

NOTICE OF FILING

Details of Filing

Document Lodged: Outline of Submissions
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 29/04/2026 10:43:39 PM AEST
Date Accepted for Filing: 29/04/2026 10:43:43 PM AEST
File Number: VID974/2024
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
WOOLWORTHS GROUP LIMITED (ACN 000 014 675)
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



No. VID 974 of 2024

Federal Court of Australia
District Registry: Victoria
Division: General

Australian Competition and Consumer Commission

Applicant

Woolworths Group Limited (ACN 000 014 675)

Respondent

**ANNEXURE TO WOOLWORTHS' CLOSING SUBMISSIONS – THE SAMPLE
PRODUCTS**

A Arnott's Tim Tam Original Fam Pk 365g (84628-EA)

- 1 The first sample product is Arnott's Tim Tam Original Fam Pk 365g (84628-EA) (**Tim Tam Sample Product**).
- 2 The evidence pertaining to the Tim Tam Sample Product is found in the affidavits of the Merchandise Manager for Impulse and Snacking, Barry O'Leary sworn on 15 December 2025 (**First O'Leary Affidavit**) and 14 April 2026 (**Second O'Leary Affidavit**). Mr O'Leary was Zoe Pipan's line manager. Ms Pipan was the Category Manager responsible for managing the cost price increase requests relevant to the Tim Tam Sample Product (T225.41-44). She ceased to be an employee of Woolworths on 18 May 2023.¹

A.1 Chronology

- 3 Between 21 April 2021 and 5 October 2022, the Tim Tam Sample Product was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online for \$4.50 on the Low Price program.²
- 4 From around July 2022, Arnott's and Woolworths began negotiating a cost price increase for the Arnott's chocolate biscuit products, which encompassed 23 different products including the Tim Tam Sample Product.³ On 13 July 2022, Arnott's provided deal sheets setting out its proposal in respect of those 23 products. A Woolworths pricing analyst assessed the total cost impact for the cost price increase to be \$ [REDACTED] (12.5%) across the 23 lines, based on the moving annual total volume as at the second week of FY23.⁴ The impact of the cost price increase insofar as it concerned the Tim Tam Sample Product's price family was about 15.5% of the total impact.⁵

¹ Crawford Affidavit, [23] (CB Tab 18, p 470).

² SOAF, Annexure C, Row 10 (CB Tab 11, p 164).

³ MPL.0003.0028.9581 (CB Tab 173, p 4224); MPL.0003.0028.9582 (CB Tab 174, p 4226, see native file); MPL.0002.0002.5568 (CB Tab 186, p 4276); MPL.0002.0002.5569 (CB Tab 187, p 4280, see native file).

⁴ MPL.0002.0002.5386 (CB Tab 177, p 4240).

⁵ MPL.0095.0001.0003 (CB Tab 178, p 4242, see native file).

- 5 In respect of the Tim Tam Sample Product, Arnott’s proposed a \$█ increase to the net cost and a sales and promotional plan involving sales at a Shelf Price of \$6.00 for 4 weeks and sales at a Promo Level 1 price of \$5.50 for 48 weeks.⁶
- 6 Arnott’s cost price increase request, including the RRP’s provided by the supplier for the 23 products, was thoroughly tested. For example, in an email dated 19 August 2022, Ms Pipan asked in respect of the Arnott’s Tim Tam Deluxe 170 to 175g, “RRP at \$4.75 vs \$5.00, what is the rationale behind decreasing the value gap between Core & Deluxe?”.⁷
- 7 Mr O’Leary’s evidence is that Arnott’s proposal entailed Woolworths paying more per 100g of biscuits in the family pack than in the core original Tim Tam product.⁸ This was first conveyed in an email to Arnott’s in which Mr O’Leary said, “*The costing of the “Arnotts Choc Value Pk” does not make sense when reviewed at a piece of 100g basis and will need review*”.⁹ Mr O’Leary also said that “[m]aintaining logical price hierarchies are very important to us, as we have experienced ranges (some even within the biscuit aisle) fail as we have confused the shopper”.¹⁰
- 8 On 30 September 2022, Arnott’s provided revised deal sheets.¹¹ In respect of the Tim Tam Sample Product, Arnott’s proposed a slightly smaller increase in net cost for the Tim Tam Sample Product of \$█.¹² The Tim Tam Sample Product was one of only two products with respect to which Arnott’s had proposed a “Prices Dropped” plan. Arnott’s proposed the other 21 products be sold on a high-low basis, with substantial sale periods at the RRP.
- 9 Although the discrepancy between the cost per 100g of biscuits in the family and core packs in Arnott’s 30 September 2022 deal sheets was lower, Mr O’Leary was not satisfied that the Arnott’s proposal addressed his concerns, so he emailed Ian Dunn, the Head of Trade Relations for advice.¹³ He did this in circumstances where it was 3

⁶ MPL.0003.0028.9581 (CB Tab 173, p 4224); MPL.0003.0028.9582 (CB Tab 174, p 4226, see native file).

⁷ MPL.0002.0002.5568 (CB Tab 186, 4276).

⁸ First O’Leary Affidavit, [44], [50] (CB Tab 26, p 664, 667); MPL.0003.0027.9261 (CB Tab 192, p 4306); MPL.0002.0002.5568 (CB Tab 186, p 4276); MPL.0002.0002.5569 (CB Tab 187, p 4280, see native file); MPL.0003.0027.7208 (CB 197 p 4341).

⁹ MPL.0003.0027.9261 (CB Tab 192, p 4306); see also First O’Leary Affidavit, [52] (CB Tab 26, p 667).

¹⁰ MPL.0003.0027.9261 (CB Tab 192, p 4306).

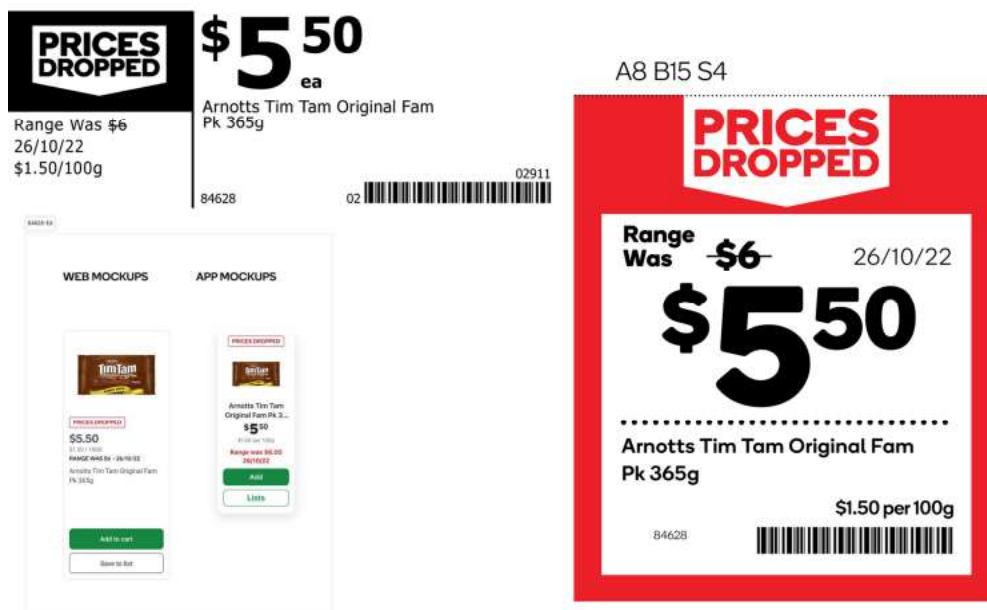
¹¹ First O’Leary Affidavit, [55] (CB Tab 26, p 668); MPL.0003.0027.6069 (CB Tab 205, 4363); MPL.0003.0027.6071 (CB Tab 207, p 4371, see native file).

¹² First O’Leary Affidavit, [55] (CB Tab 26, p 668).

¹³ First O’Leary Affidavit, [58] (CB Tab 26, p 668).

days before the “effective date” of a CPI and Arnott’s had threatened to withdraw all supplier funding unless its terms were agreed (T233.45-47-T234.1-15).

- 10 Mr Dunn said that, *“I agree the supplier is being unreasonable but they have substantial countervailing bargaining power so I think you need to keep working constructively as you have been to finalise.”*¹⁴ After receiving Mr Dunn’s email, Mr O’Leary advised the Category Manager to accept Arnott’s most recent request.¹⁵
- 11 On 6 October 2022, the Tim Tam Sample Product was offered to consumers in Woolworths Supermarkets and Woolworths Online for \$6.00 on a white ticket.
- 12 On 27 October 2022, the Tim Tam Sample Product was placed on the Prices Dropped program at the price of \$5.50.¹⁶ Examples of the Prices Dropped tickets applied to the Tim Tam Sample Product are shown below.



- 13 About six months after this, on 17 April 2023, Mr O’Leary sent Ms Darroch from Arnott’s an email foreshadowing that on 19 April 2023, the Tim Tam Sample Product would be removed from the Prices Dropped Program and placed on a “Low Price” ticket at a price of \$5.00.¹⁷ This was because Aldi had offered the Tim Tam Sample

¹⁴ First O’Leary Affidavit, [59] (CB Tab 26, p 668-669); MPL.0002.0002.5182 (CB Tab 202, p 4356).

¹⁵ First O’Leary Affidavit, [60] (CB Tab 26, p 669).

¹⁶ SOAF, Annexure C, Row 11 (CB Tab 11, p 164).

¹⁷ First O’Leary Affidavit, [63] (CB Tab 26, p 669); MPL.0002.0015.0578 (CB Tab 209, p 4385).

Product for sale at a retail price of \$5.00 (being 50 cents less than the Woolworths' Prices Dropped price at the time). Mr O'Leary's view was that Woolworths had to meet the Aldi price, but that this required Woolworths to remove the product from the Prices Dropped Program.¹⁸

14 During the P1, P2 and P3 periods, the Tim Tam Sample Product sold in the following quantities:

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Tim Tam (84628-EA)	4,593.7	2,834,333	3,937.9	82,696	4,423.2	769,634

A.2 Reasons why the P2 period was reasonable and the P2 price and subsequent price reduction were genuine

15 The P2 price for the Tim Tam Sample Product was in place for three weeks, which even without regard to other facts, was sufficient to establish the P2 price as a “real” and “genuine” price, particularly given the IPI for the product was just 2.9 weeks.¹⁹ Over 82,000 units were sold in that period. Moreover, the number of purchases is a conservative measure of the exposure of a price, given customers shopped at Woolworths on average 2.5 times per week and so were likely to see the price of the Tim Tam Sample Product more often than buying it. The Court would conclude that that period was a “reasonable period” for the purposes of the ACCC’s pleaded case.

16 That three weeks is sufficient is reinforced by the genuineness of the P2 price - a matter addressed in further detail below. Where the P2 price is genuine, the need for it to be in place for a “reasonable time” falls away, or at least that time would be very short.

17 The reasons illustrating that the P2 price of \$6.00 was a genuine price, and the P3 price of \$5.50 was a genuine discount, include the following:

¹⁸ First O'Leary Affidavit, [64] (CB Tab 26, p 670).

¹⁹ 1050794.015.001.0020 (CB Tab 69, p 1092).

- (a) *first*, Woolworths increased the “white ticket” price from \$5.50²⁰ to \$6.00 as the result of a cost price increase request from Arnott’s, which was in turn driven by significant cost pressures that Arnott’s was facing.²¹
- (b) *second*, the P2 price of \$6.00 was the same as the RRP set by Arnott’s (T227.35-43).²² Woolworths takes supplier RRPs to be competitive, given they are typically shared to all retailers in the market, and the Court would infer as much (T229.27-34).
- (c) *third*, the P3 price of \$5.50 was facilitated by a deferred deal of █%, which was conditional on the placement of the product on Prices Dropped (T233.45-47; T234.1-15). The Court would readily infer that, absent that funding, the retail price in the P3 period would have been higher.
- (d) *fourth*, other evidence undermines the ACCC’s suggestion that there was some incentive for Arnott’s or Woolworths to inflate the “white ticket” price of \$6.00. For example, Mr O’Leary’s evidence was that, when the Tim Tam Sample Product was later taken off the Prices Dropped program and put on a Low Price of \$5.00 to compete with Aldi, it *could* have been placed on a new Prices Dropped ticket, but Woolworths preferred the Low Price mechanism (T235.39-43). The Court would infer from this that Woolworths did not consider that it needed to retain the “was” claim in order to drive sales of the Tim Tam Sample Product. Given the possibility of being removed from the Prices Dropped program had always existed, there was no incentive for either Woolworths or the supplier to inflate the shelf price of \$6.00.
- (e) *fifth*, Mr O’Leary’s evidence was that, when setting a retail price, he would expect Category Managers to take account of the competitiveness of the price in the market, the place of the product within the category hierarchy, as well as the profitability of the product (T229.27-40,.44-46; T230.1-6). That analysis would not ordinarily be documented (T268.41-45; T269.38-44). Nevertheless, the evidence in respect of this example shows that Ms Pipan applied herself to Arnott’s CPI request in just this way, specifically querying the RRPs that

²⁰ MPL.0002.0015.1779 (CB Tab 170, p 4209).

