 white ticket price on 14 March 2022.¹⁷
13. Mr Rojas' evidence is that, over the following approximately four weeks, he observed that neither Coles nor Aldi had increased the price point for their competing pasta products. He therefore "decided to reduce the price of the Essentials Sample Product to \$0.80 and place the product on the Prices Dropped program to ensure the Essentials Pasta Sample Product was priced competitively as an entry-level pantry staple".¹⁸
14. On 28 April 2022, Mr Breytenbach (one of Mr Rojas' Assistant Category Managers), sent an email copying Mr Kapoor (the Merchandise Manager to whom Mr Rojas reported), relevantly stating: "I know this is late notice, but we had to move the price this week on our own brand pasta assortments. Are we able to add these as late inclusions into the dropped for winter campaign?".¹⁹ Mr Kapoor then forwarded the email to Mr Lowe of Woolworths, stating: "Ewan and I are both keen to include if possible as we will be moving down irrespective so we may as well get the dropped ticket on if possible?"²⁰
15. On 28 April 2022, the Essentials Sample Product returned to its original price of \$0.80 — this time promoted as a Prices red Dropped price.²¹
16. The changes in net cost price and gross profit margin associated with each of the P1, P2, and P3 periods discussed above is set out in **Annexure A** to the ACCC's closing submissions.

¹³ Ortolani at [54] (CB680 at 693); Rojas at [31]-[32] (CB718 at 725-726); MPL.0069.0001.0001 (CB5804 at 5810).

¹⁴ Ortolani at [59]-[61] (CB680 at 694-695); [MPL.0081.0001.0320] (CB6047).

¹⁵ Rojas at [23] (CB718 at 723); MPL.0003.0036.5994 (CB5855).

¹⁶ Rojas at [33]-[39] (CB718 at 726-727).

¹⁷ SOAF Annexure C, row 66 (CB100 at 185).

¹⁸ Rojas at [47] (CB718 at 729).

¹⁹ Rojas at [11(f)], [12], [46] (CB718 at 720, 729); MPL.002.0023.2034 (CB6043).

²⁰ MPL.002.0023.2034 (CB6043).

²¹ Rojas at [47] (CB718 at 729); SOAF Annexure C, row 66 (CB100 at 185).

Key points

17. The following key points emerge in relation to the Essentials Sample Product.
18. **First**, Woolworths made the decision to promote the product on Prices Dropped after it had already decided to increase the price of the product to \$1.00 (P2). That is, the ACCC accepts the Prices Dropped promotion for the Essentials Sample Product was not pre-planned — unlike most Sample Products.
19. **Second**, notwithstanding the above, Mr Rojas decided to return the product back to its original price of \$0.80 (P1 / P3) not because he wished to promote it, but because he shortly realised that \$1.00 was not a competitive price for the product given neither Coles nor Aldi had increased the price point for their competing pasta products. In other words, consumers were told that they were receiving a genuine discount from a ‘Was’ price of \$1.00 even though, at the time of the Prices Dropped promotion, Woolworths had decided that the \$1.00 price was not competitive and already determined that it would be “moving down irrespective” of whether the product was promoted on Prices Dropped or not.²²
20. **Third**, the product was only sold at its P2 price of \$1.00 for 45 days. To the extent the 2020 Guidance applied to this policy, it was sold in breach of Woolworths’ own policies.²³

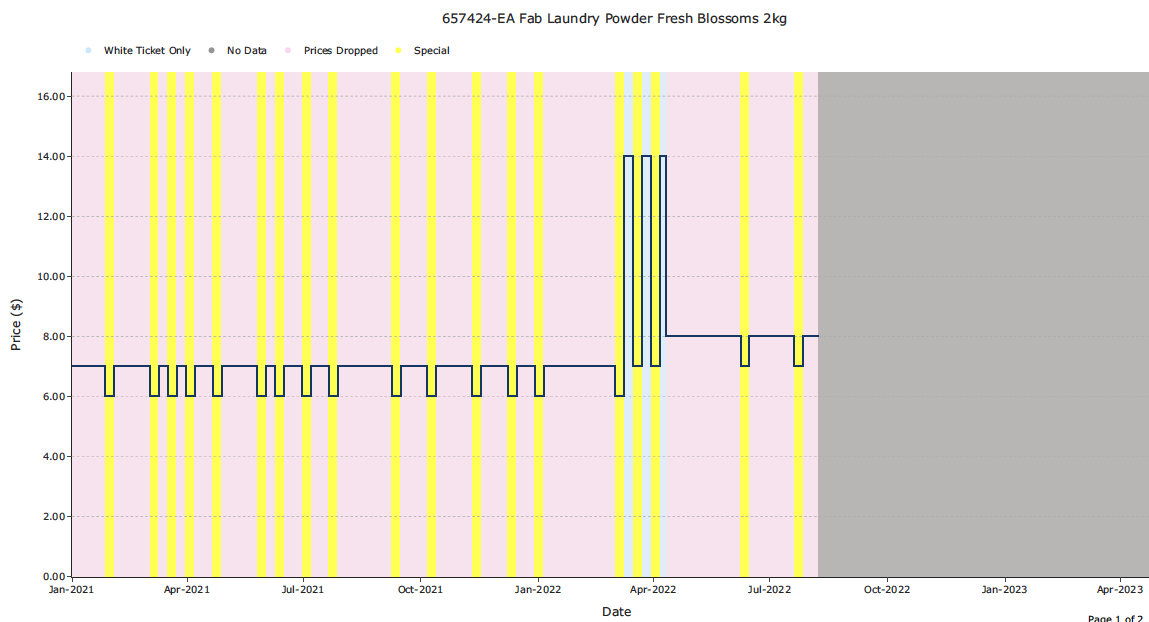
²² MPL.002.0023.2034 (CB6043).

²³ See AOS at [142(c)].

FAB SAMPLE PRODUCT (657424)

Fab Laundry Powder Fresh Blossoms 2kg

1 JANUARY 2021 TO 7 AUGUST 2022 (~1 YEAR, 7 MONTHS)¹



What consumers saw

1. For 425 days from 1 January 2021 until 1 March 2022, consumers shopping at Woolworths in-store and online would have seen the Fab Sample Product offered for sale by Woolworths in-store and online at a red Prices Dropped price of \$7.00 (**P1**) — interspersed, now and then, with short-term Specials at \$6.00 which lasted 7 days at a time.² On each occasion, consumers shopping in-store would have seen yellow ‘Specials’ tickets on top of the product’s Prices Dropped Ticket for the duration of the promotion.³ After 7 days, the yellow tickets were removed and the product returned to its Prices Dropped price of \$7.00.
2. On 9 March 2022, Woolworths increased the price of the Fab Sample Product by 100% and began offering it for sale to consumers at a white ticket price of \$14.00 (**P2**). That price stayed on shelves (and online) for a period of 33 days — however, with a little under half of that period consisting of Specials at \$7.00.⁴

¹ Graph extracted from Wright Report, Annexure F6 (**CB354** at 437).

² SOAF, Annexure C, at row 88 (**CB100** at 193-194).

³ Those shopping online would have seen a green and white roundel or yellow rectangle displaying the relevant promotional information. See SOAF, [19], [46]-[47] (**CB 100** at 103, 109).

⁴ SOAF, Annexure C, at row 88 (**CB100** at 193-194); AOS, Annexure A, row 6.

3. On 11 April 2022, the product’s price was “dropped” to \$8.00 (P3) and promoted on Prices Dropped – where it remained for 119 days, until at least 7 August 2022.⁵
4. Woolworths’ “discounted” Prices Dropped price of \$8.00 was \$1.00 higher than the price consumers had been paying for the same product just a little under five weeks ago — an effective price increase of 14%.

Events sitting behind the price changes

5. **Henkel’s first proposal:** On 6 December 2021, Woolworths received a CPI request, along with proposed promotional information, from Henkel. In respect of the Fab Sample Product, Henkel’s proposal was that:
 - (a) the “Current List Price” of \$█ to Woolworths be increased to a “New List Price” of \$█;
 - (b) the “Current RRP” of \$11.99 be increased to a “New RRP” of \$13.99; and
 - (c) the “Prices Dropped” of \$7.00 be increased to a “New Prices Dropped” of \$8.00.⁶
6. **Woolworths’ counter-proposal:** On 16 February 2022, Woolworths made a counter-proposal to Henkel. In respect of the Fab Sample Product, Woolworths’ proposal was that:
 - (a) the list cost increase by \$█ to \$█ (as Henkel had proposed), and the net cost increase from \$█ to \$█ (reflecting the inclusion of a █% deferred deal); and
 - (b) the product would be sold:
 - (i) on a “Shelf” price at an “RRP / Unit (inc GST)” of \$8.00 for 42 weeks – being a Prices Dropped price, with estimated sales volumes of 17,900 units per week and a GP% of █%; and
 - (ii) on a “Promo Level 1” price at an “RRP / Unit (inc GST)” of \$7.00 for 10 weeks – being a “Special” price with estimated sales volumes of 37,000 unit per week, scan funding per promo unit of \$█ and GP% of █%.⁷
7. Woolworths’ proposed promotional plan did not include any reference to a \$14.00 “Shelf” price, nor any estimated sales volumes or GP% at that price. Mr Davies’ evidence is that he did not regard these matters as “being likely to be consequential to the overall evaluation of the commercials of the deal”.⁸ In cross-examination, Mr Davies said: “The fact that I most likely

⁵ SOAF, Annexure C, at row 80 (CB100 at 193-194); AOS, Annexure A, row 6.

⁶ Davies 1 at [21] (CB486); MPL.0018.0003.9135 (CB6051).

⁷ Davies 1 at [27]-[28] (CB486); MPL.0015.0006.3192 (CB Tab 506/.xlsx).

⁸ Davies 1 at [31] (CB486).

wouldn't have sold a competitive amount of volume at that \$14 RRP meant that it was unlikely to have any bearing on the commercial assessment that I was doing at the time.”⁹

8. **Negotiations progressed:** Between 16 February 2022 and 24 February 2022, the negotiations progressed between the parties but did not involve any further proposals or counter-proposals concerning the Fab Sample Product.¹⁰
9. **Henkel second proposal (and agreed outcome):** On 27 February 2022, Henkel made a further proposal. In respect of the Fab Sample Product, Henkel's proposal was that the list price increase from \$█ to \$█ (as the parties had previously proposed), but that its net cost increase from \$█ to \$█ (being \$█ higher than Woolworths' counter-proposal, and reflecting a █% deferred deal).¹¹ There is nothing to suggest that Henkel proposed any changes to the promotional plan Woolworths had circulated on 16 February 2022. Later on 27 February 2022, Mr Davies approved Henkel's proposal in PartnerHub.¹²
10. **Setting price establishment period:** The next day, on 28 February 2022, Mr Taylor of Henkel emailed Mr Davies attaching a document which he said set out Henkel's "recommended RRP's to potentially establish a bench price at [sic] on Fab, in order to reflect a save and move to price drop as per the CPI alignment".¹³ The attached spreadsheet referred to a new "Price Establish RRP" of \$13.99 for the Fab Sample Product, and proposed a "New Price Drop" of \$8.00.¹⁴
11. On 1 March 2022, Mr Davies directed his category assistant to change the white ticket price of the Fab Sample Product (among others) to \$14 effective 9 March 2022.¹⁵
12. On 8 March 2022, he sent his team a calendar reminder to place the Fab Sample Product (among others) on Prices Dropped on 11 April 2022.¹⁶
13. As noted in paragraph 3 above, on 9 March 2022 the Fab Sample Product was moved to its \$14.00 white ticket price.
14. Between 16 March 2022 and 22 March 2022, and between 30 March 2022 and 5 April 2022, the Fab Sample Product ran on a \$7.00 Special.¹⁷
15. On 1 April 2022, Mr Davies discussed with his team his desire to place the Fab Sample Product on Prices Dropped as soon as possible, and when that would be in light of the promotional

⁹ T.312:42-45; see also T.313:1 – T.314:2. Mr Davies accepted that he was "not expecting to move meaningful volumes at a \$14 price point".

¹⁰ Davies 1 at [32]-[34] (CB486).

¹¹ Davies 1 at [35]-[36] (CB486); MPL.0081.0001.0382 (CB6167).

¹² Davies 1 at [36] (CB486).

¹³ Davies 1 at [37] (CB486); MPL.0018.0002.6921 (CB6168).

¹⁴ Davies 1 at [38] (CB486); MPL.0018.0002.6922 (CB6170).

¹⁵ Davies 1 at [40] (CB486); MPL.0018.0002.5831 (CB6171).

¹⁶ Davies 1 at [42] (CB486); MPL.0018.0002.6962 (CB6183).

¹⁷ Davies 1 at [41] (CB486).

Specials. At this time, Mr Davies says he thought the required establishment / resting period was 1 week following the end of a Special.¹⁸ On 6 April 2022, Mr Davies had another discussion with his team. At this time, Mr Davies says he thought the required establishment / resting period was 2 weeks following the end of a Special, and so he directed the Fab Sample Product be placed on Prices Dropped on 18 April 2022.¹⁹ Then, on 7 April 2022, Mr Davies had another discussion with his team who understood from contact with Henkel that competitors to Woolworths were about to lower their price for the product. As a result, Mr Davies directed the product be placed onto Prices Dropped on 11 April 2022 (i.e. 1 week earlier than the period he had settled on the day before). Mr Davies says in his affidavit that he did so because it was his “understanding that Woolworths could move the product to the Prices Dropped Program sooner if doing so was necessary [sic: to] remain competitive.”²⁰

16. In respect of the above negotiations and setting of the price establishment / resting period:
- (a) The supplier’s proposal from the outset was that the product be placed back onto the Prices Dropped program at \$8.00. There is no evidence that the parties ever discussed another proposal, though Mr Davies’ evidence was to the effect that he considered the option of EDLP in respect of the Fab Sample Product.²¹
 - (b) At or very close to the time the CPI was agreed, there is evidence that the parties also agreed the product would return to Prices Dropped. In the email from Mr Taylor of Henkel on 28 February 2022, he provides “recommended RRP’s to potentially establish a bench price at [sic] on Fab, in order to reflect a save and move to price drop *as per the CPI alignment*” (emphasis added).²²
 - (c) At no stage did Woolworths contemplate selling the product at \$14 on an ongoing basis, including when it lifted the price to that level.²³ Mr Davies’ proposal to Henkel did not contain any reference to sales of the Fab Sample Product at \$14.00, because he did not regard it as “likely to be consequential to the overall evaluation of the commercials of the deal.”²⁴

¹⁸ Davies 1 at [43] (CB486); Davies 2 at [3]-[7] (CB486); MPL.0097.0001.0001 (CB6178); MPL. 0072.0001.1802 (CB6185); MPL.0071.0001.1803 (CB6174). See also T317:38-T320:20.