²¹ MPL.0002.0015.1779 (CB Tab 170, p 4207).

²² MPL.0003.0027.6620 (CB Tab 194, p 4310); MPL.0003.0027.6621 (CB Tab 195, p 4311, see native file).

Arnott's had applied to the Tim Tam Deluxe product, which decreased the value gap between that product and the core Tim Tam product.²³ Testing of that nature was essential for the 21 out of 23 products included in the CPI, which were to be sold on a high-low basis. There is no reason to think the same thoughtfulness was not applied with respect to the Tim Tam Sample Product. The Court would infer that Woolworths took the same approach to the RRP of every product the subject of the CPI. In any event, when asked, Mr O'Leary confirmed that even at \$6.00, the Tim Tam Sample Product would have represented good value to consumers when compared to the core Tim Tam product (T233.31-37).

(f) *sixth*, during the P2 period, substantial volumes (being a total of 82,696 units) were sold. This equates to an average of 3,937.9 per day.²⁴ Moreover, the average number of units sold per day in the P1, P2 and P3 periods are comparable. Having regard to those figures, it would be highly artificial to characterise P1 and P3 as "genuine", but not extend that characterisation to P2.

18 From its cross-examination of Mr O'Leary, it seems the ACCC intends to submit that the discrepancy between the cost of the Tim Tam Sample Product and the cost of the Tim Tam core product is evidence that Woolworths did not properly challenge the RRP of the Tim Tam Sample Product. If that submission is made, the Court would reject it. As is clear from Mr O'Leary's evidence, the discrepancy existed in the cost *to Woolworths* of those products, not in the RRP (T224.5-23).

19 Having regard to those matters, the Court would not find that the P2 price of \$6.00 applied to the Tim Tam Sample Product, or the discount from that price to the Prices Dropped price, was not real or genuine.

²³ MPL.0002.0002.5568 (CB Tab 186, p 4276).

²⁴ SOAF, Annexure C, Row 10 (CB Tab 11, p 164).

B Arnotts Tiny Teddy Variety 15pk 375g (641537-EA)

- 1 The second sample product is Arnott's Tiny Teddy Variety 15 Pk 375g (641537-EA) (**Tiny Teddy Sample Product**).
- 2 The evidence pertaining to the Tiny Teddy Sample Product is found in the Affidavit of Cormac Deery sworn on 15 December 2025 (**Deery Affidavit**) and in documentary evidence addressed below. Mr Deery was the Merchandise Manager for Impulse, Beverage & Tobacco between May 2019 and late August 2022, before Mr O'Leary occupied that role. During that period, he was Zoe Pipan's line manager. Ms Pipan was the Category Manager responsible for managing the Tiny Teddy Sample Product.¹ She ceased to be an employee of Woolworths on 18 May 2023.²

B.1 Chronology

- 3 From 1 January 2021 to 10 May 2022, the Tiny Teddy Sample Product was offered and sold to consumers in Woolworths Supermarkets and Woolworths Online on the Prices Dropped program with a price of \$5.00 and a "was" price of \$6.00.³
- 4 In January 2022, Arnott's made a cost price increase request in respect of its sweet and savoury biscuit products,⁴ encompassing about 83 products.⁵ The cost price increase request was driven by the cost inflation challenges that Arnott's was experiencing.⁶
- 5 The Arnott's cost price increase carried a potential initial cost impact on Woolworths⁷ of approximately [REDACTED] million.⁸ The price family "Arnott's Multipacks 12/15 Pack", which included the Tiny Teddy Sample Product, accounted for just \$[REDACTED] million of this. By itself, the Tiny Teddy Sample Product was an insignificant component of the

¹ Deery Affidavit, [15] (CB Tab 21, p 519).

² Crawford Affidavit, [21] (CB Tab 18, p 470).

³ SOAF, Annexure C, Row 11, (CB Tab 11, p 164); 1050794.002.001.0013 (CB Tab 42, p 845, see native file, sheet 3, Row 10398, Column G).

⁴ Deery Affidavit, [20] (CB Tab 21, p 520).

⁵ MPL.0002.0002.6772 (CB Tab 224, p 4447, see native file); MPL.0002.0002.6773 (CB Tab 225, p 4458, see native file).

⁶ MPL.0002.0002.6443 (CB Tab 213, p 4397); MPL.0002.0002.6444 (CB Tab 214, p 4398); MPL.0003.0025.7447 (CB Tab 216, p 4412); Deery Affidavit, [18]-[20] (CB Tab 21, pp 520-521).

⁷ Deery Affidavit, [21] (CB Tab 21, p 521).

⁸ MPL.0094.0001.0002 (CB Tab 257, see native file); MPL.0094.0001.0003 (CB Tab 260, p 4656, see native file, "Summary - waterfall" sheet).

overall pack group and the proposed cost increase.⁹ This explains why the substance of the negotiations between Woolworths and Arnott's mainly concerned other products.¹⁰

6 In respect of the Tiny Teddy Sample Product and other products falling within the "Arnott's Multipacks 12/15 Pack" pricing family, Arnott's proposed an increase to the net cost of \$■■■■, or about 10%.¹¹ In respect of the promotional plan, Arnott's proposed that the products be placed on Prices Dropped, which entailed offering the product at a shelf price of \$6.50 for 4 weeks, following which the products would be sold at the price of \$5.50 for 48 weeks.¹² This was consistent with the proposal ultimately agreed between Woolworths and Arnott's on around 4 May 2022.¹³

7 The Tiny Teddy Sample Product was intended to be placed on the "white ticket" price of \$6.50 from 11 May 2022. This is clear from a Pricing Dashboard circulated on 13 May 2022.¹⁴ The Pricing Dashboard was an internal weekly email that was circulated by the Pricing Operations Team to update the business on Woolworths' and its competitors' recent retail pricing changes. In this particular Price Dashboard, the Pricing Operations Team stated that, "[t]he most notable increase this week was across the Arnotts range with both WW and Coles moving up in price following a cost increase." The email contained a link to a "Weekly Price Position" report which provided further detail on the products the subject of a retail price change.¹⁵ Page 8 of that report specifies that the price of the "ArntsVartySnckPacks12 15pk240 375g" (which included the Tiny Teddy Sample Product) had moved from a Prices Dropped price of \$5.00 to a "white ticket" shelf price of \$6.50 as at 13 May 2022 (acknowledging that Woolworths' promotional week started on a Tuesday or Wednesday).¹⁶

⁹ Deery Affidavit, [39]-[40] (CB Tab 21, p 526); T240.13-19.

¹⁰ Deery Affidavit, [37] (CB Tab 21, p 525).

¹¹ Deery Affidavit, [27] (CB Tab 21, p 523); MPL.0002.0002.6772 (CB Tab 224, p 4447, see native file).

¹² Deery Affidavit, [32]-[33] (CB Tab 21, p 524-525); MPL.0002.0002.6310 (CB Tab 236, p 4515, see native file).

¹³ Deery Affidavit, [46]-[49] (CB Tab 21, p 528-529).

¹⁴ Deery Affidavit, [52] (CB Tab 21, p 531); MPL.0002.0027.5080 (CB Tab 280, p 4702).

¹⁵ MPL.0094.0001.0006 (CB Tab 281, p 4705)

¹⁶ MPL.0094.0001.0006 (CB Tab 281, p 4712); Deery Affidavit, [52] (CB Tab 21, p 531); 1050794.002.001.0007 (CB Tab 41, p 840, 842).

8 However, due to an administrative error, the Tiny Teddy Sample Product (and two other Affected Products, being Arnott’s Biscuits Family Assorted 500g (36016-EA)¹⁷ and Arnott’s Shapes Variety 15pk 375g (641532-EA))¹⁸ were mistakenly allocated a yellow specials ticket on 11 May 2022.

9 Annexures B and C to the Statement of Agreed Facts provide that between 11 and 17 May 2022, the Tiny Teddy Sample Product¹⁹ and two other Affected Products, being Arnott’s Biscuits Family Assorted 500g (36016-EA)²⁰ and Arnott’s Shapes Variety 15pk 375g (641532-EA),²¹ were sold on a yellow special ticket, before being moved to a white ticket at P3 on 18 May 2022.²² Woolworths was granted leave to adduce evidence to contradict those agreed facts.²³ That evidence shows that on 12 May 2022, it came to Ms Pipan’s attention that the Tiny Teddy Sample Product was being sold on a yellow special ticket.²⁴ This was investigated by Ms Pipan and the Assistant Category Manager, Ms Nevoa and a probable cause of the error was identified. Ms Nevoa indicated that she was “getting it fixed”.²⁵ On the morning of 12 May 2022, Ms Nevoa raised a request with the Business Support Services team.²⁶ On 13 May 2022, Ms Pipan thanked Ms Nevoa for fixing the problem.²⁷

10 On the strength of that evidence, it is plain that contrary to rows 8, 9 and 11 of Annexures B and C of the SOAF, the Arnott’s products:

- (a) were sold on a yellow specials ticket between 11 May 2022 and 12 May 2022 at a special price of \$4.00 (for the Arnott’s Biscuits Family Assorted product) and of \$5.00 (for the Arnott’s Shapes Variety 15 pk product and the Tiny Teddy Sample Product); and

¹⁷ SOAF, Annexures B and C, Row 8 (CB Tab 11, p 119, 164).

¹⁸ SOAF, Annexures B and C, Row 9 (CB Tab 11, p 119, 164).

¹⁹ SOAF, Annexures B and C, Row 11 (CB Tab 11, p 120, 164).

²⁰ SOAF, Annexures B and C, Row 8 (CB Tab 11, p 119, 164).

²¹ SOAF, Annexures B and C, Row 9 (CB Tab 11, p 119, 164).

²² SOAF, Annexure C, Rows 8, 9 and 11 (CB Tab 11, p 164).

²³ Orders made on 22 April 2026.

²⁴ MPL.0095.0001.0009 (CB Tab 269, p 4678); MPL.0080.0001.2613_N (CB Tab 270, p 4692);

MPL.0080.0001.2614_N (CB Tab 271, p 4693); MPL.0080.0001.2615_N (CB Tab 272, p 4694).

²⁵ MPL.0095.0001.0009 (CB Tab 269, p 4678); MPL.0080.0001.2613_N (CB Tab 270, p 4692);

MPL.0080.0001.2614_N (CB Tab 271, p 4693); MPL.0080.0001.2615_N (CB Tab 272, p 4694).

²⁶ MPL.0081.0001.0024 (CB Tab 279, p 4701).

²⁷ MPL.0127.0001.0001 (SCB Tab 757, p 152).

- (b) the P2 period for each of those products commenced on 13 May 2022, when the administrative error was fixed, rather than 18 May 2022.

There appears no longer to be any dispute about this (T257.12-15; 25-28).

- 11 On 2 June 2022, the Tiny Teddy Sample Product was placed on the Prices Dropped program at the price of \$5.50.²⁸ Examples of the Prices Dropped tickets applied to the Tiny Teddy Sample Product are shown below.



- 12 During P1, P2 and P3 periods, the Tiny Teddy Sample Product sold in the following quantities:

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Tiny Teddy (641537-EA)	3,682.9	1,823,052	3,135 ²⁹	62,696 ³⁰	4,177.6	1,407,851

B.2 Reasons why the P2 period was reasonable and the P2 price and subsequent price reduction were genuine

- 13 The Court would conclude that the P2 period of 20 days (nearly 3 weeks) was sufficient time to establish the “white ticket” price of \$6.50, given that Woolworths customers shop at Woolworths approximately 2.5 times per week on average³¹ and over 62,000 units of the Tiny Teddy Sample Product were sold in the P2 period. The IPI for the product was just over 3 weeks, so the P2 period does not strictly comply

²⁸ SOAF, Annexure C, Row 11 (CB Tab 11, p 164).

²⁹ This number has been calculated by dividing the total number of units sold based on Woolworths’ submission that the P2 period was 20 days (i.e. between 13 May 2022 and 1 June 2022, divided by 20 - see footnote 30 below).

³⁰ This number has been calculated by multiplying the average by 20 days. Woolworths submits that the P2 period was 20 days, commencing on 13 May 2022, rather than 18 May 2022.

³¹ First Harker Affidavit, [60(c)] (CB Tab 22, p 568-569).

with Woolworths' price establishment rules that applied at the time. Nevertheless, that technical policy non-compliance was modest, and does not support a conclusion that the P2 period was "unreasonable". Customers will have seen the prices of products more often than they purchased them, particularly with respect to products in the biscuit aisle (Mr Deery's evidence being that the IPI for those products *generally* was relatively short).³²

- 14 In any event, given the P2 price was genuine (for the reasons explained below), any requirement that it be in place for a "reasonable period" falls away, or at least the "reasonable period" is very short.
- 15 The factors which together illustrate that the P2 price of \$6.50 was a genuine price, and the P3 price of \$5.50 was a genuine discount include at least the following:
- (a) *first*, Woolworths increased the "white ticket" price from \$6.00 to \$6.50 because of a cost price increase request from Arnott's, which was in turn driven by cost inflation challenges experienced by Arnott's.³³
 - (b) *second*, the P2 price of \$6.50 was the same as the RRP set by Arnott's.³⁴ Woolworths takes supplier RRP's to be competitive, given they are typically provided to all retailers in the market, and the Court would infer as much (T229.27-31 (O'Leary)).
 - (c) *third*, the evidence undermines the ACCC's suggestion that Arnott's RRP of \$6.50 was inflated. Mr Deery rejected the suggestion that Woolworths never intended to sell the product at the retail price of \$6.50 (T252.45-47; T260.4-7), and that its only purpose was to serve as an anchor for a "was" claim (T260.9-10). His evidence was that there was no certainty that a product would remain on Prices Dropped for any length of time (T260.24-27). He said that, far from focus being directed only to the proposed Prices Dropped price, it was necessary to have in mind that circumstances might change which meant that the product had to be removed from Prices Dropped and sold at its RRP (T254.19-27; T260.24-27). To that end, Mr Deery said that consideration

³² Deery Affidavit, [36] (CB Tab 21, p 525).

³³ MPL.0002.0002.6443 (CB Tab 213, p 4397); MPL.0002.0002.6444 (CB Tab 214, p 4398); MPL.0003.0025.7447 (CB Tab 216, p 4412); Deery Affidavit, [18]–[20] (CB Tab 21, p 520-521).

³⁴ Deery Affidavit, [46]–[49] (CB Tab 21, p 528-530).

would have been given into how the RRP for the product sat within the pricing architecture and hierarchy (T260.18-23; T261.1-5). This analysis was not usually documented (T268.41-45; T269.38-44). Nevertheless, the evidence illustrates that Woolworths tested the RRP of products the subject of the CPI in this way.³⁵ The ACCC's suggestion that no analysis of the RRP occurred ignores the wider context of the CPI. The Tiny Teddy Sample Product was one of just 4 products, out of 83 the subject of the cost price increase, that Arnott's proposed to place on the Prices Dropped program.³⁶ All the other products were proposed to be placed on a high-low promotional plan, or otherwise sold at the RRP (whether on a white ticket or as part of the Low Price program). The ACCC accepts that the RRP for those products were real and genuine, because it was envisaged the products would be sold at those prices for the long term. The Court would readily infer that Arnott's took the same approach to all of its RRP.

- (d) *fourth*, the P3 price was facilitated by a volume spend rebate of ██████% and a deferred deal of ██████%,³⁷ which was part of the promotional plan that Arnott's made conditional on the placement of the product on Prices Dropped. The Court would infer that, absent that funding, the P3 price would have been higher.
- (e) *fifth*, a substantial volume of units (over 62,000) of the Tiny Teddy Sample Product were sold in the P2 period. Moreover, the average number of daily sales of the Tiny Teddy Sample Product in the P2 period was just 15% lower than the P1 period average, and is also comparable to the P3 period average. That evidence undermines the ACCC's attempt to characterise P1 and P3 as "genuine" prices, but to characterise P2 as artificial.

16 From the cross-examination of Mr Deery, it seemed the ACCC intends to submit that because some of the deal sheets exchanged between Woolworths and Arnott's recorded "0 weeks" next to the RRP of \$6.50, the price of \$6.50 was not a genuine price. The Court would reject that submission if it is made. The "0 weeks" was most

³⁵ MPL.0003.0025.7447 (CB Tab 216, p 4412); MPL.0042.0010.8343 (CB Tab 218, p 4416); MPL.0002.0002.6732 (CB Tab 227, p 4470).

³⁶ MPL.0094.0001.0003 (CB Tab 257, p 4650, see native file, "Plans Sims" sheet).

³⁷ Deery Affidavit, [47]-[49] (CB Tab 21, p 529-530); MPL.0002.0002.6413 (CB Tab 268, p 4675).

likely an error and did not reflect the final agreement between Woolworths and Arnott's (T256.1-18; T260.12-14). Notably, the price establishment period was modelled on Woolworths' pricing simulator for the Arnott's CPI proposal that was ultimately accepted.³⁸

³⁸ Deery affidavit, [48] (CB Tab 21, p 529); MPL.0094.0001.0003 (CB Tab 257, p 4650, see native file).

C Bragg Apple Cider Vinegar 946ml (476910-EA)

- 1 The third sample product is Bragg Apple Cider Vinegar 946ml (476910-EA) (**Bragg Sample Product**). It was an apple cider vinegar imported from the United States of America that claimed to have health benefits and was the only apple cider vinegar that Woolworths sold in the health aisle (other apple cider vinegars were sold in the mainstream vinegar aisle).¹ It was part owned and heavily promoted by Katy Perry and Orlando Bloom.² The supplier of the product in Australia was Unique Health Products.³
- 2 The evidence relevant to the Bragg Sample Product is found in the affidavit of Ben Richard Jordan affirmed 3 December 2025 (**Jordan Affidavit**), who was the responsible Category Manager at the time. This affidavit was read without objection and Mr Jordan was not cross-examined.

C.1 Chronology

- 3 From at least 1 January 2021 until 24 November 2021, the Bragg Sample Product was offered and sold to consumers in Woolworths Supermarkets and on Woolworths Online at a white ticket price of \$12.95, subject to yellow ticket specials from time to time (i.e. sold on a “high-low” basis).⁴ During this period, the promotion of the Bragg Sample Product on yellow ticket specials did not significantly increase sales volumes, because the product had a customer base whose purchases did not significantly fluctuate with price.⁵
- 4 On 23 November 2021, the Category Manager responsible for the Bragg Sample Product (Ben Jordan) and his Assistant Category Manager met with a representative of Unique Health Products (Kylie Mannix) for a range review meeting.⁶ Shortly before that meeting, Ms Mannix sent Mr Jordan a slide presentation.⁷ Slide 4 stated

¹ Jordan Affidavit, [41(a)] (CB Tab 23, p 583).

² Jordan Affidavit, [46] (CB Tab 23, p 585); MPL.0055.0011.4253 (CB Tab 293, p 4775).

³ Jordan Affidavit, [45] (CB Tab 23, p 584).

⁴ SOAF, Annexure C, Row 13, (CB Tab 11, p 164-165); Jordan Affidavit, [41(b)] (CB Tab 23, p 584).

⁵ Jordan Affidavit, [41(c)] (CB Tab 23, p 584); MPL.0055.0008.2943 (CB Tab 286, p 4759).

⁶ Jordan Affidavit, [49] (CB Tab 23, p 585).

⁷ Jordan Affidavit, [48] (CB Tab 23, p 585); MPL.0055.0011.3662 (CB Tab 295, p 4780); MPL.0055.0011.3663 (CB Tab 296, p 4783).

that the RRP for the Bragg Sample Product was \$16.95, something Mr Jordan was not aware of before this time.⁸

- 5 On 25 November 2021, Woolworths increased the white ticket price of the Bragg Sample Product to \$16.95.⁹ Mr Jordan's unchallenged evidence is that once he learned that Unique Health Products' RRP was \$16.95, he decided to increase the price. Three factors caused him to do so: the product was not ranged in Coles supermarkets, he considered the market price was \$16.95 (and believes he would have confirmed this by checking the shelf price at another retailer, Go Vita) and the product had a loyal customer base.¹⁰
- 6 On 6 December 2021, Mr Jordan's Merchandise Manager (Shruti Gupta¹¹) sent him an email requesting product nominations for an upcoming Prices Dropped on Healthier Products campaign.¹² On 7 December 2021, Mr Jordan sent Ms Gupta a Google Chat message informing her that he had increased the Bragg Sample Product's price to the RRP two weeks earlier, and that by the end of December 2021 it would have been at that price for six weeks.¹³
- 7 Shortly after sending those messages, Mr Jordan inserted his nomination for the Bragg Sample Product in the master spreadsheet for the Prices Dropped on Healthier Products campaign.¹⁴
- 8 Mr Jordan did not discuss with Unique Health Products his proposal to place the Bragg Sample Product on the Prices Dropped on Healthier Products campaign; nor did he seek to negotiate supplier funding for its inclusion on this seasonal Prices Dropped campaign. This was because he considered the gross margin on the product sufficient not to require supplier funding for the reduction in shelf price and that including it on the campaign was in the broader interest of the overall campaign strategy of being able to claim that the prices of hundreds of healthy products had

⁸ Jordan Affidavit, [50] (CB Tab 23, p 585).

⁹ SOAF, Annexure C, Row 13, (CB Tab 11, p 165); Jordan Affidavit, [52] (CB Tab 23, p 586).

¹⁰ Jordan Affidavit, [51] (CB Tab 23, p 585-586).

¹¹ Jordan Affidavit, [18] (CB Tab 23, p 578).

¹² Jordan Affidavit, [59] (CB Tab 23, p 588); MPL.0039.0003.9267 (CB Tab 305, p 4866).

¹³ Jordan Affidavit, [60] (CB Tab 23, p 588); MPL.0091.0001.0003 (CB Tab 312, p 4937).

¹⁴ Jordan Affidavit, [64] (CB Tab 23, p 589); MPL.0081.0001.0002 (CB Tab 311, p 4935).

been dropped.¹⁵ The gross margin on the Bragg Sample Product was █████% at a shelf price of \$16.95 and █████% at a shelf price of \$16.00.¹⁶

9 On 5 January 2022, the Bragg Sample Product was placed on the Prices Dropped program at the price of \$16.00.¹⁷ By the time this occurred, the product had been at the white ticket price of \$16.95 for almost 6 weeks.

10 Examples of the “Prices Dropped” tickets applied to the Bragg Sample Product are as follows:¹⁸



11 During the P1, P2 and P3 periods, the Bragg Sample Product sold in the following quantities:¹⁹

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total ²⁰	Avg Unit/Day	Total	Avg Unit/Day	Total
Bragg Apple Cider Vinegar (476910-EA)	385.6 (at the white ticket price)	102,173 (at the white ticket price)	298.9	12,253	332	27,892

12 On 30 March 2022, the price of the product reverted to \$16.95 on a white ticket upon the conclusion of the Prices Dropped on Healthier Products campaign.²¹

¹⁵ Jordan Affidavit, [65] (CB Tab 23, p 589).

¹⁶ See Deal Sheet sent by Ms Mannix on 26 November 2021 recording the current cost structure: MPL.0055.0011.0809 (CB Tab 308, p 4874, see native file); Jordan Affidavit, [55] (CB Tab 23, p 587). The net cost per unit was \$████ (Cell F15). Thus, the GP at \$16.95 is $(\$16.95 - \$████) / \$16.95 = █████$, and the GP at \$16 is $(\$16.00 - \$████) / \$16.00 = █████$.

¹⁷ SOAF, Annexure C, Row 13, (CB Tab 11, p 165); Jordan Affidavit, [68] (CB Tab 23, p 590).

¹⁸ SOAF (CB Tab 11, p 116).

¹⁹ SOAF, Annexure C, Item 13 (CB Tab 11, p 164-165).

²⁰ This records sales volumes at the white ticket price of \$12.95 but not sales at a yellow ticket price of \$12.00 during the P1 period.

²¹ Jordan Affidavit, [69] (CB Tab 23, p 590).