¹⁹ Davies 1 at [44] (CB486); MPL.0093.0001.0004 (CB6186).

²⁰ Davies 1, [45] (CB486).

²¹ T.314:16-19.

²² Davies 1, [37] (CB486); MPL.0018.0002.6921 (CB6168).

²³ T.316:1-21.

²⁴ Davies 1, [27]-[28], [31] (CB486); MPL.0015.0006.3192 (CB Tab 506/.xlsx).

- (d) In cross-examination, Mr Davies:
- (i) agreed with the proposition that “the reason that the product went to \$14 was because that was a way of establishing – of creating a “was” price for a future drop”;²⁵
 - (ii) gave evidence that he considered the \$8.00 Prices Dropped price to be the competitive price,²⁶ and that the \$14.00 price would not have been a competitive price on an ongoing basis.²⁷
- (e) Woolworths wished to put the product onto Prices Dropped as quickly as possible in compliance with its internal rules. This is evident from Mr Davies’ discussions with his team on 1 April 2022, 6 April 2022 and 7 April 2022. Mr Davies also agreed with the proposition in cross-examination that he personally was “keen to get the product back on Prices Dropped as soon as possible.”²⁸ Henkel’s desire appears to have been the same: on 7 April 2022, it requested that the Fab Sample Product go on Prices Dropped as soon as possible.²⁹
17. As noted above, on 11 April 2022 the product was placed on the Prices Dropped program at \$8.00.
18. The changes in net cost price and gross profit margin associated with each of the P1, P2, and P3 periods discussed above is set out in **Annexure A** to the ACCC’s closing submissions.

Key points

19. The following key points emerge in relation to the Fab Sample Product.
20. **First**, there was never any commercial modelling undertaken by Woolworths in relation to a proposal to sell the product at a white ticket price of \$14.00 during the P2 or price establishment period, let alone at that price on an ongoing basis. Mr Davies’ explanation as to why this was the case is clear: he did not regard “the application of an Establishment Period at the start of that timeframe [i.e. the 52 week period covered by the CPI and associated promotional plan] as being likely to be consequential to the overall evaluation of the commercials of the deal”.³⁰
21. **Second**, Mr Davies did not contemplate selling the product at \$14.00 on an ongoing basis, nor did he regard it as a competitive price.

²⁵ T.316:29-35.

²⁶ T.314:31-T.315:9.

²⁷ T.320:36-38.

²⁸ T.316:26-27.

²⁹ Davies 1 at [45] (CB486); [MPL.0093.0001.0005] (CB 6190).

³⁰ Davies 1 at [31] (CB486).

22. **Third**, the product was only offered for sale at its P2 price of \$14.00 because a period at that price was required by Woolworths’ internal policies to promote P3 as a Prices Dropped price. In cross-examination, Mr Davies agreed that “the reason that the product went to \$14 was because that was a way of establishing – of creating a “was” price for a future drop”.³¹
23. **Fourth**, Mr Davies and Henkel wanted that P2 period to be as short as possible, as communications Mr Davies had with his team in early April attest.
24. **Fifth**, in the result, the P2 period was so short that it did not even comply with Woolworths’ own policy (namely, the January 2022 CPI Guidance). It was 33 days, when it ought to have been 42 days – that is, 6 weeks – given the product’s IPI was 7.3 weeks.³² That period was also interrupted by Specials, when it should have been an uninterrupted period. The evidence suggested Mr Davies believed there was an exception to the price establishment rules if the product needed to be moved to Prices Dropped to maintain its competitiveness.³³ No such exception is set out in the January 2022 CPI Guidance.
25. **Sixth**, insofar as Woolworths relies upon the receipt of a Cost Price Increase request from Henkel as justification for its conduct, the increase in the Net Cost Price for the Fab Sample Product does not fully account for its change in retail price. For the \$7.00 retail price increase from P1 to P2, █ (█%) was attributable to a change in NCP; the balance of \$█ (█%) went to Woolworths. Of the \$1.00 retail price increase from P1 to P3, █ (█%) of that was attributable to a change in NCP and █ (█%) was attributable to margin maintenance / improvement.

³¹ T.316.29-35.

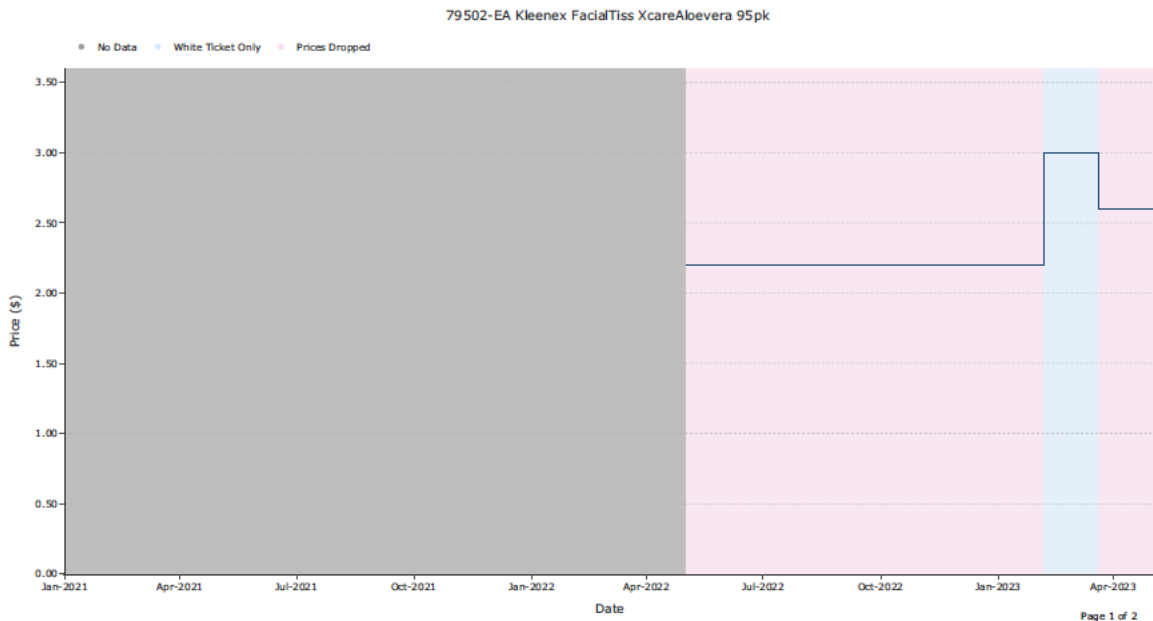
³² 1050794.015.001.0064 (CB1071).

³³ Davies 1 at [45] (CB486).

KLEENEX SAMPLE PRODUCT (79502)

Kleenex Facial Tissue Xcare Aloe Vera 95pk

2 MAY 2022 TO 4 MAY 2023 (~1 YEAR)¹



What consumers saw

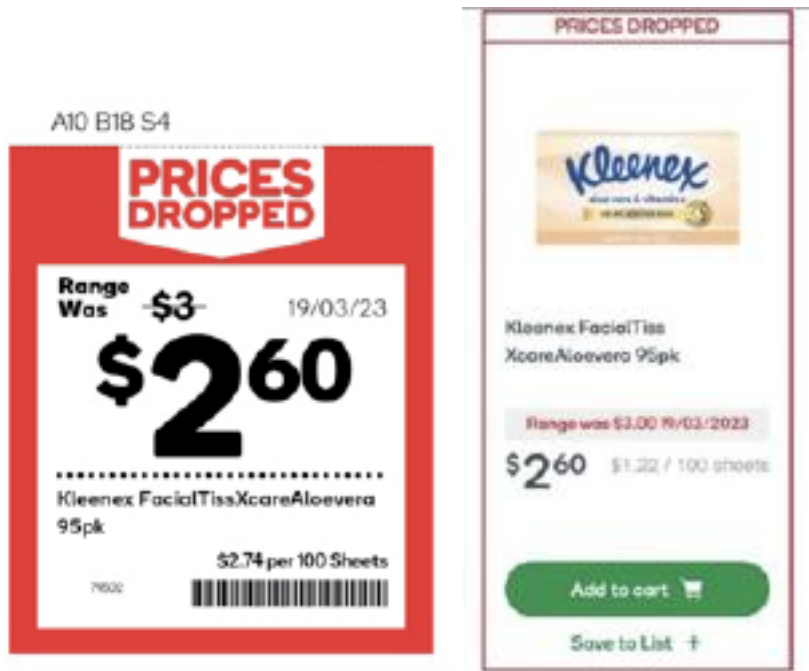
1. For 280 consecutive days, from 2 May 2022 to 5 February 2023, consumers shopping at Woolworths in-store and online would have seen the Kleenex Sample Product offered for sale by Woolworths at a Prices Dropped price of \$2.20 (**P1**).²
2. On 6 February 2023, Woolworths increased the price of the Kleenex Sample Product by 36% and began offering it for sale at a white ticket price of \$3.00 (**P2**). That price stayed on shelves (and online) for 42 days.³
3. On 20 March 2023, Woolworths “dropped” the price of the product to \$2.60 (**P3**) and started promoting it to consumers using a red Prices Dropped Ticket, showing a discount from a ‘Was’ price of \$3.00.⁴
4. In-store and online, consumers would have seen Prices Dropped tickets which looked like the below:

¹ Graph extracted from Wright Report, Annexure F7 (CB 354 at 440-441).

² SOAF at Annexure C, row 98 (CB 100 at 203).

³ Ibid; SOAF at [32]-[35], Annexure C, row 98 (CB 100 at 106, 203); AOS at [97]; AOS, Annexure A, row 7.

⁴ AOS, Annexure A, row 2 and Annexure C, row 2 to the ACCC’s written opening submissions.



5. Woolworths’ “discounted” Prices Dropped price of \$2.60 was \$0.40 higher than the price that consumers had been paying for the same product 6 weeks earlier – an effective price rise of 18%.⁵
6. Woolworths continued promoting the Kleenex Sample Product at a Prices Dropped price of \$2.60 for 46 consecutive days, until 4 May 2023.⁶

Events sitting behind the price changes

7. On 7 November 2022, Woolworths received a CPI request and proposed promotional plan from Kimberley-Clark Australia (KCA), the supplier of the Kleenex Sample Product.⁷ The covering letter from KCA referred, among other things, to an increase in the “RRP” from \$2.80 to \$3.30 per pack.⁸ As noted at paragraph **Error! Reference source not found.** above, at the time Woolworths was selling the product for \$2.20 on Prices Dropped.
8. In respect of the Kleenex Sample Product, KCA’s proposal was that:
 - (a) the net cost price to Woolworths increase from its current \$█ to \$█ (and the deferred deal of █% be maintained);
 - (b) the product would be sold:

⁵ AOS, Annexure A, row 7.

⁶ AOS, Annexure A, row 7.

⁷ Moffatt, [68]-[69] (CB pp. 646-648); [MPL.0050.0006.2414] (CB p. 6222); [MPL.0050.0006.2415] (CB Tab 533).

⁸ Moffat, [69(a)] (CB p. 647).

- (i) on a “Shelf” price of \$3.30 for 6 weeks – with estimated weekly volumes of 101,816 units and a gross profit of █%; and
 - (ii) on a “Promo Level 1” price of \$2.60 for 46 weeks – with estimated weekly volumes also of 101,816 units and a gross profit of █%.⁹
9. Mr Moffatt’s evidence is that he understood KCA to be suggesting, among other things, that the product be placed “on the Prices Dropped Program at \$2.60 for 46 weeks, after the product had been offered at the ‘\$3.30 price establishment’ price for 6 weeks (emphasis added)”.¹⁰ During cross-examination, Mr Moffatt agreed the 6 week period was to comply with at least Woolworths’ price establishment period.¹¹ He also said that there was likely an error or “significantly poor forecasting” in KCA’s volumes analysis (as the same 101,816 figure was used for both price points).¹² He also said he would never rely on the modelling of a supplier and would have done his own modelling as was his usual practice, though he conceded he had no memory of having done so and that no such modelling was annexed to his affidavit.¹³ Mr Moffatt’s evidence was that he would have done modelling of what the position would have been if the product had been sold at \$3 for 52 weeks.¹⁴
10. On 2 December 2022, Mr Moffatt expressed his concern to KCA in writing that it would not be a “fair representation” to consumers to adopt this proposal and show consumers “a save of 70c” (i.e. between the \$3.30 “Was” price and the \$2.60 Prices Dropped price).¹⁵
11. On 6 December 2022, KCA replied to Mr Moffatt’s email of 2 December 2022, but its response did not relate to Mr Moffatt’s comments about the proposal for the Kleenex Sample Product referred to above.¹⁶ Mr Moffatt does not recall any response from the relevant KCA representative.¹⁷
12. On 13 December 2022, Mr Moffatt informed KCA that Woolworths approved the CPI and promotional plan in respect of the Kleenex Sample Product.¹⁸
13. On 2 February 2023, Mr Moffatt approved KCA’s CPI request in PartnerHub,¹⁹ and on or around that same day, he instructed his Category Assistant, James Goudie, to arrange for the Kleenex

⁹ Moffatt, [69(b)], [70] (CB pp. 647-649); [MPL.0050.0006.2415] (CB Tab 533).

¹⁰ Moffatt, [70(e)] (CB pp. 648, 649).

¹¹ T.337:35-338:2.

¹² T.336:9-23.

¹³ T.337:1-23.

¹⁴ T.341:35-39.

¹⁵ Moffatt, [74] (CB p. 649); [MPL.0002.0003.3290] (CB p. 6260).

¹⁶ [MPL.0002.0003.3290] (CB pp. 6258-6259).