C.2 Reasons why the P2 price and subsequent price reduction were genuine

- 13 The Court would conclude that, because the Bragg Sample Product was offered for sale at the P2 price of \$16.95 for a lengthy period of 41 days (i.e., almost 6 weeks), it was offered at P2 for a “reasonable period”.
- 14 This conclusion (namely that 41 days was more than sufficient to constitute a “reasonable period”) is also reinforced by the fact that for at least the following reasons, there can be no question that the P2 price of \$16.95, and the subsequent price reduction, were genuine. In other words, the genuineness of P2 indicates that what is required for a “reasonable period” either falls away or is very short.
- 15 *First*, the chronology above (which arises from Mr Jordan’s affidavit) shows that Woolworths increased the price to the supplier’s RRP of \$16.95 upon realising that its white ticket shelf price of \$12.95 was substantially below that RRP. This was a rational business decision in circumstances where \$16.95 was the market price (i.e., the shelf price being charged by competing retailers), Coles did not range the product and the product had a loyal customer base whose purchases did not significantly fluctuate with price.
- 16 *Second*, the price increase to \$16.95 was entirely unrelated to Mr Jordan’s subsequent decision two weeks later to nominate the Bragg Sample Product for a seasonal Prices Dropped campaign.²² Thus, there can be no suggestion that the price increase was for a purpose of establishing a price from which a price drop could be claimed. As explained in Woolworths’ Closing Submissions, whether or not a subsequent price drop is anticipated or intended at the time of a price increase (or at the time a cost price increase is accepted) is irrelevant to the question of whether the Prices Dropped tickets are misleading. Nevertheless, it is notable that the purpose or intention relied upon by the ACCC in respect of other Sample Products plainly did not exist in the case of the Bragg Sample Product.
- 17 *Third*, the fact that when the Bragg Sample Product came off the seasonal Prices Dropped campaign on 30 March 2022, it returned to a white ticket shelf price of \$16.95, demonstrates that the P2 price of \$16.95 was a commercially realistic and competitive price. This puts beyond doubt that it was genuine.

²² Jordan Affidavit, [60], [63] (CB Tab 23, p 588-589).

- 18 *Fourth*, the fact that the Bragg Sample Product had substantial sales during the P2 period of 12,253 units (which equates to 298.9 units per day) tells against it being an artificial price. Further, the fact its daily sales during this period were broadly similar to its daily sales in the P1 and P3 periods (of 385.6 and 332 units per day respectively) reinforces this: see table above at paragraph 11.
- 19 Having regard to those reasons, it is clear that the P2 price of \$16.95 was a genuine price and one that was intended to be its long term white ticket shelf price.
- 20 Further, if the ACCC is permitted to pursue the alternative case, namely that the Prices Dropped Ticket merely represents a “genuine reduction” in price, and that it was misleading because the P2 price of \$16.95 and/or the price reduction were not genuine, then the Court would reject that case for the same reasons as those outlined above.

D Carman’s Muesli Bars FrNut Bars 12pk 540g (31158-EA)

- 1 The fourth sample product is Carman’s Muesli Bars FrNut Bars 12pk 540g (31158-EA) (**Carman’s Sample Product**). It was a box of 12 fruit and nut muesli bars that was ranged in the Woolworths Supermarkets Breakfast Cereals, Muesli Bars & Spreads category. The supplier was Carman’s.
- 2 The evidence relevant to the Carman’s Sample Product is found in the affidavit of Sam Edward Woodcock affirmed 25 November 2025 (**Woodcock Affidavit**), who was the responsible Category Manager at the time. The affidavit was read without objection and Mr Woodcock gave oral evidence during the hearing.

D.1 Chronology

- 3 From at least 1 January 2021 to 24 March 2022, the Carman’s Sample Product was offered and sold to consumers in Woolworths Supermarkets and on Woolworths Online on the Prices Dropped program at the price of \$9.00.¹ Although the cost structure during this period did not include a deferred deal (T188.41-45),² Carman’s effectively provided funding for the product to be on the Prices Dropped program through a reduced First Cost (T189.4-6).³
- 4 From around June 2021, Woolworths and Carman’s started negotiating a “Joint Category Plan”.⁴ A Joint Category Plan is a non-binding agreement that Woolworths sometimes enters into with a supplier that includes targets and commitments by both parties in relation to that supplier’s range within a particular category.⁵
- 5 On 13 December 2021, Mr Woodcock sent Carman’s a “framework” for the proposed Joint Category Plan.⁶ This framework included the following Year 1 profitability targets based on gross profit percentages:

- Loose Oats = █%
- Muesli Bars = █% (note: certain segments need to be █%)

¹ SOAF, Annexure C, Row 22 (CB Tab 11, p 167).

² Woodcock Affidavit [50]-[51] (CB Tab 31, p 771-772); see also the applicable deal sheet MPL.0002.0004.8320 at Rows 80-95 (CB Tab 351, p 5204, see native file).

³ Woodcock Affidavit, [37]-[38], [51] (CB Tab 31, p 768-769, 771-772).

⁴ Woodcock Affidavit, [44] (CB Tab 31, p 770).

⁵ Woodcock Affidavit, [42]-[43] (CB Tab 31, p 769-770).

⁶ Woodcock Affidavit, [53] (CB Tab 31, p 772); MPL.0003.0007.1509 (CB Tab 352, p 5207).

- Cereals = █%
- Muesli & Granolas = █%
- Oat Sachets = █%

6 Towards Christmas in December 2021, Mr Woodcock agreed this profitability framework with Carman’s and it became known as the “agreed framework”.⁷ In other words, Woolworths agreed with Carman’s a working framework for a “Joint Category Plan” in which together they would seek to achieve these gross profit targets across the Carman’s range in Woolworths Supermarkets.⁸ Relevantly, for present purposes, although the formal Joint Category Plan was not ultimately agreed until 9 June 2022,⁹ the effect of that agreement was that Carman’s and Woolworths agreed a profitability target for the Carman’s Sample Product of █%.¹⁰

7 On 21 December 2021, Carman’s notified Woolworths of a cost price increase across the majority of its product range, including for the Carman’s Sample Product, with effect from 21 March 2022.¹¹ The spreadsheet that accompanied that cost price increase request recorded Carman’s new RRP’s and proposed net cost prices.¹² The Carman’s Sample Product formed part of the “Muesli Bar Value Pcks” line at Row 19. This row recorded that Carman’s was increasing both its RRP and net cost price for these product lines by about 10%, with the RRP increasing from \$10.00 to \$11.00. The spreadsheet also stated Carman’s proposal that these products return to the Prices Dropped program “once new base price established” (as indicated by the two asterisks next to the Carman’s Sample Product) (T189.34-35).¹³

8 The increase in RRP that Carman’s proposed on the Carman’s Sample Product was broadly consistent with the increase in RRP’s it was proposing for its other products that were affected by a cost price increase, including for product lines that were not on the Prices Dropped program (i.e., product lines without the double asterisk).¹⁴

⁷ Woodcock Affidavit, [54], [89] (CB Tab 31, p 772, 781).

⁸ Woodcock Affidavit, [53]-[54] (CB Tab 31, p 772); MPL.0003.0007.1509 (CB Tab 352, p 5207).

⁹ Woodcock Affidavit, [55] (CB Tab 31, p 772).

¹⁰ The figure of █% was also referred to as the average margin target for new muesli bar category products that Woolworths accepted in a range review letter dated 7 February 2022: MPL.0003.0006.6450 (CB Tab 386, p 5308); also see cover email at MPL.0003.0006.6449 (CB Tab 385, p 5306).

¹¹ Woodcock Affidavit, [64] (CB Tab 31, p 774); MPL.0002.0004.9104 (CB Tab 356, p 5215);

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

¹² MPL.0002.0004.9106 (CB Tab 358, p 5218, see native file).

¹³ MPL.0002.0004.9106, Row 19 (CB Tab 358, p 5218, see native file).

¹⁴ MPL.0002.0004.9106 (CB Tab 358, p 5218, see native file).

- 9 When negotiating and considering whether to accept Carman’s cost price increase request, Mr Woodcock considered the overall effect of the total proposal (T190.1-3). On several occasions during the negotiation, Mr Woodcock referenced the gross profit percentages in the “agreed framework” and observed that Carman’s various proposals fell well short of achieving that framework overall.¹⁵ This was significant in circumstances where, as at late January 2022, the financial year to date gross profit on the Carman’s muesli bar range was already well below the agreed target (being ██████% vs. the target of ██████%).¹⁶
- 10 By 8 March 2022, Woolworths and Carman’s had not agreed on Carman’s cost price increase request. In view of the impending effective date for the cost price increases (i.e., 21 March 2022), Mr Woodcock proposed two options to Carman’s, namely either extending the effective date for the cost price increase by a minimum of one week to allow further negotiating time, or for Woolworths to agree only to the new cost prices without agreeing a new plan for promotions and pricing programs.¹⁷ The second option was a “worst case” because it would mean no promotional plan on the Carman’s range with the effect that consumers would pay more for Carman’s products if they could not be purchased on special.¹⁸
- 11 On 16 March 2022, Mr Woodcock sent Carman’s an email stating that Carman’s latest cost proposal was still “massively short” of the agreed framework and that he was going to propose accepting Carman’s new list price on all existing lines but without agreement on the promotional plan.¹⁹
- 12 On 18 March 2022, Mr Woodcock proposed to his Merchandise Manager that Carman’s existing proposed cost price increase be accepted without a revised promotional plan agreed.²⁰ The slide deck that supported this approach records that while Carman’s latest cost proposal would lead to a gross profit on muesli bars of ██████%, it remained below the gross profit target of ██████% for the muesli bars

¹⁵ Woodcock Affidavit, [80], [85], [90], [94], [95] (CB Tab 31, p 779, p 780, p 781, p 782, p 783); MPL.0003.0006.6876 (CB Tab 393, p 5327); MPL.0003.0006.4262_N (CB Tab 409, p 5423); MPL.0049.0003.1693 N (CB Tab 429, p 5590); MPL.0003.0006.0574 (CB Tab 427, p 5546); MPL.0003.0006.1039_N (CB Tab 428, p 5562).

¹⁶ MPL.0081.0001.0546 (CB Tab 380, p 5296); see also MPL.0003.0006.6015 (CB Tab 379, p 5295).

¹⁷ Woodcock Affidavit, [90] (CB Tab 31, p 781); MPL.0049.0003.1693 N (CB Tab 429, p 5590).

¹⁸ Woodcock Affidavit, [90] (CB Tab 31, p 781).

¹⁹ Woodcock Affidavit, [96]-[97] (CB Tab 31, p 783-784); MPL.0003.0006.1039_N (CB Tab 428, p 5562).

²⁰ Woodcock Affidavit, [99] (CB Tab 31, p 784).

sub-category in the agreed framework.²¹ The increase in gross profit for the Carman's Sample Product was only █% (to █%).²² This exceeded the agreed GP target for the muesli bar sub-category, however, as noted the sub-category as a whole remained below the target.

13 At around this time, Woolworths approved the cost price increases across the Carman's range, including for the Carman's Sample Product, to take effect from 25 March 2022.²³ However, the revised promotional plan for Carman's range remained unagreed, which meant in theory that it was possible that there would be no promotions on Carman's products until such time as a new plan was agreed.²⁴

14 At this time, Mr Woodcock considered it possible that there would not be any promotions on Carman's products and could not speculate on whether this would occur or how long it might take to agree a revised promotional plan (T190.11-21). However, accepting the cost price increase without a promotional plan was no mere negotiating tactic on Mr Woodcock's part (T190.43-47). Given the possibility that Carman's would cease supply if Woolworths had not accepted the cost price increase by the effective date for the cost increase notified by Carman's, Mr Woodcock considered it an absolute requirement that he ensure that Woolworths would have Carman's stock on shelves (T195.19-23).

15 Accordingly, on 25 March 2022, Woolworths increased the price of the Carman's Sample Product to \$11.00 on a white ticket.²⁵ During this period, the First Cost of the product increased from █ per unit to \$█ per unit and the net cost increased from \$█ to \$█ per unit.²⁶

16 Subsequently, in April 2022, Woolworths reached agreement with Carman's on a new promotional plan across its range.²⁷ Part of that further negotiation involved Carman's reducing the magnitude of the cost price increase on the Carman's Sample Product from the level agreed in March, such that the First Cost would increase to \$█ per

²¹ MPL.0081.0001.0547 (CB Tab 437, p 5749).

²² See MPL.0002.0004.8320 at Cell N81 (CB Tab 351, p 5204, see native file) for original GP%; see MPL.0081.0001.0547 (CB Tab 437, p 5746) for proposed GP%.

²³ Woodcock Affidavit, [100] (CB Tab 31, p 784).

²⁴ Woodcock Affidavit, [101] (CB Tab 31, p 785).

²⁵ SOAF, Annexure C, Row 22, (CB Tab 11, p 167); Woodcock Affidavit, [102] (CB Tab 31, p 785).

²⁶ Woodcock Affidavit, [75], [100] (CB Tab 31, p 776-777, 784).

²⁷ Woodcock Affidavit, [108]-[110] (CB Tab 31, p 787).

unit (reduced from \$ [REDACTED] and the net cost would increase to \$ [REDACTED] per unit (reduced from \$ [REDACTED]).²⁸ This was done to assist the overall profitability of the Carman’s range.²⁹

17 Under the agreement reached in April 2022, the gross profit on muesli bars increased to [REDACTED]%, but still fell short of the agreed framework which required a gross profit of [REDACTED]% for muesli bars.³⁰ The increase in gross profit for the Carman’s Sample Product was [REDACTED]% (to [REDACTED]%).³¹

18 On 26 April 2022, the Carman’s Sample Product was placed on the Prices Dropped program at the price of \$10.00.³² By this time, the Carman’s Sample Product had been at the white ticket price of \$11.00 for 32 days.³³

19 Examples of the “Prices Dropped” tickets applied to the Carman’s Sample Product are as follows:³⁴



20 During the P1, P2 and P3 periods, the Carman’s Sample Product sold in the following quantities.³⁵

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Carman’s Muesli Bars FrNut Bars 12pk (31158-EA)	877.9	393,335	749.2	23,975	908.8	339,906

²⁸ Woodcock Affidavit, [106] (CB Tab 31, p 786).

²⁹ Woodcock Affidavit, [107] (CB Tab 31, p 786).

³⁰ MPL.0081.0001.0544 (CB Tab 446, p 5776).

³¹ MPL.0081.0001.0544 (CB Tab 446, p 5777).

³² SOAF, Annexure C, Row 22, (CB Tab 11, p 167); Woodcock Affidavit, [111] (CB Tab 31, p 787).

³³ SOAF, Annexure C, Row 22, (CB Tab 11, p 167).

³⁴ SOAF (CB Tab 11, p 115).

³⁵ SOAF, Annexure C, Row 22 (CB Tab 11, p 167).

D.2 Reasons why the P2 period was reasonable and the P2 price and subsequent price reduction were genuine

- 21 The Court would conclude that, because the Carman’s Sample Product was offered for sale at the P2 price of \$11.00 for a lengthy period of 32 days, which is over 4.5 weeks, it was offered at P2 price for a “reasonable period”. While Woolworths’ internal price establishment period is not the touchstone of compliance with the law, it is notable that the P2 period exceeded the three weeks required by the policy at that time (given the IPI for the applicable sub-category was 2.8 weeks).³⁶
- 22 This conclusion (namely that 32 days was more than sufficient to constitute a “reasonable period”) is also reinforced by the fact that for at least the following additional reasons, there can be no question that the P2 price of \$11.00, and the subsequent price reduction, were genuine. In other words, the genuineness of P2 price indicates that what is required for a “reasonable period” either falls away or is very short.
- 23 *First*, as the chronology above demonstrates, Woolworths increased the price from \$9.00 to \$11.00 as the direct result of a cost price increase by the supplier.
- 24 *Second*, the P2 price of \$11.00 matched the supplier’s new RRP of \$11.00. This represented an increase in the RRP of 10%, which was broadly consistent with the increase in RRP that the supplier proposed for its other products, many of which were not on the Prices Dropped program.³⁷ Thus, there can be no suggestion that the supplier’s new RRP was artificial or inflated. It also follows that the P2 price was not artificial or inflated.
- 25 *Third*, as it turned out, Woolworths agreed to the supplier’s cost price increases without agreement on a promotional plan. As explained in the chronology above, this meant there was a real possibility that there would not be promotions on the Carman’s range (including the Carman’s Sample Product), or at least not for a significant period. The fact that Woolworths was prepared to offer the Carman’s Sample Product at the P2 price of \$11.00 without a guarantee that it would be putting it on Prices Dropped at \$10.00 is inconsistent with any notion that it was not a genuine price.

³⁶ 1050794.015.001.0020 (CB Tab 69, p 1053).

³⁷ See Column D of MPL.0002.0004.9106 (CB Tab 358, p 5218, see native file).

- 26 *Fourth*, when Mr Woodcock considered the supplier's recommendation of a P2 price at \$11.00 and a new Prices Dropped price of \$10.00, he considered the *likely* competitiveness of both prices in the marketplace. That is, because it is assumed that a supplier will be implementing a cost price increase across the market, it is not usually possible to be certain what other retailers will do while Woolworths is negotiating the cost price increase (T193.33-45; also see T194.6-14, 23-31).
- 27 *Fifth*, the fact that the Carman's Sample Product had substantial sales during the P2 period of 23,975 units (which equates to 749.2 units per day) tells against it being an artificial price. Further, the fact its daily sales during this period were broadly similar to its daily sales in the P1 and P3 periods (of 877.9 and 908.8 units per day respectively) reinforces this: see table above at paragraph 20.
- 28 *Sixth*, placing the Carman's Sample Product on the Prices Dropped program in circumstances where it was not supported by a deferred deal that would be withdrawn during the P2 period does not gainsay the genuineness of the P2 price. Mr Woodcock expected that had Woolworths ultimately not placed the product on Prices Dropped, the supplier would have sought to increase the cost price again, because it would not have been receiving the benefit of placement on the program on which that cost price was predicated.³⁸ Thus, it was commercially rational to set the P2 price at the supplier's RRP in circumstances where there was a real possibility that the cost price might increase if it were not placed on Prices Dropped, and presumably increase to a level consistent with what it would charge retailers who did not have programs equivalent to Prices Dropped.
- 29 *Seventh*, the fact that the gross profit that Woolworths achieved on the Carman's Sample Product increased during the P3 period relative to the P1 period by █% also does not undermine the genuineness of the P2 price. The cost price increases across the Carman's range took place at a time when Woolworths and the supplier had an agreed framework for increasing the gross profit across that range.³⁹ That is, the cost price increases were to be formulated with this objective in mind. The fact that those gross profit targets were ultimately not able to be achieved with the cost price increases, including on the muesli bars sub-category (see paragraph 17 above),

³⁸ Woodcock Affidavit, [101] (CB Tab 31, p 785).

³⁹ See Woodcock Affidavit, [47], [54] (CB Tab 31, p 770, 772).

reinforces rather than undermines the genuineness of the P2 price. It is notable in this context that Woolworths ultimately accepted both a cost price increase and promotional and pricing plan that fell short of the sub-category gross profit target originally agreed with Carman's.

30 Having regard to those reasons, it is clear that the P2 price of \$11.00 was a genuine price and one that was intended to be its long term white ticket shelf price.

31 Further, if the ACCC is permitted to pursue the new alternative case, namely that the Prices Dropped Ticket merely represents a "genuine reduction" in price, and that it was misleading because the P2 price of \$11.00 and/or the price reduction were not genuine, then the Court would reject that case for the same reasons as those outlined above.

E Essentials Pasta Penne Ribbed 500g (188800-EA)

- 1 The fifth sample product is Essentials Pasta Penne Ribbed 500g (188800-EA) (**Essentials Pasta Sample Product**), an “Own Brand” product sourced by Woolworths Food Company (**WFC**) and ultimately supplied by Rinoldi.
- 2 The evidence relevant to the Essentials Pasta Sample Product is found in the affidavit of Senior Strategic Sourcing Manager, Carlo Ortolani, sworn 21 November 2025 (**Ortolani Affidavit**) and the affidavits of former Category Manager, Tom Rojas, affirmed 21 November 2025 (**First Rojas Affidavit**) and 14 April 2025 (**Second Rojas Affidavit**). Each of those affidavits was read without objection and without cross examination of their deponents.

E.1 Chronology

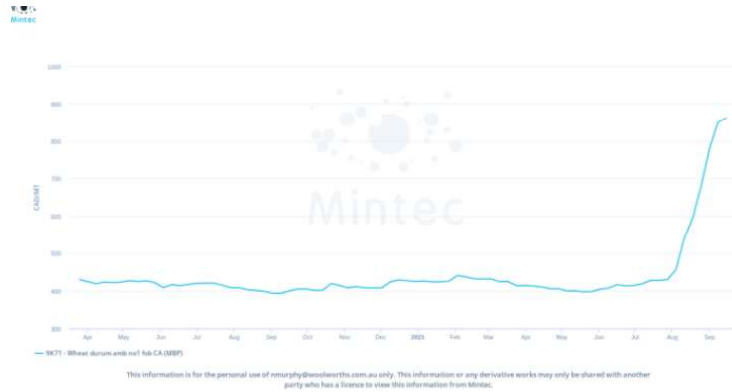
- 3 Between 1 January 2021 and 15 February 2022, the Essentials Pasta Sample Product was offered and sold to consumers in Woolworths Supermarkets and Woolworths Online for \$0.80 on a “Low Price” ticket.¹
- 4 On 22 September 2021, one of Mr Ortolani’s Commodity Managers, Nathan Murphy, circulated an email setting out his research into developments in the durum wheat market.² Nathan Murphy ceased to be a Woolworths employee on 18 April 2022.³
- 5 Mr Murphy said that Canada’s crop, which ordinarily accounted for over half the world’s export volumes, had largely failed due to poor weather conditions, with production volumes down from 7.5 million metric tonnes (MT) to 3.1-3.4 million MT. Mr Murphy said that, even taking into account other exports and an expected favourable Australian crop, the impact to Woolworths would be considerable, estimated to be around [REDACTED] per 500 gram pack across all pasta lines whether sourced internationally or domestically. The email included the following graph of the price of durum wheat in Canadian dollars/MT produced by Mintec:⁴

¹ SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

² Ortolani Affidavit, [19] (CB Tab 27, p 684); MPL.0057.0003.3670 (CB Tab 451, p 5814).

³ Crawford Affidavit, [17] (CB Tab 18, p 469).

⁴ Ortolani Affidavit, [19] (CB Tab 27, p 684); MPL.0057.0003.3670 (CB Tab 451, p 5814).



- 6 Given that cost price increase requests had already been received from the suppliers of other branded pasta products, and because durum wheat would need to be secured within a short timeframe, WFC and Mr Rojas worked together to obtain pre-approval for the supplier of the “Woolworths” and “Essentials” pasta lines (including the Essentials Pasta Sample Product) to spend up to [REDACTED] MT on durum wheat.⁵ For the purposes of requesting pre-approval, Mr Rojas prepared a “price architecture” spreadsheet, to model the expected impact of the increase in durum wheat prices on retail prices for “Own Brand” pasta products, assuming Woolworths maintained its gross profit in percentage terms on those products. That analysis suggested that a retail price of \$1.01 was necessary to maintain margin for the Essentials Pasta Sample Product, based on a forecasted cost price of \$[REDACTED], increased from the current cost of \$[REDACTED].⁶ As explained below, the product was offered and sold to consumers at the P2 price of \$1.00.
- 7 Pre-approval was obtained at or around the Weekly Cost & Pricing Forum on 11 November 2021,⁷ where Nathan Murphy made a presentation about the increase in the global price of durum wheat.⁸
- 8 Following the pre-approval, on around 22 December 2021, Rinoldi submitted the cost price increase request that Woolworths had been expecting in relation to the three “Essentials” pasta products, including the Essentials Pasta Sample Product.⁹

⁵ Ortolani Affidavit, [23], [24] (CB Tab 27, p 686); MPL.0052.0004.5020 (CB Tab 456, p 5841); First Rojas Affidavit, [19]-[21] (CB Tab 29, p 722-723).

⁶ First Rojas Affidavit, [23] and [23(e)] (CB Tab 29, 723); MPL.0003.0036.5994 (CB Tab 459, p 5855, see native file).

⁷ Ortolani Affidavit, [26] (CB Tab 27, p 686); MPL.0086.0001.0001 (CB Tab 461, p 5867).

⁸ Ortolani Affidavit, [27] (CB Tab 27, p 687); MPL.0065.0002.0003 (CB Tab 460, p 5859).

⁹ Ortolani Affidavit, [28] (CB Tab 27, p 687); MPL.0081.0001.0319 (CB Tab 492, p 6046); MPL.0081.0001.0321 (CB Tab 494, p 6048).