¹⁷ Moffatt, [75] (CB pp. 649, 650).

¹⁸ Moffatt, [77] (CB p. 650); [MPL.0002.0003.3280] (CB p. 6263).

¹⁹ Moffatt, [82] (CB p. 651); [MPL.0081.0001.0461] (CB p. 6296).

Annexure B – Kleenex Sample Product

Sample Product to be sold on a new shelf price of \$3.00 for 6 weeks from 6 February 2023, before being added to the Prices Dropped Program at a price of \$2.60.²⁰

14. His evidence was that he considered “KCA’s proposed RRP was overinflated at \$3.30”,²¹ and that he eventually decided to select a \$3.00 price in its place.²² In his affidavit, Mr Moffatt said that the \$3.00 price would “better represent the value of the product and the appropriate price point at which Woolworths would sell the product if it was not on the Prices Dropped Program or any promotion”.²³ In cross-examination, Mr Moffatt’s evidence was that, in the event that for whatever reason the Prices Dropped promotion came to an end, he would in practice review the price at which the product would then be sold. Mr Moffatt conceded, however, that although he considers it would be his practice to do so, he could not recall specifically whether any modelling was undertaken in respect of Woolworths’ position if the Kleenex Sample Product was to be sold at the \$3.00 price for 52 weeks.²⁴
15. Throughout the negotiations, the parties only ever discussed a proposal whereby the Kleenex Sample Product would be placed onto the Prices Dropped program at a \$2.60 price after a 6 week price establishment period.
16. As noted in paragraph **Error! Reference source not found.** above, the Kleenex Sample Product was then sold at its P2 price for 42 days, from 6 February 2023 to 19 March 2023, before being promoted on Prices Dropped at P3 from 20 March 2023 to at least 4 May 2023.

Key points

17. The following key points emerge in relation to the Kleenex Sample Product.
18. **First**, the product was only sold at P2 because that is what was required by Woolworths’ internal policies to “establish” the price and promote P3 as a Prices Dropped price. That is the reason Mr Moffatt understood KCA to propose the ““\$3.30 price establishment’ price for 6 weeks”.²⁵ That was the same substantive proposal ultimately adopted by Mr Moffatt, with the exception of his selection of a \$3.00 P2 price in place of KCA’s proposed \$3.30 price.
19. **Second**, in the case of this Sample Product, Mr Moffatt did not simply accept the “RRP” of \$3.30 proposed by the supplier, KCA, but exercised independent judgment and arrived at the conclusion that it was “over-inflated”. His conduct shows the limits of any suggestion that

²⁰ Moffatt, [83] (CB p. 651).

²¹ Moffatt, [74] (CB p. 649).

²² Moffatt, [75] (CB pp. 649, 650).

²³ Moffatt, [75] (CB pp. 649, 650).

²⁴ T.341:24-39.

²⁵ Moffatt, [70(e)] (CB pp. 648, 649); T.337:37-338:2.

Annexure B – Kleenex Sample Product

Category Managers were in a position of reliance on suppliers, and their proposed “RRPs”, as to what would be an appropriate or competitive selling price.

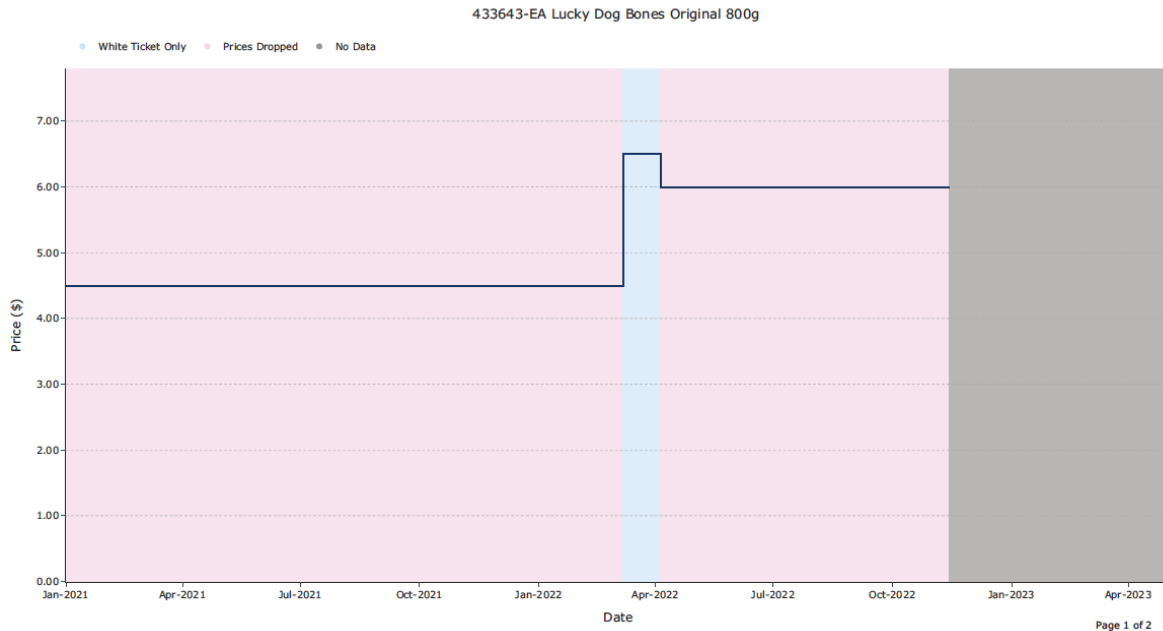
20. **Third**, Mr Moffatt agreed that, in practice, if the Prices Dropped promotion ended, he would review the price at which the product would be charged, as opposed to automatically charging the \$3.00 price.²⁶
21. **Fourth**, the increase in the Net Cost Price for the Kleenex Sample Product does not fully account for its change in retail price. Of the 80c retail price increase from P1 to P2, ■■■ (■■■■%) was attributable to a change in net cost and ■■■ (■■■■%) was attributable to margin maintenance / improvement. Of the 40c retail price increase from P1 to P3, ■■■ (■■■■%) of that was attributable to a change in net cost and ■■■ (■■■■%) was attributable to margin maintenance / improvement.

²⁶ T.341:24-33.

LUCKY DOG SAMPLE PRODUCT (433643)

Lucky Dog Bones Original 800g

1 JANUARY 2021 TO 13 NOVEMBER 2022 (~1 YEAR, 10 MONTHS)¹



What consumers saw

1. For 430 days from 1 January 2021 to 6 March 2022, consumers shopping at Woolworths in-store and online would have seen the Lucky Dog Sample Product offered for sale by Woolworths in-store and online at a Prices Dropped price of \$4.50 (**P1**).²
2. On 7 March 2022, Woolworths increased the price of the Lucky Dog Sample Product by 44% and began offering it for sale at a white ticket price of \$6.50 (**P2**). That price remained on shelves (and online) for 29 days.³
3. On 5 April 2022, Woolworths “dropped” the price of the product to \$6.00 (**P3**) and started promoting it to consumers using a red Prices Dropped Ticket, showing a discount from the “Was” price of \$6.50.⁴ Woolworths’ “discounted” Prices Dropped price of \$6.00 was \$1.50 higher than the price consumers had been paying for the same product just over 4 weeks ago – an effective price rise of 33%.⁵

¹ Extracted from Wright Report, Annexure F8 (**CB354** at 443-444).

² SOAF, Annexure B, row 108 (**CB100** at 134).

³ AOS, Annexure A, row 8.

⁴ SOAF at [32]-[35], Annexure C, row 108 (**CB100** at 105-106)

⁵ AOS, Annexure A, row 8.

4. Woolworths continued promoting the Lucky Dog Sample Product at a Prices Dropped price of \$6.50 for a period of 223 days until 13 November 2022.⁶

Events sitting behind the price changes

5. On 13 December 2021, Woolworths received a CPI request with a proposed promotional plan from the supplier, Nestle Purina.⁷ In respect of the Lucky Dog Sample Product, the supplier's proposal was that:
- (a) the net cost price to Woolworths would be increased from its current \$ [REDACTED] to \$ [REDACTED] (reflecting the removal of a deferred deal of [REDACTED] %);⁸ and
 - (b) the product would be sold on a hi-lo promotional schedule (instead of Prices Dropped) as follows:⁹
 - (i) on its "Shelf" price at an "RRP / Unit (inc GST)" of \$6.50 for 40 weeks;
 - (ii) on its "Promo Level 1" at an "RRP / Unit (inc GST)" of \$5.50 for 8 weeks; and
 - (iii) on its "Promo Level 2" at an "RRP / Unit (inc GST)" of \$5.00 for 4 weeks.
6. On 2 February 2022, Woolworths made a counter-proposal to Nestle Purina. In respect of the Lucky Dog Sample Product, Woolworths' proposal was that:
- (a) the net cost price to Woolworths would be increased from its current \$ [REDACTED] to \$ [REDACTED] (reflecting the introduction of a [REDACTED] % deferred deal); and
 - (b) the product would be sold on a "Shelf" price at an "RRP / Unit (inc GST)" of \$6.00 for 52 weeks, being an EDLP price.¹⁰
7. During cross-examination, Mr McCaig's evidence was that it was unlikely that he would have modelled sales at price points other than \$6,¹¹ and would instead have considered factors such as the cost change and how to increase the profit percentage to Woolworths.¹² Mr McCaig also confirmed that, in his proposal, he was proposing a different product, Lucky Dog Meaty Chews, go back onto Prices Dropped at some point in the future, but only modelled it in the deal sheet at its "dropped" price.¹³

⁶ See Annexure C, row 8 to the ACCC's written opening submissions.

⁷ McCaig, [20]-[23] (CB595); [MPL.0008.0010.1831] (CB6305); [MPL.0008.0010.1832] (CB6307); [MPL.0008.0010.1834] (CB Tab 547/.xlsx).

⁸ McCaig, [23(a)(iii)], [23(a)(iv)] (CB595); [MPL.0008.0010.1834] (CB Tab 547/.xlsx).

⁹ [MPL.0008.0010.1834] (CB Tab 547/.xlsx); T.279:40-46 (McCaig XXN).

¹⁰ McCaig, [26]-[29] (CB595); [MPL.0002.0005.1666] (CB6334); [MPL.0002.0005.1667] (CB Tab 557/.xlsx); T.280:5-12 (McCaig XXN).

¹¹ T.283.11-26 (McCaig XXN).

¹² T.284:4-10; see also T.288:1-T.289:6 (McCaig XXN).

¹³ [MPL.0002.0005.1667] (CB Tab 557/.xlsx); T.292:12-T.294:23 (McCaig XXN).

Annexure B – Lucky Dog Sample Product

8. On 8 February 2022, Woolworths’ received a second proposal from Nestle Purina. In respect of the Lucky Dog Sample Product, Nestle Purina’s proposal was that:
- (a) the net cost price to Woolworths would be increased from its current \$█ to \$█ (reflecting the removal of Woolworths’ proposed █% deferred deal); and
 - (b) the product would be sold:
 - (i) on a “Shelf” price at an “RRP / Unit (inc GST)” of \$6.50 for 8 weeks – with estimated sales volumes of 9,059 units per week and a GP% of █%;
 - (ii) on a “Promo Level 1” price at an “RRP / Unit (inc GST)” of \$6.00 for 44 weeks, being a Prices Dropped price – with estimated sales volumes of 14,500 units per week, scan funding of \$█ per promo unit, and a GP% of █%.¹⁴
9. Mr McCaig’s evidence was that Nestle Purina proposed 8 weeks of sales at \$6.50, because it did not yet know and was awaiting clarification from Mr McCaig as to the actual length of the required price establishment period under Woolworths’ internal rules.¹⁵
10. On 14 February 2022, Woolworths made its second counter-proposal to Nestle Purina. In respect of the Lucky Dog Sample Product, Woolworths’ proposal was that:
- (a) the net cost price to Woolworths would be increased from its current \$█ to \$█ (reflecting the re-introduction of a deferred deal, at a rate of █%); and
 - (b) the product would be sold on a “Promo Level 1” price at an “RRP / Unit (inc GST)” of \$6.00 for 52 weeks, being an EDLP price – with estimated sales volumes of 14,500 units per week, scan funding of \$█ per promo unit, and a GP% of █%.¹⁶
11. Later on 14 February 2022, Woolworths received a third proposal from Nestle Purina. In respect of the Lucky Dog Sample Product, Nestle Purina’s proposal was that:
- (a) the net cost price to Woolworths would be increased from its current \$█ to \$█ (reflecting the removal of Woolworths’ proposed █% deferred deal); and
 - (b) the product would be sold:
 - (i) on a “Shelf” price at an “RRP / Unit (inc GST)” of \$6.50 for 8 weeks – with estimated sales volumes of 9,059 units per week and a GP% of █%;
 - (ii) on a “Promo Level 1” price at an “RRP / Unit (inc GST)” of \$6.00 for 44 weeks, being a Prices Dropped price.¹⁷

¹⁴ McCaig, [32]-[35] (CB595); [MPL.0002.0005.1636] (CB6340); [MPL.0002.0005.1637] (CB Tab 560.xlsx).

¹⁵ T.294:34-46 (McCaig XXN); see also McCaig, [36] (CB595).

¹⁶ McCaig, [39]-[41] (CB595); [MPL.0002.0005.0994] (CB6353); [MPL.0002.0005.0995] (CB Tab 564.xlsx).

¹⁷ McCaig, [42]-[45] (CB595); [MPL.0002.0005.0987] (CB6366); [MPL.0002.0005.0988] (CB Tab 566.xlsx).

Annexure B – Lucky Dog Sample Product

12. .That is, Nestle proposed Prices Dropped yet again instead of Woolworths’ proposed EDLP for the Lucky Dog Sample Product. Under cross-examination, Mr McCaig agreed that this was because they considered “there was some potency to the Prices Dropped message that went beyond the potency of the Every Day Low Prices” message,¹⁸ and that the “main reason they were keen for Dropped, I can remember, is they placed a lot of value on that saved statement”.¹⁹
13. On 15 February 2022, Woolworths made a third counter-proposal to Nestle. In respect of the Lucky Dog Sample Product, Woolworths proposed an increase in its trading gross profit of █%. Then, on 16 February 2022, Nestle Purina wrote back to Woolworths, and provided some data by which Mr McCaig understood Nestle Purina to be conveying that the parties were aligned on an increase in Woolworths trading gross profit of █% in respect of the Lucky Dog Sample Product. But Mr McCaig did not understand this to be consistent with Woolworths’ data.²⁰ Thereafter, the parties’ correspondence appeared to focus on their data alignment issues and how to progress the negotiations.²¹ Those issues do not appear principally to have affected the Lucky Dog Sample Product.²² Ultimately, Mr McCaig suggested the parties “focus on using the deal sheets to improve the proposal, whilst acknowledging that there will be a difference in our valuations”, to which Nestle agreed.²³
14. On 28 February 2022, Woolworths received a further proposal from Nestle Purina. In respect of the Lucky Dog Sample Product, Nestle Purina’s proposal was that:
- (a) the net cost price to Woolworths would be increased from its current \$█ to \$█ (reflecting the removal of a deferred deal); and
 - (b) the product would be sold:
 - (i) on a “Shelf” price at an “RRP / Unit (inc GST)” of \$6.50 for 8 weeks;
 - (ii) on a “Promo Level 1” price at an “RRP / Unit (inc GST)” of \$6.00 for 44 weeks, being a Prices Dropped price.²⁴
15. Following the above proposal, Mr McCaig sought a further margin improvement on the overall CPI increase (i.e. not in specific relation to the Lucky Dog Sample Product).²⁵ Nestle Purina rejected this, which Mr McCaig understood to be because of data misalignment issues.²⁶ Nestle Purina also said that its final position was to deliver a █% GP improvement versus the previous

¹⁸ T.297:21-25 (McCaig XXN).

¹⁹ T.297:32-33 (McCaig XXN).

²⁰ McCaig, [46]-[51] (CB595).

²¹ McCaig, [52], [54]-[55] (CB595).

²² McCaig, [52] (CB595).

²³ McCaig, [54]-[55] (CB595).

²⁴ McCaig, [55]-[57] (CB595); [MPL.0002.0005.0737] (CB Tab 575/.xlsx).

²⁵ McCaig, [58] (CB595); [MPL.0002.0005.0702] (CB6493).

²⁶ McCaig, [59] (CB595); [MPL.0002.0005.0700] (CB6522).

Annexure B – Lucky Dog Sample Product

- year.²⁷ Woolworths rejected this, including due to Nestle Purina’s removal of deferred deal funding in respect of the Lucky Dog Sample Product.²⁸
16. On 2 March 2022, Woolworths received a further proposal from Nestle Purina. In respect of the Lucky Dog Sample Product, Nestle Purina’s proposal was that:
- (a) the net cost price to Woolworths would be increased from its current \$█ to \$█ (reflecting the movement of the previous scan funding of \$█ per promo unit into deferred deal funding of █%),²⁹
 - (b) the product would be sold:
 - (i) on a “Shelf” price at an “RRP / Unit (inc GST)” of \$6.50 for 8 weeks – with estimated sales volumes of 9,059 units per week and a GP% of █%;
 - (ii) on a “Promo Level 1” price at an “RRP / Unit (inc GST)” of \$6.00 for 44 weeks, being a Prices Dropped price – with estimated sales volumes of 14,500 units per week, and a GP% of █%.³⁰
17. On 3 March 2022, the above proposal for the Lucky Dog Sample Product was ultimately agreed, once Nestle Purina accepted a further condition from Woolworths.³¹
18. As noted above, the Lucky Dog Sample Product was sold at its white ticket P2 price of \$6.50 from 7 March 2022 to 4 April 2022.
19. A Nestle Purina representative replied on 7 March 2022 (the same day as the price movement) and identified a preference that the Lucky Dog Sample Product’s “evolved dropped” at \$6.00 “GO LIVE...(Ideally in 2-4wks time).³²
20. On 11 March 2022, Mr McCaig emailed Nestle Purina and requested it provide more information about the proposed price drops before he sought approval for them the next week, after which he would “be able to share timings”.³³ Nestle Purina’s reply, on 17 March 2022, set out a “summarised position on the DROPPED campaigns”; for the Lucky Dog Sample Product, it referred to the status as “Implement ASAP”.³⁴

²⁷ McCaig, [59] (CB595); [MPL.0002.0005.0700] (CB6522).

²⁸ McCaig, [60] (CB595); [MPL.0002.0005.1734] (CB6565).

²⁹ McCaig, [62] (CB595); [MPL.0002.0005.1743] (CB Tab 580/.xlsx).

³⁰ McCaig, [62]-[64] (CB595); [MPL.0002.0005.1743] (CB Tab 580/.xlsx). A further deal sheet was provided later that day which is relevantly the same for the Sample Product: McCaig, [65]-[67] (CB595).

³¹ McCaig, [69]-[70] (CB595); [MPL.0002.0005.1732] (CB6568); [MPL.0002.0005.1726] (CB Tab 586/.xlsx).

³² McCaig, [74] (CB595); [MPL.0002.0005.1712] (CB6576).

³³ [MPL.0002.0005.0816] (CB6580); see also McCaig, [77] (CB595).

³⁴ [MPL.0002.0005.0816] (CB6580); see also McCaig, [78] (CB595).

Annexure B – Lucky Dog Sample Product

21. During cross-examination, Mr McCaig gave evidence that he was ultimately informed by Woolworths' pricing team that 4 weeks was sufficient as a price establishment period, which is why that was selected in place of the initially contemplated 8 weeks.³⁵
22. On 31 March 2022, Mr McCaig made a presentation to his superiors in which he, among other things, sought approval for the Lucky Dog Sample Product to be placed on Prices Dropped.³⁶ In that presentation, Mr McCaig referred to the importance of increasing the penetration of Woolworths' red promotional program, placing Own Brand products on Low Price (i.e. the EDLP program) for a "consistent Value message", and utilising "Prices Dropped on Key Brands for greater impact".³⁷ Mr McCaig also proposed a "Launch Date on 4/4 to ensure first to market".³⁸
23. Later on 31 March 2022, Mr McCaig emailed Nestle Purina to confirm that approval had been given to place the Lucky Dog Sample Product (among others) on the Prices Dropped program, effective Monday 4 April 2022.³⁹
24. As noted in paragraph **Error! Reference source not found.** above, the Lucky Dog Sample Product was sold at its P3 Prices Dropped price of \$6.00 from 5 April 2022 to 13 November 2022.

Key points

25. The following key points emerge in relation to the Lucky Dog Sample Product.
26. **First**, the product was only sold at P2 because that is what was required by Woolworths' internal policies to promote P3 as a Prices Dropped price. Nestle Purina wanted this period to be as short as possible. The initial sale of the Lucky Dog Sample Product at \$6.50 for a period of time before placing it on Prices Dropped at \$6.00 was discussed in the context of complying with Woolworths' internal price establishment requirements, and was ultimately shortened to about 4 weeks despite the parties (particularly, Nestle Purina) contemplating an 8 week period up until close to the time of the CPI and promotional plan being agreed. Further, Nestle Purina wanted the Prices Dropped price to be "implement[ed] ASAP"⁴⁰ and "[i]deally in 2-4wks time" after the CPI came into effect.⁴¹ Woolworths also wanted that period to be relatively short, as it wanted

³⁵ T.305:9 – T.306:3 (McCaig XXN).

³⁶ McCaig, [79] (CB595).

³⁷ [MPL.0109.0001.0001] (SCB172).

³⁸ [MPL.0109.0001.0001] (SCB172 at 173).

³⁹ McCaig, [80] (CB595).

⁴⁰ [MPL.0002.0005.0816] (CB6580); see also McCaig, [78] (CB595).

⁴¹ McCaig, [74] (CB595); [MPL.0002.0005.1712] (CB6576).

to promote the Lucky Dog Sample Product (among others) on Prices Dropped so that it was “first to market”.⁴²

27. **Second**, the evidence is that Woolworths, from the outset, considered \$6 as the appropriate price point to sell the product, rather than \$6.50. As noted above, Mr McCaig’s evidence was that it was unlikely that he would have modelled sales at price points other than \$6,⁴³ and would instead have considered factors such as the cost change and how to increase the profit percentage to Woolworths.⁴⁴ The evidence only shows Woolworths modelling an ongoing price point of \$6. Mr McCaig also gave evidence that, “at no point” in his first counter proposal to Nestle Purina did he “put forward the possibility that the product would ever be sold at \$6.50 on Woolworths’ shelves”, because he “didn’t want it to go that high at all”.⁴⁵ He was focused on “get[ting] it straight back down to \$6”.⁴⁶
28. **Third**, the increase in the Net Cost Price for the Lucky Dog Sample Product does not fully account for its change in retail price. Of the \$2.00 retail price increase from P1 to P2, ■■■ (■■%) was attributable to a change in NCP and \$■■■ (■■%) was attributable to margin maintenance / improvement. Of the \$1.50 retail price increase from P1 to P3, ■■■ (■■■■%) of that was attributable to a change in NCP and ■■■ (■■■■%) was attributable to margin maintenance / improvement.

⁴² [MPL.0109.0001.0001] (SCB172 at 173).

⁴³ T.283.11-26 (McCaig XXN).

⁴⁴ T.284:4-10 (McCaig XXN).

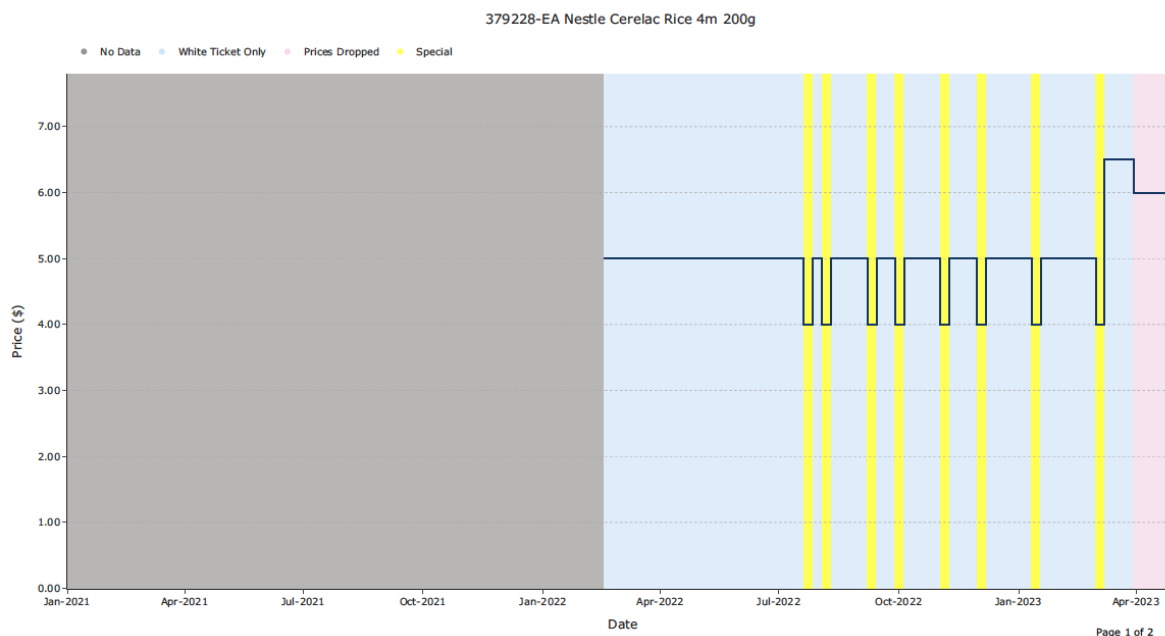
⁴⁵ T285:4-7 (McCaig XXN).

⁴⁶ T288:16-19 (McCaig XXN).

NESTLE CERELAC RICE SAMPLE PRODUCT (379228)

Nestle Cerelac Rice 4m 200g

17 FEBRUARY 2022 TO 4 MAY 2023 (~1 YEAR, 2 MONTHS)¹



What consumers saw

1. For 377 days between 17 February 2022 and 28 February 2023, consumers shopping at Woolworths in-store and online would have seen the Nestle Sample Product offered for sale at a white ticket price of \$5.00 (**P1**) — interspersed, now and then, with short-term Specials at \$4.00 which lasted 7 days at a time.²
2. On 8 March 2023, Woolworths increased the price of the Nestle Sample Product by 30% and began offering it for sale at a white ticket price of \$6.50. That price stayed on shelves (and online) for 22 days.³
3. On 30 March 2023, Woolworths “dropped” the price of the product to \$6.00 (**P3**) and promoted it on Prices Dropped – where it remained for 36 consecutive days, until 4 May 2023.⁴
4. Woolworths’ “discounted” Prices Dropped Price of \$6.00 was \$1.00 higher than the price which consumers had paid for the product just a little over 3 weeks ago — an effective price increase of 20%.⁵

¹ Graph extracted from Wright Report, Annexure F9 (CB354 at 446).

² SOAF, Annexure C, row 168 (CB pp. 233-234).

³ SOAF, Annexure C, row 168 (CB pp. 233-234).

⁴ See AOS, Annexure C, row 9; see also SOAF, Annexure B, row 168 at CB p. 142.

⁵ AOS, Annexure A, row 9.

Events sitting behind the price changes

5. **Nestle’s first proposal:** On 20 December 2022, Woolworths received a CPI request with a proposed promotional plan from Nestle.⁶ In respect of the Nestle Sample Product, Nestle’s proposal was that:
- (a) the net cost price to Woolworths would be increased from \$█ to \$█ (which reflected the proposed removal of a deferred deal of █%, but did not reflect the proposed “scan deal” of \$█); and
 - (b) the product would be sold on “Promo Level 1”, at an “RRP / Unit (exc GST)” of \$6.00, for 52 weeks – with estimated sales volumes 9,801 units per week and a gross profit to Woolworths of █% (which reflected the “scan deal” of █ per unit).⁷
6. Nestle’s proposal also recorded a “Shelf” price of \$6.50 in the column headed “RRP / Unit (exc GST)”.⁸ However, the proposed frequency at this price was recorded as “0” weeks, and while an estimated sales volumes figure of 8,910 per week was provided, a gross profit figure was not.⁹ (The █% referred to above was not calculated by reference to sales at \$6.50 – it was only calculated for sales at \$6.00.)¹⁰
7. Around this time, Mr Robinson had a telephone call with Nestle’s representative in the negotiations who informed him that it was Nestle’s desire to move the Nestle Sample Product onto the Prices Dropped program.¹¹ Mr Robinson informed the Nestle representative that “Woolworths needed to establish the new shelf price for the Cerelac Sample Product for a 3-week Rest Period before it could be placed onto the Prices Dropped program”.¹² Mr Robinson understood Nestle’s proposal to sell the product at its “Promo Level 1” price of \$6.00, was a proposal that it be placed on Prices Dropped.¹³
8. **Woolworths’ first counter-proposal:** On 3 February 2023, Woolworths made a counter-proposal to Nestle.¹⁴ It did not make any changes to the cost price increase or promotional plan proposed by Nestle, other than the re-inclusion of a deferred deal (of █%) to bring the “net cost”

⁶ Robinson Affidavit, [32] (CB p. 706); [MPL.0002.0009.7499] (CB pp. 6649 – 6650).