- 9 Rinoldi's initial request proposed a 25.86% increase in the cost of the Essentials Pasta Sample Product (being an increase of [REDACTED] from [REDACTED] to [REDACTED]).¹⁰ WFC's analysis of the request showed that, on the basis of assumed "sell" prices, the annualised impact of the proposed combined price change requests for both Rinoldi's "Woolworths" and "Essentials" branded pasta product lines was [REDACTED] and the proposed GP% for the Essentials Pasta Sample Product was [REDACTED]%, which reflected an annualised loss for that product of \$ [REDACTED].¹¹
- 10 Woolworths made enquiries of other pasta suppliers, however Rinoldi's final proposed terms, involving a cost increase of [REDACTED] from [REDACTED] to [REDACTED] transpired to be the most favourable and were agreed on around 28 January 2022.¹² The cost price increase relating to the Essentials Pasta Sample Product was to cost Woolworths \$ [REDACTED], being around 10.5% of the financial impact of the cost price increase as a whole.¹³
- 11 Between 16 February 2022 and 13 March 2022, the product was offered to consumers at \$0.80 on a white ticket.¹⁴
- 12 From 14 March 2022, the product was offered and sold to consumers on a white ticket at the increased price of \$1.00.¹⁵ Mr Rojas prepared an explanation for the increase in pasta prices to be used by Woolworths stores when responding to customer inquiries about those increased prices.¹⁶
- 13 Over the following approximately 6 weeks, Mr Rojas observed that Coles *had not* increased the price of its competitor product from \$0.80 (although Aldi had). Mr Rojas was concerned to ensure that the Essentials Pasta Sample Product was priced competitively as an entry-level pantry staple product,¹⁷ and so for this reason, on 28 April 2022, the product was put on a seasonal Prices Dropped program returning to a

¹⁰ Ortolani Affidavit, [30] (CB Tab 27, p 687); MPL.0052.0003.9917 (CB Tab 465, p 5910). See also MPL.0059.0001.0007 (CB Tab 473, p 5973, see native file).

¹¹ Ortolani Affidavit, [36] (CB Tab 27, p 689); MPL.0059.0001.0007 (CB Tab 473, p 5973, see native file).

¹² Ortolani Affidavit, [31]-[32] (CB Tab 27, p 688); First Rojas Affidavit, [31]-[32] (CB Tab 29, p 725-726); MPL.0069.0001.0001 (CB Tab 449, p 5810).

¹³ MPL.0069.0001.0001 (CB Tab 449, p 5810).

¹⁴ SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

¹⁵ SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

¹⁶ First Rojas Affidavit, [42] (CB Tab 29, p 728-729); MPL.0003.0039.2933 (CB Tab 488, p 6041).

¹⁷ First Rojas Affidavit, [45] (CB Tab 29, p 729); Second Rojas Affidavit, [6]-[7] (SCB Tab 745, p 21).

price of \$0.80.¹⁸ Examples of the “Prices Dropped” tickets that applied to the Essentials Pasta Sample product are as follows:¹⁹



14 During the P1, P2 and P3 periods, the Essentials Pasta Sample Product sold in the following quantities:²⁰

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Essentials Pasta (188800-EA)	4,715.6	2,060,698	4,119.7	185,388	4,938	237,024

15 In each period, hundreds of thousands of units were sold, equating to an average of between 4,000 and 5,000 units per day. That context illustrates the artificiality of characterising P1 and P3 as “real” and “genuine” prices, but not extending that characterisation to P2.

E.2 Reasons why the P2 period was reasonable and the P2 price and subsequent price reduction were genuine

16 There could be no question that the P2 period of 45 days (equal to 6.4 weeks) was ample time to establish the “white ticket” price of \$1.00.²¹ During that time, a total of 185,388 units were sold. That figure is a conservative measure of consumers’ exposure to the P2 price, given Woolworths’ shoppers are likely to have seen the price of the product more often than they purchased it. Although Woolworths’ internal policies are not the touchstone of compliance, the ACCC contends differently, and so it is notable that the P2 period substantially exceeded the relevant PEP period of 4.2 weeks.²²

¹⁸ SOAF, Annexure C, Row 66, (CB Tab 11, p 185); First Rojas Affidavit, [45]-[47] (CB Tab 29, p 729).

¹⁹ SOAF, Annexure A (CB Tab 11, p 115).

²⁰ SOAF, Annexure C, Item 66 (CB Tab 11, p 185).

²¹ SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

²² 1050794.015.001.0020 (CB Tab 69, p 1043).

- 17 That 45 days was sufficient is reinforced by the factors illustrating the genuineness of the P2 price. Given the reasons for the price increase, the need for the price to be in place for a “reasonable period” falls away, or in any event the period need only be short to be reasonable.
- 18 There are a number of additional factors which illustrate that the P2 price of \$1.00 was a genuine price and that the P3 price of \$0.80 was a genuine discount:
- (a) *First*, Woolworths increased the price from \$0.80 to \$1.00 as the direct result of a cost price increase by the supplier, which was itself driven by a sharp increase in the price of durum wheat on the worldwide market.
 - (b) *Second*, the P2 price of \$1.00 was virtually the same price that Aldi moved to in respect of its competitor product (\$0.99) in the same period.²³
 - (c) *Third*, there is no evidence that the price was artificially inflated. The price of \$1.00 was consistent with the contemporaneous price architecture prepared by Mr Rojas having regard to the expected cost increase.²⁴ Mr Rojas’ decision to increase the price had nothing to do with his decision over six weeks later to reduce the price back to \$0.80. That later decision was driven by the need to ensure that the Essentials Pasta Sample Product was priced competitively.²⁵ Contrary to the ACCC’s contention, whether a subsequent price drop was anticipated at the time of the price increase is irrelevant to the question of whether the Prices Dropped tickets are misleading. In any event, no such intention existed with respect to the Essentials Pasta Sample Product.
 - (d) *Fourth*, during the 45 day P2 period, a significant number of units were sold - 185,388 in total, equivalent to an average of 4,120 per day, that average being comparable to the average units sold per day in P1 and P3.²⁶
 - (e) *Fifth*, the price of \$1.00 was intended to be the long term shelf price. It was only when Mr Rojas observed that Coles *had not* increased the price of its counterpart product from \$0.80 (although Aldi had) after around 45 days that

²³ Second Rojas Affidavit, [6]-[7] (SCB Tab 745, p 21); MPL.0112.0001.0001 (SCB Tab 748, p 51).

²⁴ First Rojas Affidavit, [23] (CB Tab 29, 723); MPL.0003.0036.5994 (CB Tab 459, p 5855, see native file).

²⁵ First Rojas Affidavit, [45] (CB Tab 29, p 729); Second Rojas Affidavit, [6]-[7] (SCB Tab 745, p 21).

²⁶ SOAF, Annexure C, Row 66, (CB Tab 11, p 185).

Mr Rojas returned the price of the product to its P1 price of \$0.80, on the seasonal Prices Dropped program, to ensure that it was priced competitively.²⁷

- 19 Having regard to those reasons, the Court would find that the “was” price of \$1.00 was a genuine price. It was the price resulting from a cost price increase, was in place for over 6 weeks during which over 180,000 units were sold, and was intended by the Category Manager to be the long term shelf price. The ACCC has pointed to no evidence in support of a contention that \$1.00 was not “genuine” and has not cross-examined either Mr Ortolani on the verification of the cost price increase or Mr Rojas about his reasons for selecting the price of \$1.00.

²⁷ First Rojas Affidavit, [45] (CB Tab 29, p 729); Second Rojas Affidavit, [6]-[7] (SCB Tab 745, p 21).

F Fab Laundry Powder Fresh Blossoms 2kg (657424-EA)

1 The sixth sample product is Fab Laundry Powder Fresh Blossoms 2kg (657424-EA) (**Fab Sample Product**), which sits within the Laundry category at Woolworths, under the Powders subcategory (being one of five subcategories in Laundry).¹ The Laundry category is a heavily promoted category within Woolworths Supermarkets, with the majority of the sales occurring while products are on promotion.² The evidence relevant to the Fab Sample Product is found in the affidavits of Callum Michael Davies affirmed on 15 December 2025 (**First Davies Affidavit**) and 17 February 2026 (**Second Davies Affidavit**). Mr Davies was the Category Manager responsible for the management of the Fab Sample Product in the Relevant Period.

F.1 Chronology

2 From 1 January 2021 to 8 March 2022, the Fab Sample Product was offered and sold to consumers in Woolworths Supermarkets and Woolworths Online on the Prices Dropped program at the price of \$7.00.³ During this period, the Fab Sample Product was offered on yellow ticket specials at a price below the \$7.00 Dropped price.⁴ The relevant “was” price at the time was \$8.50.⁵

3 On 6 December 2021, Henkel (being the supplier of the Fab Sample Product) submitted a cost price increase request to Woolworths in respect of 39 products across various ranges within the laundry liquid and powder subcategories, which was proposed to take effect on 28 February 2022.⁶ This included the Fab Sample Product. Henkel stated that the cost price increase request was “[i]n response to increases in raw materials and logistics costs.”⁷ For the Fab Sample Product, the list price was proposed to increase from \$██████ to \$██████ (an increase of approximately ██████%).⁸ The overall cost increase for Woolworths if the proposal was accepted in full was \$██████

¹ Davies Affidavit, [8] (CB Tab 19, p 488).

² Davies Affidavit, [22] (CB Tab 19, p 492); T313.01-04 (Davies).

³ SOAF, Annexure C, Row 80 (CB Tab 11, p 193-194); Davies Affidavit, [16] (CB Tab 19, p 490).

⁴ SOAF, Annexure C, Row 80 (CB Tab 11, p 193-194); Davies Affidavit, [17] (CB Tab 19, p 490).

⁵ MPL.0002.0032.6022 (CB Tab 168, p 4155); 1050794.002.001.0013, Sheet titled “Part4”, Row 331718, Column G (CB Tab 42, p 845, see native file).

⁶ Davies Affidavit, [20] to [21] (CB Tab 19, p 491); MPL.0018.0003.9134 (CB Tab 495, p 6049); MPL.0018.0003.9135 (CB Tab 496, p 6050).

⁷ Davies Affidavit, [21] (CB Tab 19, p 491); MPL.0018.0003.9135 (CB Tab 496, p 6050).

⁸ MPL.0018.0003.9135 (CB Tab 496, p 6051).

million per annum, and an absolute net impact (after promotional funding) of [REDACTED] million per annum.⁹

4 Henkel also informed Woolworths of an increase in the RRP for Fab Sample Product from \$11.99 to \$13.99 per unit (with increased RRPs also provided by Henkel for all other 38 products which were the subject of the cost price increase request).¹⁰

5 Henkel's cost price increase request was also accompanied by a proposed promotion plan for each of the products. In respect of the promotion of the Fab Sample Product, Henkel requested that the product be placed on the Prices Dropped Program at \$8.00.¹¹

6 On 12 January 2022, Mr Davies informed David Taylor and Andrew Drivas (representatives of Henkel) that the proposal to increase the cost price was accepted, but the amount of the increase was not agreed.¹²

7 On 16 February 2022, Mr Davies sent Woolworths' counterproposal to Henkel.¹³ Mr Davies adopted Henkel's proposed placement of the product on the Prices Dropped program at \$8.00, adding a proposed period of 42 weeks for that program with 10 weeks of \$7.00 specials (which was proposed to be partially funded by Henkel).¹⁴ Mr Davies' deal sheet did not include any establishment period but it was Mr Davies' intention that there be such a period.¹⁵ Mr Davies did not include the establishment period in the deal sheet because, in his view, it was unlikely to be consequential to the overall evaluation of the deal with Henkel.¹⁶ Given the overall quantum of Henkel's proposed price increase (see paragraph 3 above), that assessment was clearly correct.

8 On 27 February 2022, Henkel re-submitted its proposal for the Fab Sample Product, among others.¹⁷ On the same day, Mr Davies approved Henkel's cost price proposal.¹⁸ The annualised net cost impact to Woolworths was \$ [REDACTED] million, an increase of

⁹ MPL.0018.0002.8750_N (CB Tab 503, p 6081).

¹⁰ Davies Affidavit, [21(b)] (CB Tab 19, p 491); MPL.0018.0003.9135 (CB Tab 496, p 6050).

¹¹ MPL.0018.0003.9135 (CB Tab 496, p 6051).

¹² Davies Affidavit, [24] (CB Tab 19, p 492); MPL.0021.0007.2646 (CB Tab 500, p 6069).

¹³ Davies Affidavit, [27]-[28] (CB Tab 19, p 493); MPL.0015.0006.3191 (CB Tab 505, p 6118); MPL.0015.0006.3192 (CB Tab 506, p 6120).

¹⁴ Davies Affidavit, [28(d)] (CB Tab 19, p 494).

¹⁵ Davies Affidavit, [31] (CB Tab 19, p 495). See also T312.37-45 (Davies).

¹⁶ Davies Affidavit, [30]-[31] (CB Tab 19, p 494-495).