⁷ Robinson, [32]-[41] (CB pp. 706 – 709); [MPL.0002.0009.7500] (CB pp. 6652 – 6653). If one assumes an effective cost price to Woolworths of \$█ (i.e. \$█ net cost minus \$█ scan deal), and a sell price of \$6 (i.e. the proposed Prices Dropped price), then that produces a GP % figure of = █% (i.e. (((\$6.00 – (\$█ – \$█)) / \$6.00) x 100). These sell prices figures used here are “exc GST” (CB p. 6653).

⁸ Robinson, [40].

⁹ Robinson, [40].

¹⁰ Robinson, [40] (CB p. 708); [MPL.0002.0009.7500] (CB p. 6653); see also T.202:9-21.

¹¹ Robinson [42] (CB p. 709).

¹² Robinson [42] (CB p. 709).

¹³ Robinson, 41(b)] (CB p. 708); T.201:23-T.202:7

¹⁴ Robinson [44] (CB p. 709).

down to \$ [REDACTED] per unit (which, again, must have excluded the scan deal of \$ [REDACTED] per unit).¹⁵ That also resulted in a higher gross profit percentage for Woolworths of [REDACTED]% (which did reflect the inclusion of the scan deal of \$ [REDACTED] per unit).¹⁶

9. **Nestle’s second proposal:** On 10 February 2023, Nestle made its second proposal to Woolworths.¹⁷ It did not make any changes to the cost price increase or promotional plan proposed by Woolworths, other than the inclusion of a deferred deal (of [REDACTED]%) to bring the “net cost” down to \$ [REDACTED] per unit (which, again, must have excluded the scan deal of \$ [REDACTED] per unit).¹⁸ That resulted in a gross profit percentage for Woolworths of [REDACTED]% (which did reflect the inclusion of the scan deal of \$ [REDACTED] per unit).¹⁹ At this point in the negotiations, each party had only ever calculated gross profit percentage based on the product being on Prices Dropped.²⁰
10. **Woolworths’ second counter-proposal:** On 14 February 2023, Woolworths made a second counter-proposal to Nestle which was that it would give Nestle two free brochure spots if it could increase its proposed gross profit percentage on the current position by [REDACTED]%.²¹ The gross profit percentage being referred to, again, was only calculated by reference to the product being placed onto Prices Dropped at \$6.00.²²
11. **Nestle’s third proposal:** On 16 February 2023, Nestle effectively agreed to Woolworths’ second counter-proposal, and provided deal sheets revised only to increase the deferred deal Nestle had previously proposed to [REDACTED]%, with the result that the net cost would be \$ [REDACTED] (not reflecting the \$ [REDACTED] scan deal) and the gross profit percentage would be [REDACTED]% (which did reflect the inclusion of the scan deal of \$ [REDACTED] per unit).²³ The gross profit percentage being referred to, again, was only calculated by reference to the product being placed onto Prices Dropped at \$6.00.²⁴

¹⁵ Robinson [44]-[46] (CB pp. 709 – 710).

¹⁶ Robinson, [44]-[48] (CB pp. 709-710); [MPL.0002.0009.7642] (CB p. 6669); see also T.202:22-T.203:32. If one assumes an effective cost price to Woolworths of \$ [REDACTED] (i.e. \$ [REDACTED] net cost minus \$ [REDACTED] scan deal), and a sell price of \$6 (i.e. the proposed Prices Dropped price), then that produces a GP% figure of [REDACTED]% (i.e. $((\$6.00 - (\$ [REDACTED] - \$ [REDACTED])) / \$6.00) \times 100$). These sell prices figures used here are “exc GST” (CB p. 6669).

¹⁷ Robinson, [49]-[50] (CB p. 710).

¹⁸ Robinson, [49]-[50] (CB pp. 710 – 711).

¹⁹ Robinson, [49]-[50] (CB pp. 710 – 711); [MPL.0002.0009.7326] (CB p. 6684). If one assumes an effective cost price to Woolworths of \$ [REDACTED] (i.e. \$ [REDACTED] net cost minus \$ [REDACTED] scan deal), and a sell price of \$6 (i.e. the proposed Prices Dropped price), then that produces a GP% figure of [REDACTED]% (i.e. $((\$6.00 - (\$ [REDACTED] - \$ [REDACTED])) / \$6.00) \times 100$). These sell prices figures used here are “exc GST” (CB p. 6669).

²⁰ T.204:8-15.

²¹ Robinson, [51] (CB pp. 711 – 712); [MPL.0002.0009.7178] (CB p. 6715).

²² T.204:17-19; T.205:9-17.

²³ Robinson, [52]-[54] (CB p. 712); [MPL.0002.0009.7464] (CB p. 6700). If one assumes an effective cost price to Woolworths of \$ [REDACTED] (i.e. \$ [REDACTED] net cost minus \$ [REDACTED] scan deal), and a sell price of \$6 (i.e. the proposed Prices Dropped price), then that produces a GP% figure of [REDACTED]% (i.e. $((\$6.00 - (\$ [REDACTED] - \$ [REDACTED])) / \$6.00) \times 100$). These sell prices figures used here are “exc GST” (CB p. 6669).

²⁴ T.208:22-T208:33.

12. On 1 March 2023, Mr Robinson sought approval for the proposal from Mr James Hepworth by email.²⁵ In doing so, Mr Robinson referred to the “Current sell: \$5.00”, the “New was: \$6.50” and the “Dropped price: \$5.00”. Under cross-examination, Mr Robinson ultimately accepted that this was saying to Mr Hepworth, “We’re going to, in the future, charge \$6.50 for the product and that will then become the “was” price when we drop the price down to \$6.00”.²⁶ Mr Robinson, in his email, did not set out the period at which the product would be sold at \$6.50, but only referred to it being a proposed “price drop which I have got better buying to verify and they are happy it is within the rules”.²⁷ There is no evidence that Mr Hepworth ever inquired as to the length of the price establishment period.²⁸ On 2 March 2023, Mr Hepworth approved the proposal.²⁹
13. In respect of the negotiations and Woolworths’ approval concerning Nestle’s CPI request and the promotional plan for the Nestle Sample Product:
- (a) neither party discussed a proposal that the Nestle Sample Product be sold at something *other than* a Prices Dropped Price of \$6.00 after the requisite price establishment period — with negotiations instead focusing on the quantum of any deferred deal to be provided;
 - (b) the initial sale of the Nestle Sample Product at \$6.50 for a period of time before placing it on Price Dropped at \$6.00 was discussed in the context of complying with Woolworths’ internal price establishment requirements,³⁰ and in any event was not something which relevant individuals at Woolworths otherwise wished to occur for any other reason, or about which those individuals had independent views;³¹
 - (c) Nestle’s proposal was always that the Nestle Sample Product be sold at a Prices Dropped price of \$6.00 with support comprising, at least, scan funding of \$█;³²
14. As noted above, the Nestle Sample Product was sold at its P2 price of \$6.50 from 8 March 2023 to 29 March 2023, before being promoted on Prices Dropped at its P3 price of \$6.00 from 30 March 2023 until 4 May 2023.

Key points

15. The following key points emerge in relation to the Nestle Sample Product.

²⁵ Robinson, [55] (CB p. 713); [MPL.0002.0004.0295] (CB p. 6711).

²⁶ T.210:15-T.211:19.

²⁷ Robinson, [55] (CB p. 713); [MPL.0002.0004.0294] (CB p. 6710).

²⁸ T.211:8-19.

²⁹ Robinson, [58] (CB pp. 713 – 714); [MPL.0002.0004.0294] (CB p. 6711).

³⁰ See paragraph 7 above, referring to Robinson, [42] (CB p. 709).

³¹ See paragraph 12 above, referring to Robinson, [55] (CB p. 713); [MPL.0002.0004.0295] (CB p. 6710); T.210:15-T.211:19; see also T.212:18-21.

³² See T.207:34-37.

16. **First**, the product was only sold at P2 because that is what was required by Woolworths’ internal policies to promote P3 as a Prices Dropped price. Mr Hepworth was not told, and did not ask about, the length of the P2 period when he approved the plan.
17. **Second**, Mr Robinson conceded in cross-examination that:
- (a) he never turned his mind to whether it would be competitive for Woolworths to sell the Nestle Sample Product at a white ticket price of \$6.50 on an ongoing basis (because the only proposal he was considering was a “Prices Dropped proposal” – ie, selling the product at \$6.50 with a Prices Dropped ticket);³³
 - (b) had Woolworths done so, Woolworths’ gross profit percentage would have gone backwards given the absence of scan deal funding from the supplier in that scenario;³⁴ and
 - (c) contrary to what he had said in his affidavit at [63] as to the \$6.50 price being a “genuine price”, in the absence of an agreed deferred deal to fund the product going onto Prices Dropped at \$6.00, he would have instead sought to negotiate another deal in which Woolworths could be satisfied as to the profitability of the product and its competitiveness.³⁵
18. **Third**, there is no evidence of Woolworths having modelled its gross profit percentage at an ongoing white ticket price of \$6.50, despite that – and the competitiveness of the price within the market³⁶ – being accepted by Mr Robinson as one of the two things he would take into account were he to be setting a price on an ongoing basis.³⁷ The only situation used to model the product’s gross profit was the product being sold at \$6.00 with a Prices Dropped ticket (see paragraphs **Error! Reference source not found.** to 11 above).
19. **Fourth**, insofar as Woolworths relies upon the receipt of a Cost Price Increase request from Nestle’s as justification for its conduct, the increase in the Net Cost Price for the Nestle Sample Product does not fully account for its change in retail price. Of the \$1.50 retail price increase from P1 to P2, \$█ (█%) was attributable to a change in NCP and █ (█%) was attributable to margin maintenance / improvement. Of the \$1.00 retail price increase from P1 to P3, █ (█%) of that was attributable to a change in Net Cost Price and █ (█%) was attributable to margin maintenance / improvement. Further, while Woolworths’ Net Cost Price for the product increased by 14.8% from P1 to P3, Woolworths’ gross profit margin from P1 to P3 improved by █%.

³³ T.212:23-46.

³⁴ T.214:36-T.215:14.

³⁵ T.215:11-22.

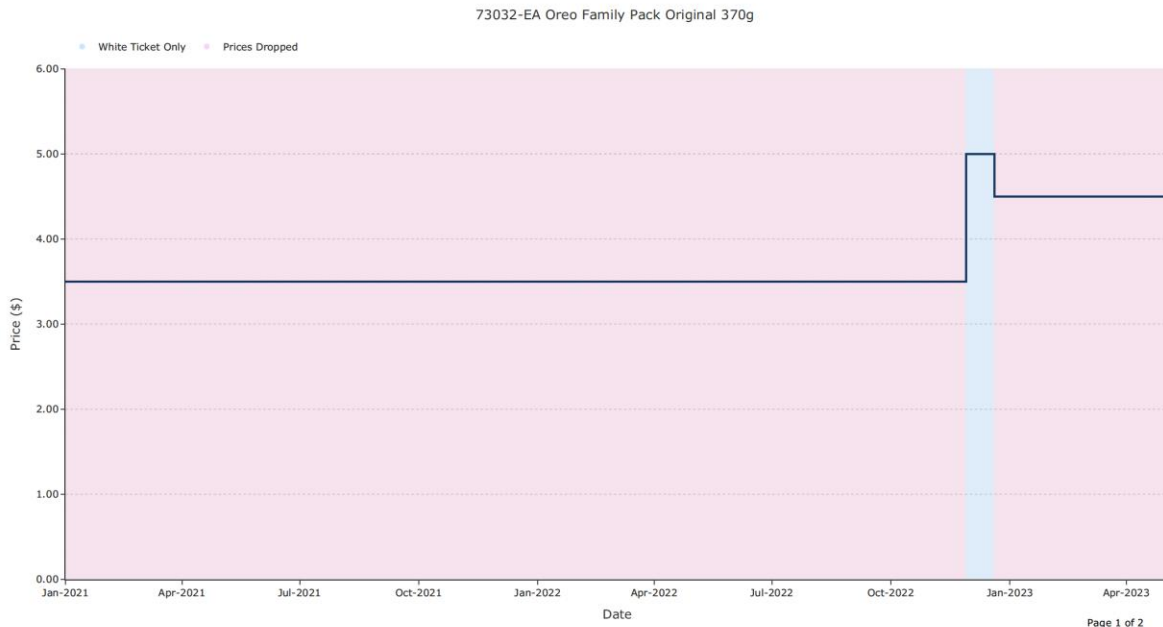
³⁶ T214: 25-29.

³⁷ T.214:19-32.

OREO SAMPLE PRODUCT (73032)

Oreo Family Pack Original 370g

1 JANUARY 2021 TO 4 MAY 2023 (~2 YEARS, 4 MONTHS)¹



What consumers saw

1. For 696 consecutive days between 1 January 2021 to 27 November 2022 (~23 months), consumers shopping at Woolworths in-store and online would have seen the Oreo Sample Product offered for sale by a Woolworths at a Prices Dropped price of \$3.50 (**P1**).²
2. On 28 November 2022, Woolworths increased the price of the Oreo Sample Product by 43% and began offering it for sale to consumers at a white ticket price of \$5.00 (**P2**). That price stayed on shelves (and online) for 22 days.³
3. On 20 December 2022, Woolworths “dropped” the price of the product to \$4.50 (**P3**) and started promoting it to consumers using a red Prices Dropped Ticket, showing a discount from a ‘Was’ price of \$5.00.⁴
4. In-store and online, consumers would have seen Prices Dropped Tickets which looked like the below:⁵

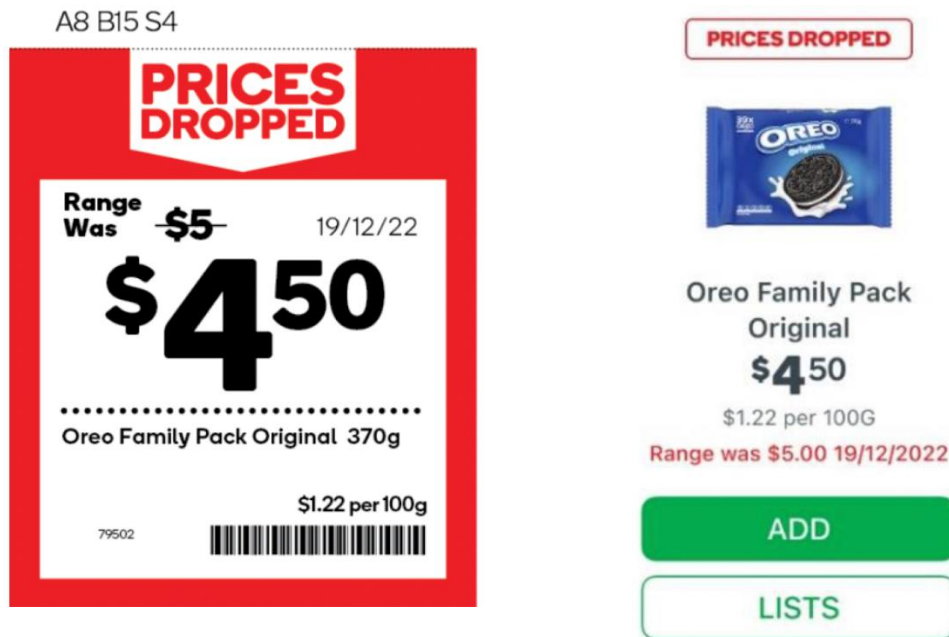
¹ Graph extracted from Wright Report, Annexure F10 (**CB354** at 449).

² SOAF, Annexure C, row 188 (**CB100** at 245).

³ SOAF, Annexure C, row 188 (**CB100** at 245); AOS, Annexure A, row 10.

⁴ SOAF at [32]-[35], Annexure C, row 188 (**CB100** at 106, 109, 245); AOS at [97].

⁵ SOAF, Annexure A (**CB100** at 113).



5. Woolworths’ “discounted” Prices Dropped price of \$4.50 was \$1.00 higher than the price that consumers had been paying for the same product just a little over three weeks ago (an effective price rise of 29%).⁶
6. Woolworths continued promoting the Oreo Sample product at a Prices Dropped price of \$4.50 for at least 136 consecutive days, until 4 May 2023.⁷

Negotiations preceding price changes

7. On 2 September 2022, Woolworths received a letter from the supplier of the Oreo Sample Product, **Mondelez**, notifying of a cost price increase on certain products including the Oreo Sample Product.⁸
8. The earliest evidence of any pricing and promotional plan proposed by Mondelez in connection with its cost price increase request is an extract from a CPI simulator dated 23 September 2022 which Mr O’Leary states he received from Ms Pipan via email.⁹
9. With respect to the Oreo Sample Product, that CPI simulator relevantly recorded:
 - (a) a “Supplier initial ask” for a net cost price increase of 27.69%, from \$█ to \$█; and
 - (b) a “Supplier Proposed Plan” to sell the product at a “Standard Shelf” price of \$4.50 for 52 weeks.¹⁰

⁶ AOS, Annexure A, row 2.

⁷ SOAF, Annexure C, row 188 (CB100 at 245).

⁸ O’Leary at [68]-[69] (CB654); MPL.0002.0002.5456 (CB6751); MPL.0002.0002.5457 (CB6753).

⁹ O’Leary at [71]-[72] (CB654).

¹⁰ Ibid.

10. The same CPI simulator extract also recorded a “Woolworths counter proposal” of:
 - (a) a net cost price increase of 18.39%, from \$█ to \$█; and
 - (b) selling the product at a “Standard Shelf Price” of \$5.00 for 4 weeks, before promoting the product at \$4.50 for 48 weeks.¹¹
11. On 6 October 2022, Ms Pipan emailed a one-page presentation to Mr O’Leary, containing modelling on the impact of Mondelez’s CPI proposals on the sale and gross profit of products including the Oreo Sample Product.¹² Ms Pipan’s presentation included the statement: “Starting again to ensure we are compiling [sic] with the pricing policy Mondelez has been spoken to”.¹³
12. This email, as well as the structure of Woolworths’ proposal referred to above, is indicative of Woolworths proposing that a \$5 price be implemented prior to a Prices Dropped price of \$4.50 being implemented 4 weeks later. That this was indeed the proposal was made clear in writing by no later than 11 November 2022, when Ms Pipan emailed Mondelez, and noted with respect to the Oreo Sample Product that she was proposing:

Baseline \$5.00 x 4 weeks at 12,000 units, establish price point.

Prices Dropped Launch at \$4.50 x 48 weeks, at 15,800 units.¹⁴

13. Ultimately, on 17 November 2022, Woolworths confirmed it and Mondelez were aligned on the following:¹⁵

Oreo Family Pack 370g - Overall +27.7% / █ GF █%, █%	
First Cost \$	█
Invoice Cost \$	█
Deferred Deal \$	█
Net Cost \$	█
Net Net Cost \$	█
Promotional Plan	
Baseline \$5.00 x 4 weeks at 12,000 units, establish price point.	
Prices Dropped Launch at \$4.50 x 48 weeks, at 17,568 units.	

14. A day later, on 18 November 2022, Ms Pipan sent an email to various individuals within Woolworths, directing that the Oreo Sample Product be removed from the Prices Dropped program and have its price increased to \$5.00, effective 28 November 2022. Given the proposed return of the product onto Prices Dropped fell within a “change freeze period” Ms Pipan also requested that her Assistant Category Manager, Ms Nevoa, liaise with Woolworths’ Buying

¹¹ O’Leary at [71]-[72] (CB654).

¹² O’Leary at [73] (CB654); MPL.0003.0027.2998 (CB6761); MPL.0094.0001.0008 (CB6762).

¹³ MPL.0094.0001.0008 (CB6762).

¹⁴ MPL.0002.0002.5281 (CB6765).

¹⁵ O’Leary [76] (CB654); MPL.0002.0002.5293 (CB6795 at 6801).

Team “so we can work through next steps on relaunching [the Oreo Sample Product] back onto PRICES DROPPED”.¹⁶

15. The inclusion of the Oreo Sample Product back onto Prices Dropped during Woolworths’ Christmas freeze period, after a three week price establishment period, was ultimately approved by Mr O’Leary and a Mr Justin Riley on 21 November 2022.¹⁷ The email from Ms Nevoa seeking that approval noted: “These packs have just undergone a CPI, and adhering to our Pricing Governance Guidelines, we can update the PRICE DROPPED flag 21 days post RRP update...”.¹⁸
16. As noted above, the agreement between Woolworths and Mondelez was then implemented, with the Oreo Sample Product moving to its P2 price of \$5.00 on 28 November 2022, and the product being sold at P2 for 22 days, from 28 November until 19 December, before being promoted on Prices Dropped at P3 from 20 December 2022 until 4 May 2023.
17. Throughout the negotiations concerning Mondelez’s CPI request and the promotional plan for the Oreo Sample Product, which lasted some 2.5 months. At all times, the initial sale of the of the Oreo Sample Product at \$5.00 for 4 weeks before placing it on Prices Dropped at \$4.50 was only discussed in the context of complying with Woolworths’ internal price establishment requirements.

Key points

18. The following key points emerge in relation to the Oreo Sample Product.
19. **First**, Mondelez’s initial proposal was for the product to be sold consistently at \$4.50 for 52 weeks. The \$5.00 P2 price thus seems to have originated with Woolworths (notwithstanding some references in internal documents to it being the “RRP”) — it appears, only for the purposes of complying with Woolworths’ internal price establishment requirements. Despite the parties agreeing on a promotional plan that provided for the product to be sold at \$5.00 for 4 weeks, subsequent emails moved to discussing a price establishment period of three weeks (based, it may be inferred, on changing views about what was required). The three week price establishment period is what was ultimately implemented.
20. **Second**, there is no evidence of any assessment, modelling, or other consideration having actually been conducted by Woolworths or Mondelez as to whether it was commercially sensible for the Oreo Sample Product to be sold at \$5.00 for longer than the required price establishment period.

¹⁶ O’Leary at [77] (CB654); MPL.0002.0015.0931 (CB6789 at 6790).

¹⁷ O’Leary at [80]-[81] (CB654); MPL.0002.0002.5164 (CB6791).

¹⁸ MPL.0002.0002.5164 (CB6791).

21. **Third**, given the difference in forecast sales between P2 and P3, P3 was the commercially more attractive scenario for Woolworths with or without a deferred deal from Mondelez:
- (a) inclusive of the \$ [REDACTED] per unit deferred deal, Woolworths’ weekly gross profit would have been \$ [REDACTED] at P2 vs \$ [REDACTED] at P3 – a difference of \$ [REDACTED] per week;¹⁹ and
 - (b) even removing the \$ [REDACTED] per unit deferred deal (but maintaining the [REDACTED]% volume spend rebate and [REDACTED]% allowance not specific to Prices Dropped),²⁰ Woolworths’ weekly gross profit would have been \$ [REDACTED] at P2 vs \$ [REDACTED] at P3 – a difference of \$ [REDACTED] per week.²¹
22. **Fourth**, the increase in the Net Cost Price for the Oreo Sample Product does not fully account for its change in retail price. As noted in **Annexure A** to the ACCC’s closing submissions, of the \$1.50 retail price increase from P1 to P2, \$ [REDACTED] ([REDACTED]%) was attributable to a change in net cost and \$ [REDACTED] ([REDACTED]%) was attributable to margin maintenance / improvement. Of the \$1.00 retail price increase from P1 to P3, \$ [REDACTED] ([REDACTED]%) of that was attributable to a change in net cost and \$ [REDACTED] ([REDACTED]%) was attributable to margin maintenance / improvement.
23. **Fifth**, during cross-examination, Mr O’Leary accepted that the pricing of the Oreo Sample Product breached Woolworths’ internal rules for price establishment periods relating to price increases on products which had already been on an existing Prices Dropped promotion for more than 18 months.²²

¹⁹ P2: $(\$5.00 - \$ [REDACTED]) \times 12,000 = \$ [REDACTED]$ P3 = $(\$4.50 - \$ [REDACTED]) \times 17,568 = \$ [REDACTED]$

²⁰ Resulting in a Net Cost Price of \$ [REDACTED]; being \$ [REDACTED] + \$ [REDACTED] (the per unit deferred deal).

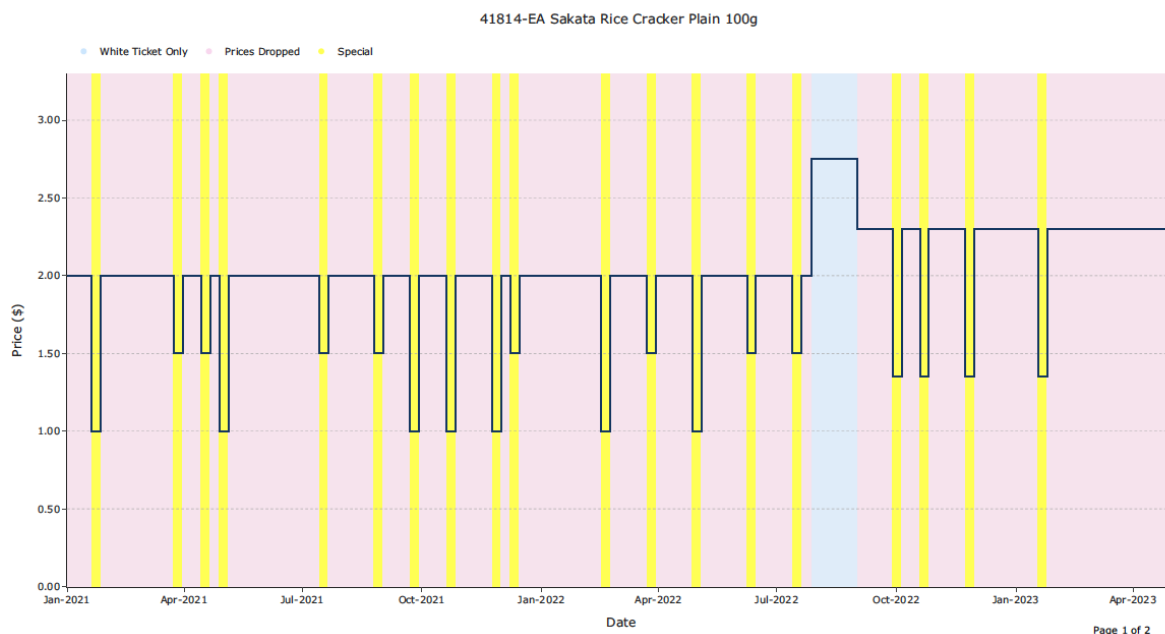
²¹ P2: $(\$5.00 - \$ [REDACTED]) \times 12,000 = \$ [REDACTED]$. P3: $(\$4.50 - \$ [REDACTED]) \times 17,568 = \$ [REDACTED]$.

²² T.237:41-45 (O’Leary XXN); AOS, Annexure A, row 10.