¹⁷ Davies Affidavit, [35] (CB Tab 19, p 496); MPL.0018.0002.7440 (CB Tab 511, p 6165).

¹⁸ Davies Affidavit, [36] (CB Tab 19, p 496); MPL.0081.0001.0382 (CB Tab 512, p 6167).

5.37%.¹⁹ The net cost per unit in respect of the Fab Sample Product increased from ██████ to \$█████. Ultimately, Henkel offered funding for the placement of the Fab Sample Product on the Prices Dropped program at the price of \$8.00 for a period of 42 weeks, with 10 weekly specials at \$7.00, proposed to also be supported by funding from Henkel.²⁰

9 On 28 February 2022, Mr Taylor of Henkel emailed Mr Davies a “*table for recommended RRP’s to potentially establish a bench price at [sic] on Fab*”.²¹ The attachment proposed that the Fab Sample Product be sold at its RRP of \$13.99 to “price establish”.²² Mr Taylor’s cover email observed that Coles was currently pricing certain Fab products consistently with the RRPs in the attached document.

10 At 1.22pm on 1 March 2022, Mr Davies instructed James Goudie (his Category Assistant) to implement a commencement of the price establishment period for the Fab Sample Product on 9 March 2022.²³ Minutes earlier, one of his Assistant Category Managers (ACM) approved two weekly specials submitted by Henkel which would run from 16 to 22 March 2022 and 30 March to 5 April 2022.²⁴ Had Mr Davies been aware of these specials, he would not have allowed them to run, given the rules for price establishment periods (T317.01-07).

11 On 8 March 2022, Mr Davies sent his team a calendar reminder to place the Fab Sample Product onto the Prices Dropped program on 11 April 2022.²⁵ It is to be inferred that, at this time, Mr Davies intended that the retail price of the Fab Sample Product at Woolworths would be \$14.00 between 9 March and 11 April 2022.

12 On 9 March 2022, Woolworths took the Fab Sample Product off the Prices Dropped program and offered it on a white ticket shelf price at Henkel’s RRP of \$14.00.²⁶ The

¹⁹ MPL.0002.0028.0866_N_0023 (CB Tab 88, p 1535).

²⁰ Davies Affidavit, [27], [28] and [38] (CB Tab 19, p 493-494 and 497); MPL.0093.0001.0001 (CB Tab 516, p 6172) and MPL.0093.0001.0002 (CB Tab 517, p 6173).

²¹ Davies Affidavit, [37] (CB Tab 19, p 496-497); MPL.0018.0002.6921 (CB Tab 513, p 6168); T314.26-29.

²² Davies Affidavit, [38] (CB Tab 19, p 497); MPL.0018.0002.6922 (CB Tab 514, p 6170).

²³ Davies Affidavit, [40] (CB Tab 19, p 497); MPL.0018.0002.5831 (CB Tab 515, p 6171).

²⁴ Davies Affidavit, [41] (CB Tab 19, p 497); MPL.0093.0001.0001 (CB Tab 516, p 6172); MPL.0093.0001.0002 (CB Tab 517, p 6173).

²⁵ Davies Affidavit, [42] (CB Tab 19, p 497-498); MPL.0018.0002.6962 (CB Tab 521, p 6183).

²⁶ Davies Affidavit, [18(a)] (CB Tab 19, p 490).

price establishment period for the Fab Sample Product ran from 9 March 2022 to 10 April 2022,²⁷ during which time the two weekly specials noted above occurred.²⁸

- 13 By 1 April 2022, Mr Davies had become aware of the two weekly specials.²⁹ On that day, Mr Davies inquired with his team about when the product would come off promotion as he wished to place it onto Prices Dropped as soon as possible.
- 14 On 6 April 2022,³⁰ Mr Davies decided to place the Fab Sample Product on the Prices Dropped program on 18 April 2022 (being 2 weeks from 5 April, being the last day of the two weekly specials noted above).
- 15 On 7 April 2022, Mr Davies became aware that Mr Drivas from Henkel requested that the Fab Sample Product be placed on the Prices Dropped program as soon as possible – which, later that day, he requested be Monday (11 April). Mr Drivas appears to have told Mr Davies’ ACM that a competitor to Woolworths may be about to lower its retail price of the product. Mr Davies inferred this competitor was Coles.³¹ On the same day, Mr Davies agreed to place the product on the Prices Dropped program on 11 April 2022 (as originally intended). Mr Davies assumed the 4-week price establishment period had been observed (which he acknowledged in cross-examination was an incorrect assumption) and, in any event, understood that Woolworths could move a product to the Prices Dropped program sooner to remain competitive, as an exception to the rules (T318.25-320.20).
- 16 On 11 April 2022, the Fab Sample Product was placed on the Prices Dropped program at the price of \$8.00.³²
- 17 Examples of the “Prices Dropped” tickets that applied to the Fab Sample Product are as follows:³³

²⁷ Davies Affidavit, [18(a)] and [39] (CB Tab 19, p 490, 497).

²⁸ Davies Affidavit, [18(b)] and [41] (CB Tab 19, p 490, 497).

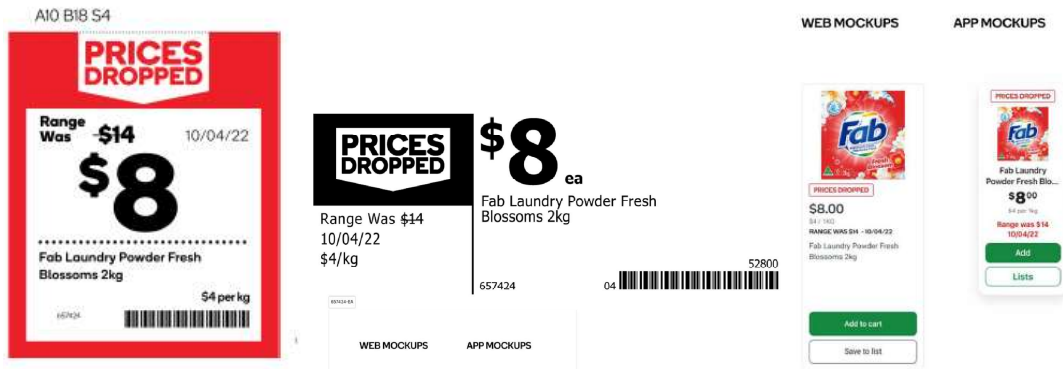
²⁹ Davies 2 and MPL.0097.0001.0001 (CB Tab 20, p 508).

³⁰ MPL.0093.0001.0004 (CB Tab 523, p 6188).

³¹ Davies Affidavit, [45] (CB Tab 19, p 491, 498-499); MPL.0093.0001.0005 (CB Tab 524, p 6190 and 6192).

³² Davies Affidavit, [18(c)], [45] and [46] (CB Tab 19, p 491, 498-499).

³³ MPL.0085.0001.0012 (CB Tab 530, p 6220).



18 During the P1, P2 and P3 periods, the Fab Sample Product was sold in the following quantities:³⁴

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Fab Laundry Powder Fresh Blossoms 2kg (657424-EA)	991.8	324,318	355.3	6,750	1,365.7	143,395

19 In August 2022, following an internal compliance review by Woolworths in respect of its internal guidelines governing the Prices Dropped program, the product was removed from the Prices Dropped program and sold at the RRP of \$14.00 for approximately 10 weeks (being the period from 9 August to 17 October 2022).³⁵

F.2 Reasons why the P2 price period was reasonable and the P2 price and subsequent price reduction were genuine

20 The Court would conclude that the Fab Sample Product was offered at the P2 price of \$14.00 for a “reasonable period.” This is because the P2 period was 19 days (i.e., approximately 3 weeks), even with the interruption of two weekly specials. That period is not trivial. The reasonableness of this 19-day period is further highlighted by the fact that the P2 price, and the subsequent price reduction to \$8.00, were genuine. The Court would conclude that those prices were genuine for the following reasons.

21 *First*, the retail price increase to \$14.00 was the direct result of Henkel’s request for an increase in the cost price of the product, which Woolworths accepted.

³⁴ SOAF, Annexure C, Item 80 (CB Tab 11, p 193-194).

³⁵ Davies Affidavit, [47]-[53] (CB Tab 19, p 499-500).

- 22 *Second*, the P2 price of \$14.00 was consistent with Fab’s new RRP for the product (being \$13.99), which Mr Davies understood to be competitive in the market as it was “traditionally a market-wide price” (T314.31-36).
- 23 *Third*, the P3 price was funded, in part, by a deferred deal of ██████% from Henkel.³⁶ That funding was expressly offered by Henkel to support the inclusion of the product on Prices Dropped.
- 24 *Fourth*, there was a substantial number of sales of the Fab Sample Product during the P2 period, being a total of 6,750 units (which equates to approximately 355.3 units per day). While this was lower than the number of units sold per day in the P1 period (991.8 units) and P3 period (1,365.7 units), the product was discounted in both these periods and Laundry is a category where the majority of the sales occur while products are on promotion (T313.01-04). In any event, the *volume* of sales in the P2 period was not negligible. That volume is sufficient to demonstrate the price was established, real and genuine.
- 25 *Fifth*, the circumstance that it was not Mr Davies’ intention to sell the product at RRP of \$14.00 on an “ongoing” basis, or “for the foreseeable future” does not negate the genuineness of the P2 price (cf T316.01-05 and T316.19-21). With laundry being a heavily promoted category, it is unsurprising that Mr Davies’ evidence was that it would be highly unlikely that the product would be sold at \$14.00 for a 52-week period of time. Nevertheless, the likely alternative strategy if the product was not on Prices Dropped was a high-low promotional strategy (T315.06-09). If the product was sold on a high-low strategy, the white ticket shelf price would likely be the RRP (\$14.00) for 26 weeks a year or more (T321.01-25). It follows that the mere fact that the RRP was not an indefinite price does not mean it was not a genuine price.
- 26 In his cross-examination, Mr Davies said that the “primary element” for charging the RRP in respect of the Fab Sample Product was to create a “was” price for a future dropped price (T316.29-35). That answer needs to be understood in the context of Mr Davies’ evidence as a whole. Mr Davies’ evidence was to the effect that Woolworths typically uses suppliers’ RRPs for white ticket prices in the laundry category and it is common to deeply discount off those white ticket prices (T315.06-09; T321.01-25).

³⁶ Davies Affidavit, [36] (CB Tab 19, p 496); MPL.0081.0001.0382 (CB Tab 512, p. 6167).

The discounts are so deep that Mr Davies' evidence is that he expects few sales on any of his products at RRP (T313.01-04); most sales occur when products are on promotion. In that context, Mr Davies' acceptance that a "primary element" for charging the RRP for the Fab Sample Product was to show a future "was" price (T316.29-35) does not distinguish that product from any other product in the laundry category. It is merely a reflection of how laundry products are typically sold in supermarkets. It is certainly not evidence that Mr Davies considered the RRP, and therefore the P2 price, to be anything other than a genuine price. His evidence was to the contrary (T312.39-40).

27 *Sixth*, when the product was removed from the Prices Dropped program in August 2022, it was offered and sold at the RRP of \$14.00 for a 10-week period. That is corroborative of Mr Davies' evidence that the RRP was the likely counterfactual price absent funding from Henkel.

28 Further, if the ACCC is permitted to pursue the new alternative case (that is, the Prices Dropped Ticket merely represents a "genuine reduction" in price, and that it was misleading because the P2 price of \$14.00 and/or the price reduction were not genuine), then the Court would reject that case for the same reasons as those outlined above.

G Kleenex Facial Tissue Xcare Aloe vera 95pk (79502-EA)

- 1 The seventh sample product is Kleenex Facial Tissue Xcare Aloe vera 95pk (79502-EA) (**Kleenex Sample Product**), a product supplied by Kimberly Clark Australia (**KCA**) and ranged within Woolworths' Paper Goods, Period & Continence Care category.¹
- 2 The evidence relevant to the Kleenex Sample Product is found in the affidavit of Timothy Charles Moffatt sworn on 21 November 2025 (**Moffatt Affidavit**). Mr Moffatt was the Category Manager responsible for the management of the product at the relevant time.