SAKATA SAMPLE PRODUCT (41814)

Sakata Rice Cracker Plain 100g

1 JANUARY 2021 TO 4 MAY 2023 (~2 YEARS, 4 MONTHS)¹



What consumers saw

1. For 573 days from 1 January 2021 until 27 July 2022, consumers shopping at Woolworths in-store and online would have seen the Sakata Sample Product offered for sale by Woolworths in-store and online at a Prices Dropped price of \$2.00 (P1) — interspersed, now and then, with short-term Specials at \$1.00 and \$1.50 which lasted 7 days at a time.² These Specials occurred at irregular intervals. On each occasion, consumers shopping in-store would have seen yellow “Specials” tickets on top of the product’s white tickets for the duration of the promotion.³ After 7 days, the yellow tickets were removed and the product returned to P1.
2. On 28 July 2022, Woolworths increased the price of the Sakata Sample Product by 38% and began offering it for sale at a white ticket price of \$2.75. That price remained on shelves (and online) for 35 days.⁴

¹ Graph extracted from Wright Report, Annexure F11 (CB354 at 452).

² SOAF at Annexure B, row 209 and Annexure C, row 209 (CB100 at 147, 252-253).

³ Those shopping online would have seen a green and white roundel or yellow rectangle displaying the relevant promotional information. See SOAF, [19], [46]-[47] (CB 100 at 103, 109).

⁴ SOAF at Annexure B, row 209 and Annexure C, row 209 (CB100 at 147, 252-253).

3. On 1 September 2022, Woolworths “dropped” the price of the product to \$2.30 (**P3**) and started promoting it to consumers using a red Prices Dropped Ticket, showing a discount from a “Was” price of \$2.75.⁵
4. Woolworths’ “discounted” Prices Dropped price of \$2.30 was \$0.30 higher than the price that consumers had been paying for the same product just five weeks ago — an effective price rise of 15%.⁶
5. Woolworths continued promoting the Sakata Sample Product at a Prices Dropped price of \$2.30 for a period of at least 246 days until 4 May 2023 — including various Specials down to \$1.35.⁷

Events sitting behind the price changes

6. On 2 May 2022, Woolworths received notification of a CPI request from Smith’s.⁸ In respect of the Sakata Sample Product, the proposal involved an increase to the list price from its current \$█ to \$█, and a proposed RRP of \$2.75.⁹ On 6 May 2022, Smith’s submitted the deal sheets relating to its CPI request and promotional plan. In respect of the Sakata Sample Product, Smith’s proposal was that:
 - (a) the net cost price to Woolworths would be \$█ (a shift from its current \$█)¹⁰;
 - (b) the product would be sold:
 - (i) on a “Shelf” “RRP / Unit (inct GST)” of \$2.30, for 46 weeks;
 - (ii) on a “Promo Level 1” price of \$1.15 for 6 weeks,which would have resulted in Woolworths’ GP% being █%.¹¹
7. Mr Deery’s evidence is that he was unsure if \$2.30 was intended to be a Prices Dropped price, but given the 6 weeks of Specials proposed, he did not think it would be an EDLP price.¹² He accepted in cross-examination that \$2.30 was, in effect, the RRP that Smith’s was now proposing.¹³
8. As at 22 June 2022, a Woolworths simulator recorded that its proposed counter-proposal involved the same product pricing proposed by Smith’s, with the only changes being to propose an increase in Woolworths’ margins (from a trading GP of █% to █%), and a “Promo Level

⁵ SOAF at [32]-[35], Annexure C, row 209 (**CB100** at 106, 109, 252-253); AOS at [97].

⁶ AOS, Annexure A, row 11.

⁷ AOS, Annexure C, row 11.

⁸ Deery Affidavit, [60] (**CB517**); MPL.0003.0029.9147 (**CB6839**).

⁹ Deery Affidavit, [61] (**CB517**); MPL.0003.0029.9147 (**CB6839** at 6840).

¹⁰ See Deery, [69] (row 128) (**CB517**); MPL.0094.0001.0004 (**CB Tab 653/.xlsx**).

¹¹ Deery, [62]-[63] (**CB517**); MPL0002.0002.6125 (**CB Tab 646/.xlsx**).

¹² Deery, [64] (**CB517**).

¹³ T.262:1-20.

Annexure B – Sakata Sample Product

1” price of \$1.15 for 8 weeks (instead of 6 weeks).¹⁴ It also appears that, by this time, Woolworths’ Category Manager, Zoe Pipan, was of the view that Woolworths wanted to “relaunch onto Red”, which, according to Mr Deery, was “most likely referring to placing the Sakata Sample Product on the Prices Dropped program”.¹⁵

9. On 23 June 2022, Woolworths made a counter-proposal to Smith’s. In respect of the Sakata Sample Product, Woolworths proposed:
 - (a) the net cost price to Woolworths would be \$████ (as opposed to the current \$████); and
 - (b) the product would be sold:
 - (i) on a “Promo Level 1” price of \$2.30, for 44 weeks;
 - (ii) on a “Promo Level 2” price of \$1.15 for 8 weeks,which would have resulted in Woolworths’ GP% being █████%.¹⁶
10. Woolworths’ proposal also recorded a “Shelf” price of \$2.50 in the column headed “RRP / Unit (inc GST)”. However, the proposed “Frequency” at this price was recorded as “0” weeks, and no forecasted sales volumes or gross profit figures were supplied for sales at \$2.50. This was the first time an RRP of \$2.50 had been mentioned by either party. Mr Deery confirmed in cross-examination that, despite his review of the documents, he had never seen anything forecasting sales volumes for the Sakata Sample Product at \$2.50.¹⁷ He also confirmed that the only modelling he had seen was of a \$2.30 baseline price.¹⁸
11. The parties negotiated further,¹⁹ and appear to have discussed the forecasted sales volumes at the \$2.30 and \$1.15 prices.²⁰
12. On 7 July 2022, Mr Deery was sent another simulator, which recorded Woolworths’ proposal of a “Standard Shelf” price of \$2.30 for 46 weeks, and “Promotion Level 1” price \$1.15 at 8 weeks.²¹ That proposal was consistent with Woolworths’ proposal as set out in its deal sheets on 23 June 2022, other than the removal of the \$2.50 “Shelf” price for 0 weeks.
13. On 14 July 2022, Smith’s provided further deal sheets covering its proposed CPI request and promotional plan. In respect of the Sakata Sample Product, Smith’s proposal was that:

¹⁴ Deery, [70] (CB517); MPL.0094.0001.0004 (CB Tab 653/.xlsx).

¹⁵ Deery, [72]-[73] (CB517); MPL.0003.0028.9182 (CB 6858).

¹⁶ Deery, [74]-[75] (CB517); MPL.002.0015.1540 (CB Tab 655/.xlsx).

¹⁷ T.267:22-40 (Deery XXN).

¹⁸ T.271:27-30 (Deery XXN).

¹⁹ Deery, [76]-[79] (CB517).

²⁰ Deery, [79] (CB517); compare the volumes forecasts from Smith’s recorded in Deery, [70], [82] and [88(b)(ii)] (CB517).

²¹ Deery, [80]-[82] (CB517); MPL.0094.0001.0005 (CB Tab 667/.xlsx).

- (a) the net cost price to Woolworths would be \$ [REDACTED] (as opposed to Woolworths' \$ [REDACTED] proposed on 23 June 2022); and
- (b) the product would be sold:
- (i) on a "Shelf" price of \$2.30, for 47 weeks;
 - (ii) on a "Promo Level 1" price of \$1.38 for 5 weeks,
- which would have resulted in Woolworths' GP% being [REDACTED]%.²²
14. On 15 July 2022, Woolworths accepted the above proposal from Smith's.²³
15. On 19 July 2022, Smith's asked Ms Nevoa and Ms Pipan for confirmation on the proposed dates for the Prices Dropped promotion to commence, referring to a conversation with "Matt", who had "flagged the need to price-reset on Dropped Lines ahead of the new pricing taking effect".²⁴ In response on 22 July 2022, Ms Nevoa confirmed the following process:
- "Red Ticket will be removed on the 25th Monday
 - The shelf price will move to \$2.70 on Tuesday 26th
 - We will rebase pricing for 2 weeks
 - Prices Dropped Flag and new pricing will be applied on Tuesday 9th August",
- and asked how Smiths requested to manage "the two weeks we are price establishing at a higher RRP".²⁵
16. As noted in paragraph 3 above, the price of the Sakata Sample Product was increased to its P2 price of \$2.75 on 28 July 2022.
17. On 23 August 2022, Mr Richard Lowe of the pricing team told Mr O'Leary and Ms Pipan (the Category Manager), that "we'll need to validate the current price is justifiable, ie. reflects the was price + CPI".²⁶ On 30 August 2022, Paul Harker approved the Sakata Sample Product being added to the Prices Dropped program despite it being "slightly outside the 'was price + CPI price'.²⁷
18. Mr Deery confirmed in cross-examination that, despite his review of various documents:

²² Deery, [88] (CB517); MPL.0002.0002.6576 (CB Tab 680/.xlsx).

²³ Deery, [90] (CB517); MPL.0002.0002.6571 (CB7049).

²⁴ MPL.0002.0002.6552 (CB7080).

²⁵ MPL.0002.0002.6524 (CB7084).

²⁶ MPL.0071.0001.2805 (CB7183).

²⁷ MPL.0002.0005.5966 (CB3492).

- (a) he had never seen anything forecasting sales volumes for the Sakata Sample Product at \$2.75;²⁸
 - (b) he had not seen any documents considering the performance of the Sakata Sample Product at a price of \$2.75;²⁹
 - (c) he had not seen any documents or had any conversations with his Category Manager as to how a price of \$2.75 would “fit” within the rice cracker category.³⁰
19. In respect of the negotiations and Woolworths’ approval concerning Smith’s CPI request and the promotional plan for the Sakata Sample Product:
- (a) There is no evidence that the parties discussed a proposal that the Smith’s Sample Product be sold at something other than a Prices Dropped price of \$2.30 on an ongoing basis (being the proposal Woolworths accepted on 15 July 2023) — with negotiations instead focusing on the cost to Woolworths, the pricing and frequency of Specials off the Prices Dropped price, and Woolworths’ margins.
 - (b) There is no evidence that Woolworths took into account factors such as the likely performance of the product at a \$2.75 sell price, and how it fit within the category, when it set that sell price. Woolworths’ recording of \$2.50 in its 23 June 2022 deal sheet at a frequency of 0 weeks, and lack of identified documents identifying any forecasted sales volumes or analysis of the likely performance of the product at a \$2.50 or \$2.75 price, is consistent with the \$2.75 price being selected for the purpose of establishing it as a “Was” price for the \$2.30 Prices Dropped price.
 - (c) There is no evidence that Woolworths was ever likely to have charged the \$2.75 price on an ongoing basis. Mr Deery’s suggestion that the \$2.75 sell price – one which he was not involved in setting –³¹ was justified because “there exists the possibility that, you know, ultimately that the Prices Dropped in time may come off”,³² and that the \$2.75 was “legitimate” because it had a “basis in fact... because there existed the possibility that in time we may have to sell it at that price at some point undetermined” should not be accepted.³³
20. As noted in paragraph 3 above, the Sakata Sample Product was sold at its P2 price of \$2.75 from 28 July 2022 to 31 August 2022, before being promoted on Prices Dropped at its P3 price of \$2.30 from 1 September 2022 to 4 May 2023.

²⁸ T.267:22-40 (Deery XXN).

²⁹ T.268:22-40; see also T.272:4-10 (Deery XXN).

³⁰ T.272:12-30 (Deery XXN).

³¹ T.268:23-25 (Deery XXN).

³² T.271:32-47 (Deery XXN).

³³ T.271:32-T.272:2 (Deery XXN).

Key points

21. The following key points emerge in relation to the Sakata Sample Product.
22. **First**, the product was only sold at P2 because that is what was required by Woolworths’ internal policies to promote P3 as a Prices Dropped price.
23. **Second**, there is no evidence of any assessment, modelling, or other consideration having actually been conducted by Woolworths or Smith’s as to whether it was commercially sensible for the Sakata Sample Product to be sold at \$2.50 or \$2.75 on an ongoing basis.
24. **Third**, there is no evidence that Smith’s suggested that it might withdraw the funding that was proposed for the Sakata Sample Product or that Woolworths raised any concerns with Smith’s about whether it might do so. Mr Deery’s suggestions that the \$2.75 sell price – one which he was not involved in setting as he was on leave³⁴ – was justified because “there exists the possibility that, you know, ultimately that the Prices Dropped in time may come off”,³⁵ and that it had a “basis in fact... because there existed the possibility that in time we may have to sell it at that price at some point undetermined” do not establish that the \$2.75 price was contemplated at the time as a price that might be maintained on an ongoing basis.³⁶
25. **Fourth**, insofar as Woolworths relies upon the receipt of a CPI request from Smith’s as justification for its conduct, the increase in the Net Cost Price for the Sakata Sample Product does not fully account for its change in retail price. As noted in row 11 of the table on page 17 (Annexure A), of the \$0.75 retail price increase from P1 to P2, ■■■ (■■■%) was attributable to a change in net cost and ■■■ (■■■%) was attributable to margin maintenance / improvement. Of the 30c retail price increase from P1 to P3, ■■■ (■■■%) of that was attributable to a change in net cost and ■■■ (■■■%) was attributable to margin maintenance / improvement.

³⁴ T.268:23-25 (Deery XXN).

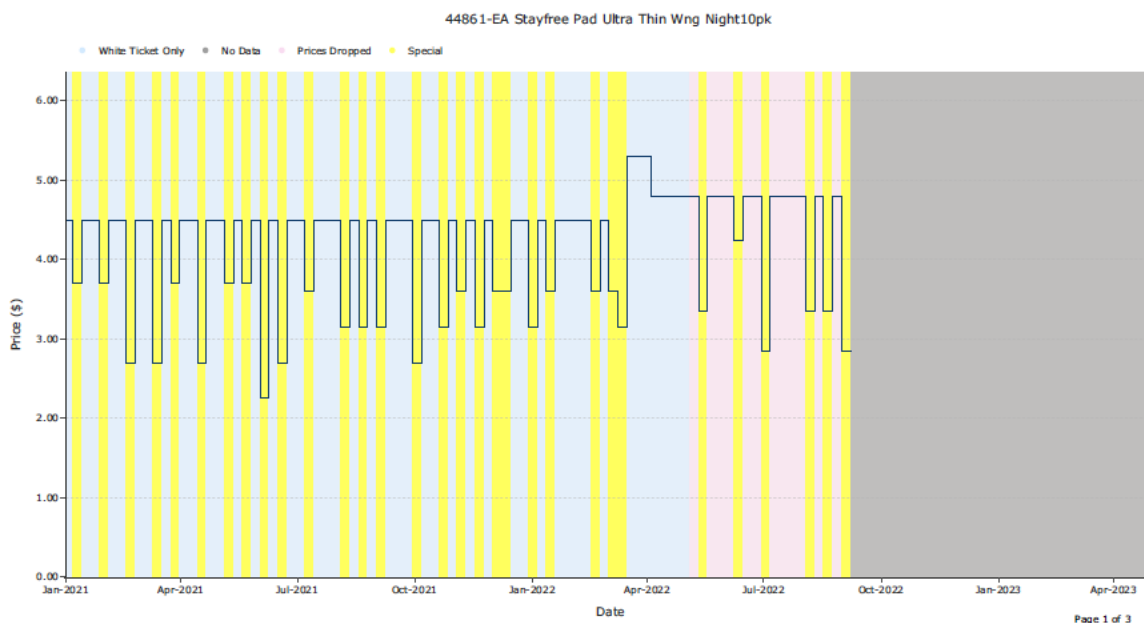
³⁵ T.271:32-47 (Deery XXN).

³⁶ T.271:32-T.272:2 (Deery XXN).

STAYFREE SAMPLE PRODUCT (44861)

Stayfree Pad Ultra Thin Wng Night 10pk

1 JANUARY 2021 TO 30 AUGUST 2022 (~1, 8 MONTHS)¹



What consumers saw

1. For 425 days between 1 January 2021 and 1 March 2022, the Stayfree Sample Product was offered for sale by Woolworths at a white ticket price of \$4.50 (**P1**) —interspersed, frequently, with short-term Specials which lasted 7 days at a time.² On each occasion, consumers shopping in-store would have seen yellow ‘Specials’ tickets on top of the product’s white tickets for the duration of the promotion.³ After 7 days, the yellow tickets were removed and the product returned to its white ticket price of \$4.50.
2. On 16 March 2022, Woolworths increased the price of the Stayfree Sample Product by 18% and began offering it for sale at a white ticket price of \$5.30 (**P2**). That price stayed on shelves (and online) for 19 days.⁴
3. On 4 April 2022, Woolworths “dropped” the price of the product to \$4.80.⁵ However, there appears to have been some internal errors with Woolworths’ systems, with the result that while the Stayfree Sample Product was sold on Woolworths Online between 4 April 2022 and 29 April

¹ Graph extracted from Wright Report, Annexure F12 (CB354 at 454).

² SOAF, Annexure C, at row 233 (CB100 at 273-275).

³ Those shopping online would have seen a green and white roundel or yellow rectangle displaying the relevant promotional information. See SOAF, [19], [46]-[47] (CB 100 at 103, 109).

⁴ SOAF, Annexure C, at row 233 (CB100 at 273-275).

⁵ Ibid.

2022 at \$4.80, this was displayed as a white ticket rather than a Prices Dropped Ticket.⁶ Mr Moffatt does not know when Prices Dropped Tickets started being applied to the product in-store. However, it is uncontroversial that this occurred by no later than 4 May 2022.⁷

4. In any event, by no later than 4 May 2022, Woolworths began promoting the price of the Stayfree Sample Product to consumers using a red Prices Dropped Ticket, showing a discount from a ‘Was’ price of \$5.30.
5. Woolworths’ “discounted” Prices Dropped price of \$4.80 was \$0.30 higher than the price that consumers had been paying for the same product less than three weeks ago — an effective price rise of 7%.⁸
6. Woolworths continued to promote the product at \$4.80 using Prices Dropped Tickets for at least the next 119 days, until 30 August 2022 — again, with intermittent Specials.⁹

Events sitting behind the price changes

7. On 6 December 2021, Johnson & Johnson Pacific Pty Ltd (**J&J**) sent Woolworths a CPI request. In respect of the Stayfree Sample Product, J&J’s proposal was that:
 - (a) the list or invoice cost be increased from its current \$█ to \$█ per unit;
 - (b) the RRP increase from its current \$4.81 to \$5.29.¹⁰
8. During cross-examination, Mr Moffatt’s evidence was that he would not simply accept the supplier’s RRP, which could be higher than what Woolworths considered to be the appropriate selling price.¹¹
9. At this time, the Stayfree Sample Product was being sold on a white ticket price at \$4.50 (i.e., lower than the RRP).
10. On 16 December 2021, J&J sent Woolworths a “WIP” report containing its proposed pricing and promotional strategy for, relevantly, the Stayfree Sample Product.¹² It proposed, in effect, that the Stayfree Sample Product:
 - (a) be sold on Prices Dropped for \$4.80 for 35 weeks;
 - (b) be sold on short-term promotions (off that Prices Dropped price) of:

⁶ Moffatt at [64] (**CB627**).

⁷ Moffatt at [65] (**CB627**); SOAF, Annexure B, row 233 (**CB100**).

⁸ AOS, Annexure A, row 12.

⁹ SOAF, Annexure C, at row 233 (**CB100** at 273-275).

¹⁰ Moffatt, [19]-[23] (**CB627**); [MPL.0021.0007.7602] (**CB7309**); [MPL.0021.0007.7604] (**CB Tab 710**).

¹¹ T.324:33-T.326:2.

¹² Moffatt, [25]-[26] (**CB627**); [MPL.0002.0014.1592] (**CB7313**); [MPL.0002.0014.1593_N] (**CB7315**).

¹³ Moffatt, [25]-[27] (**CB627**); [MPL.0002.0014.1593] (**CB7323**).

- (i) \$3.80 for 10 weeks; and
- (ii) \$3.36 for 7 weeks.

11. As at 19 January 2022, J&J’s proposal remained the same as that proposed on 16 December 2021. Neither proposal sets out any price establishment period for the proposed Prices Dropped price of \$4.80. Mr Moffatt’s evidence is that:¹⁴

While it was Woolworths' policy and practice to implement a Rest Period after a price increase before any product could be returned to the Prices Dropped Program, it was not uncommon for suppliers to propose CPIs and promotional plans that did not explicitly include a Rest Period. One reason for that is such proposals are intended to be long-term arrangements (52 weeks or more), and so a Rest Period at the very start of those arrangements is unlikely to be material to the long-term economics of the deal. Another reason is that the appropriate Rest Period was set by Woolworths, not the supplier. So while suppliers might not explicitly include a Rest Period in their promotional plans, that did not mean that there would not be a Rest Period at the shelf price.

12. On 25 January 2022, J&J completed a spreadsheet recording its proposed pricing and promotional plan at the request of Woolworths.¹⁵ The promotional plan proposed that the Stayfree Sample Product:¹⁶

- (a) have a “Standard Shelf” price of \$5.29 with a proposed frequency of “0” weeks yet forecast sales volumes of 9,000 per week;
- (b) Be placed on the Prices Dropped Program at a proposed Dropped Price of \$4.80 for 35 weeks;
- (c) be sold on short-term promotions (off that Prices Dropped price) of:
 - (i) \$3.80 for 7 weeks; and
 - (ii) \$3.36 for 10 weeks.

13. On 17 February 2022, J&J provided a deal sheet setting out its proposed CPI request and promotional plan.¹⁷ In the covering email, J&J’s representative stated that the “Shelf prices are at the proposed “Dropped” where applicable”,¹⁸ which Mr Moffatt explains is consistent with

¹⁴ Moffatt, [36] (CB627); see also T.327:23-T.328:27; T.333:39 – T.335:2.

¹⁵ Moffatt, [38] (CB627); [MPL.0002.0014.3286] (CB Tab 721.xlsx).

¹⁶ [MPL.0002.0014.3286] (CB Tab 721.xlsx) (“Proposed Promo Plan” worksheet, row 40); see also T.329:10 – T.330:18.

¹⁷ Moffatt, [40] (CB627); [MPL.0050.0009.1462] (CB7395); [MPL.0050.0009.1463] (CB7398).

¹⁸ Moffatt, [40] (CB627); [MPL.0050.0009.1462] (CB7395).

what he says at paragraph 36 to his affidavit (quoted above).¹⁹ In respect of the Stayfree Sample Product, J&J’s proposal was that:

- (a) the net cost price to Woolworths be \$■■■■,;²⁰
- (b) the product be sold at \$4.80 price for 41 weeks, and be sold at a variety of lower promotional prices for a total of 11 weeks.²¹

14. Between 24 and 25 February 2022, the parties communicated with one another about J&J’s proposal.²² Relevantly in respect of the Stayfree Sample Product:

- (a) J&J clarified that it was proposing a net cost price to Woolworths of \$■■■■ at the \$5.29 price, and \$■■■■ at the “Dropped” price of \$4.80;²³
- (b) Woolworths approved J&J’s CPI request to increase the net cost price to Woolworths from its current \$■■■■ to \$■■■■;²⁴ and
- (c) Woolworths approved J&J’s promotional plan as set out in the 25 January 2022 spreadsheet (not the 17 February 2022 deal sheet) referred to above.²⁵

15. Mr Moffatt accepted in cross-examination that, throughout the negotiations, the parties were unlikely to have discussed a proposal to sell the Stayfree Sample Product at \$5.30 for 52 weeks, and that they only ever communicated proposals in which it was placed back onto Prices Dropped after a rest period.²⁶ Mr Moffatt could not recall when he settled on the rest period for the promotion, but did say that he discussed the matter with his line manager.²⁷

16. On 3 March 2022, Woolworths received another deal sheet which had the same promotional prices and frequencies of J&J’s 19 and 25 January 2022 proposals.²⁸ Mr Moffatt’s evidence was that the net cost set out in the deal sheet, being \$■■■■ for the Stayfree Sample Product, only took into account the deferred deal funding, and that the net cost would in fact have been lower if one took into account the scan funding.²⁹

¹⁹ Moffatt, [40] (CB627).

²⁰ Moffatt, [41(a)] (CB627); [MPL.0050.0009.1463] (CB Tab 724).

²¹ Moffatt, [41(b)] (CB627); [MPL.0050.0009.1463] (CB Tab 724).

²² Moffatt, [42]-[46] (CB627).

²³ Moffatt, [43] (CB627); [MPL.0002.0003.3646] (CB7407).

²⁴ Moffatt, [44]-[45] (CB627); [MPL.0081.0001.0202] (CB7409).

²⁵ Moffatt, [46] (CB627); [MPL.0002.0014.1991] (CB7419); see also T.330:42 – T.331:2.

²⁶ T.335:10-16.

²⁷ T.333:44-T.334:5.

²⁸ Moffatt, [48] (CB627); [MPL.0002.0003.3836_N] (CB7425); [MPL.0002.0003.3837] at “Stayfree” tab (CB Tab 731/.xlsx).

²⁹ T.331:5-T.332:25.

17. On 1 March 2022, Mr Moffatt directed his Assistant Category Manager to arrange for the Stayfree Sample Product to move, effective 4 April 2022, to a Dropped Price at \$4.80 with a “Was” price of \$5.30.³⁰
18. As noted in paragraph 2 above, on 16 March 2022, the price of the Stayfree Sample Product was increased to its P2 price of \$5.30.
19. On 2 April 2022, Mr Moffatt approved a further price change request from J&J to, in effect, reduce the net cost price to Woolworths to \$█ (through the application of a larger deferred deal) effective from 4 April 2022, consistent with the parties’ agreement on 24 and 25 February 2022.³¹
20. As noted at paragraph 2 above, on 4 April 2022, the price of the Stayfree Sample Product moved to \$4.80 and a white ticket was applied to the product.
21. Between 4 April 2022 and 29 April 2022, Woolworths worked through an issue where the Prices Dropped tickets were not showing, but the price had moved to the new “Dropped” price of \$4.80.³²
1. As noted at paragraph **Error! Reference source not found.** above, the Stayfree Sample Product was then promoted on Prices Dropped at a price of \$4.80:
 - (a) in the case of Woolworths online, by no later than 29 April 2022; and
 - (b) in the case of Woolworths Supermarkets, by no later than 4 May 2022.
2. The changes in net cost price and gross profit margin associated with each of the P1, P2, and P3 periods discussed above is set out in **Annexure A** to the ACCC’s closing submissions.

Key points

3. The following key points emerge in relation to the Stayfree Sample Product.
4. **First**, the product was only sold at P2 because that is what was required by Woolworths’ internal policies to promote P3 as a Prices Dropped price. Mr Moffatt accepted that the only proposals the parties communicated to one another in writing involved the product going back onto Prices Dropped after an appropriate resting period.³³ The length of the “rest period” was set having regard to Woolworths’ policies.
5. **Second**, there is no evidence of any modelling having actually been conducted by Woolworths as to the likely gross profit that would result from sales of the Stayfree Sample Product at \$5.30 (whether for the rest period or otherwise).

³⁰ Moffatt, [47] (CB627); [MPL.0002.0013.9475] (CB7425).

³¹ Moffatt, [52] (CB627); [MPL.0081.0001.0205] (CB7437); [MPL.0081.0001.0206] (CB7438).

³² Moffatt, [54]-[65] (CB627).

³³ T.335:10-16.

Annexure B – Stayfree Sample Product

6. **Third**, insofar as Woolworths relies upon the receipt of a CPI request from J&J's as justification for its conduct, the increase in the Net Cost Price for the Stayfree Sample Product does not fully account for its change in retail price. Of the \$0.80 retail price increase from P1 to P2, ■■■ (■■■■%) was attributable to a change in net cost and ■■■ (■■■■%) was attributable to margin maintenance / improvement. Of the 30c retail price increase from P1 to P3, ■■■ (■■■■%) of that was attributable to a change in net cost and ■■■ (■■■■%) was attributable to margin maintenance / improvement.
7. **Fourth**, the P2 period for the Stayfree Sample Product was so short that it breached even Woolworths' revised January 2022 CPI Guidance (to the extent it applied to this product, which was not promoted on Prices Dropped during its P1 period).³⁴ The sale of the product at P2 for 19 days was short of the required minimum 3-week price establishment period. It was also short of the product's IPI of 4.4 weeks (31 days).³⁵

³⁴ To the extent the 2020 Guidance applied, then the P2 period for the Stayfree Sample Product would also have been too short: see AOS, [142(f)].

³⁵ See AOS, Annexure A, row 12.