G.1 Chronology

- 3 From 2 May 2022 to 5 February 2023, the Kleenex Sample Product was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online on the Prices Dropped program at \$2.20 (with no yellow ticket specials).²
- 4 On 7 November 2022, KCA submitted a cost price increase request to Woolworths in respect of 27 products within its Kleenex Facial Tissue and Viva Paper Towel ranges. This included the Kleenex Sample Product. KCA informed Woolworths that it had absorbed "*significant increases in input costs across the entire [KCA] portfolio*" but "*the business [was] no longer able to offset accelerated increases in input costs.*"³ KCA also informed Woolworths of an increase to the RRP for the 27 products the subject of the cost price increase. The RRP for the Kleenex Sample Product increased from \$2.80 to \$3.30 per pack.⁴
- 5 As part of its request, KCA proposed an increase in the net cost of the Kleenex Sample Product from \$ [REDACTED] to [REDACTED] (per pack).⁵ It also proposed that the product be sold at the new RRP of \$3.30 for 6 weeks followed by the placement of the product

¹ Moffatt Affidavit, [3(b)] (CB Tab 25, p 628).

² SOAF, Annexure C, Row 98, (CB Tab 11, p 203); Moffatt Affidavit, [66(a)] (CB Tab 25, p 646).

³ Moffatt Affidavit, [68] and [69(a)] (CB Tab 25, p 646-647); MPL.0050.0006.2413 (CB Tab 531, p 6221).

⁴ Moffatt Affidavit, [69(a)] (CB Tab 25, p 647); MPL.0050.0006.2414 (CB Tab 532, p 6223).

⁵ Moffatt Affidavit, [69(b)] and [70] (CB Tab 25, p 647-649); MPL.0050.0006.2415 (CB Tab 533, p 6224, see native file).

on the Prices Dropped program at \$2.60 for 46 weeks. KCA offered a deferred deal of [REDACTED] % for the reduced price of \$2.60 on the Prices Dropped program.⁶

6 Mr Moffatt expects that he undertook an initial assessment of KCA's proposal, which first included an assessment of the likely impact of the proposed cost price increase on Woolworths' customers by considering the amount of the cost price increase and the RRP for the products, including how KCA's proposed prices compared to other products in the category (which he termed the "pricing hierarchy").⁷ The Court would infer he did, in fact, undertake this initial assessment in light of Mr Moffatt's unchallenged evidence set out in paragraphs 7 and 8 below.

7 On 2 December 2022, Mr Moffatt sent an email to Kate Wilkie (a representative of KCA) setting out some concerns he held with KCA's proposal. Mr Moffatt's email included the following statement:⁸

Currently on Dropped at \$2.20ea, Was \$2.60.

This proposal has the shelf price lift to \$3.30, 26.9% above the previous was price, and then drop to \$2.60, 18.2% above the current dropped price.

I do not believe showing a save of 70c is a fair representation to our Customers.

8 As Mr Moffatt explains at [74] of his affidavit, the above statement conveyed his concern that KCA's proposed RRP was overinflated at \$3.30, given it was a 26.9% increase above the previous "was" price (being \$2.60). Mr Moffatt was concerned to ensure that the amount called out to consumers on the Prices Dropped tickets was 'fair'.⁹ He therefore determined to set the new shelf price (P2 price) at \$3.00, being 30 cents less than the RRP for the Kleenex Sample Product (see T340.25-30). That price was, in Mr Moffatt's assessment, "*the appropriate price point at which Woolworths would sell the product if it was not on the Prices Dropped program or any promotion*".¹⁰

⁶ Moffatt Affidavit, [69(b)(ii)] (CB Tab 25, p 648); MPL.0050.0006.2415 (CB Tab 533, p 6224, see native file at cell I15).

⁷ Moffatt Affidavit, [71] (CB Tab 25, p 649).

⁸ Moffatt Affidavit, [72]-[73] (CB Tab 25, p 649); MPL.0002.0003.3290 (CB Tab 537, p 6260).

⁹ Moffatt Affidavit, [73]-[74] (CB Tab 25, p 649).

¹⁰ Moffatt Affidavit, [75] (CB Tab 25, p 649-650).

- 9 On 13 December 2022, Mr Moffatt confirmed with KCA that Woolworths was proposing to accept the proposal for the Kleenex Sample Product in the terms set out at paragraph 5 above.¹¹
- 10 On 21 December 2022, Ms Caton acknowledged Woolworths' agreement to KCA's proposal, providing an updated deal sheet (with no changes to the proposal set out in paragraph 5 above for the Kleenex Sample Product).¹²
- 11 On 2 February 2023, Mr Moffatt formally approved KCA's cost price increase request, which would take effect from 6 February 2023.¹³
- 12 On 6 February 2023, the Kleenex Sample Product was removed from the Prices Dropped program and offered at the price of \$3.00 using a white ticket.¹⁴
- 13 Between 6 February 2023 and 19 March 2023 (i.e., approximately 6 weeks), the Kleenex Sample Product was offered and sold to customers in Woolworths Supermarkets and Woolworths Online at the price of \$3.00 using a white ticket.¹⁵
- 14 On 20 March 2023, the Kleenex Sample Product was placed back on the Prices Dropped program at the price of \$2.60, with KCA contributing funding for this price reduction.¹⁶
- 15 Examples of the "Prices Dropped" tickets that applied to the Kleenex Sample Product are as follows:¹⁷



¹¹ Moffatt Affidavit, [77] (CB Tab 25, p 650); MPL.0002.0003.3280 (CB Tab 538, p 6264).
¹² Moffatt Affidavit, [78] (CB Tab 25, p 650); MPL.0002.0003.3281 (CB Tab 539, p 6270, see native file).
¹³ Moffatt Affidavit, [82] (CB Tab 25, p 651); MPL.0081.0001.0461 (CB Tab 542, p 6296); MPL.0081.0001.0465 (CB Tab 543, p 6303).
¹⁴ SOAF, Annexure C, Row 98, (CB Tab 11, p 203).
¹⁵ SOAF, Annexure C, Row 98, (CB Tab 11, p 203). Moffatt Affidavit, [66(b)] (CB Tab 25, p 646).
¹⁶ SOAF, Annexure C, Row 98, (CB Tab 11, p 203). Moffatt Affidavit, [66(c)], [69(b)] and [78] (CB Tab 25, p 646-648, 650) and MPL.0002.0003.3281 (CB Tab 539, p 6270, see native file).
¹⁷ See SOAF, Annexure A (CB Tab 11, p 114).

16 During the P1, P2 and P3 periods, the Kleenex Sample Product sold in the following quantities:¹⁸

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Kleenex Facial Tissue Xcare Aloe vera 95pk (79502-EA)	7,243	2,028,034	5,572.6	234,050	8,823.4	405,878

G.2 Reasons why the P2 price period was reasonable and the P2 price and subsequent price reduction were genuine

17 The Court would conclude that the Kleenex Sample Product was offered at the P2 price of \$3.00 for a “reasonable period,” given the P2 period was 42 days (or 6 weeks). On any view, this was a reasonable period of time to establish the P2 price. Further, the reasonableness of the 42 day period is highlighted by the fact that the P2 price, and the subsequent price reduction to \$2.60, were genuine. The Court would find that those prices were genuine for the following reasons.

18 *First*, the increase in Woolworths’ retail price was the direct result of a cost price increase request from KCA, which was accepted by Woolworths.

19 *Second*, there was a significant number of sales of the Kleenex Sample Product during the P2 period, being a total of 234,050 units (which equates to approximately 5,572.6 average units per day). While this was lower than the average number of units sold per day in the P1 period (7,243 units) and P3 period (8,823.4 units), the number of average sales per day, and the cumulative total of sales, across the entire P2 period is sufficient to demonstrate the P2 price was offered for a reasonable period of time, and that the P2 price was real and genuine.

20 *Third*, the P3 price was funded by a deferred deal of [REDACTED] % from KCA. This funding was offered on the basis that the product would be placed on the Prices Dropped program. It evidences that the discount from the P2 price was not “illusory”.

21 *Fourth*, in setting the P2 price at \$3.00, Mr Moffatt’s intention was to set the price at a white ticket shelf price for which “the product is sold at in [the] absence of any promotion, so during the rest period, and at the conclusion of any promotions such as

¹⁸ SOAF, Annexure C, Row 98, (CB Tab 11, p 203).

Prices Dropped’ (T340.41-46. See also T341.12-14). Indeed, Mr Moffatt understood that the P2 price would be the price for the product if its placement on the Prices Dropped program was to conclude, including following any review of the promotional program (T341.04-10). This evidence supports the notion that the P2 price was not an artificial construct that was implemented solely for the purpose of later claiming a “dropped” price.

- 22 *Fifth*, and as outlined above, Mr Moffatt undertook an assessment of the proposed RRP increase in accordance with the pricing hierarchy. As a result of that assessment, Mr Moffatt determined to depart from KCA’s RRP and set the new white ticket shelf price at the P2 price of \$3.00 – being the price he considered appropriate for Woolworths to charge if the product was not on the Prices Dropped program or any promotion.¹⁹ Mr Moffatt gave evidence that is the basis on which the white ticket shelf price is determined - that is, the price point which “*Woolworths would be comfortable selling that product at in absence of any promotion including Prices Dropped or Weekly Special*” (T339.40-46).
- 23 *Sixth*, while Mr Moffatt does not specifically recall undertaking any modelling for the P2 price for the Kleenex Sample Product, the Court would infer he did so, having regard to the third and fourth points above and Mr Moffatt’s evidence that such modelling was his usual practice for many years (T337.01-21; T341.36-39).
- 24 Further, if the ACCC is permitted to pursue the new alternative case (that is, the Prices Dropped Ticket merely represents a “genuine reduction” in price, and that it was misleading because the P2 price of \$3.00 and/or the price reduction were not genuine), then the Court would reject that case for the same reasons as those outlined above.

¹⁹ Moffatt Affidavit, [75] (CB Tab 25, p 649-650).

H Lucky Dog Bones Original 800g (433643-EA)

1 The eighth sample product is Lucky Dog Bones Original 800g (433643-EA) (**Lucky Dog Sample Product**) which sits within the Pet Needs category of Woolworths and is sourced from Nestle Purina Petcare (**Nestle Purina**). The evidence relevant to the Lucky Dog Sample Product is found in the affidavit of Martin John McCaig sworn on 21 November 2025 (**McCaig Affidavit**). Mr McCaig was the Category Manager responsible for the management of the product during the Relevant Period.

H.1 Chronology

2 From 1 January 2021 until 6 March 2022, the Lucky Dog Sample Product was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online on the Prices Dropped program at the price of \$4.50.¹

3 On 13 December 2021, Nestle Purina submitted a cost price increase request for 114 products across a wide variety of pet food ranges and brands in 5 subcategories of cat and dog foods.² This included the Lucky Dog Sample Product, for which Nestle Purina proposed an increase in net cost from \$████ to █████ per unit (a 41.9% increase) and an increase in RRP from \$5.60 to \$6.50 (a 16.1% increase).³

4 Nestle Purina's request was accompanied by a proposed promotional plan for each of the 114 products.⁴ Relevantly, in respect of the Lucky Dog Sample Product, Nestle Purina initially proposed a "high/low" promotional strategy, where the product would be sold for 40 weeks at the white ticket shelf price of \$6.50 (being Nestle Purina's RRP for the product) and offered on specials for \$5.50 (8 weeks) and \$5.00 (4 weeks).⁵

5 Between 17 January 2022 and 2 March 2022, Woolworths and Nestle Purina engaged in a significant and complex negotiation of the cost price increase request, with six

¹ SOAF, Annexure C, Row 108 (CB Tab 11, p 204); McCaig Affidavit, [17(a)] (CB Tab 24, p 600).

² MPL.0008.0010.1831 (CB Tab 544, p 6305); MPL.0008.0010.1832 (CB Tab 545, p 6307); MPL.0008.0010.1833 (CB Tab 546, p 6310, see native file); MPL.0008.0010.1834 (CB Tab 547, p 6311, see native file); MPL.0008.0010.1836 (CB Tab 548, p 6312, see native file); MPL.0008.0010.1838 (CB Tab 550, p 6317, see native file).

³ McCaig Affidavit, [23(a)(iv)] (CB Tab 24, p 602); MPL.0008.0010.1834 (CB Tab 547, p 6311, see native file).

⁴ McCaig Affidavit, [22] (CB Tab 24, p 601).

⁵ McCaig Affidavit, [22]-[23(b)] (CB Tab 24, p 601, 602); MPL.0008.0010.1834 (CB Tab 547, p 6311, see native file).

proposals provided by Nestle Purina and two counterproposals made by Woolworths.⁶ A summary of these negotiations is set out below.

- 6 On 2 February 2022, in response to Nestle Purina's above proposal, Mr McCaig indicated an acceptance of the requested increase in the list price for all products subject to various conditions, including additional deferred deals of \$ [REDACTED] m, which brought the net impact of the overall cost increase to \$ [REDACTED] m, and the placement of products that were then currently on the Prices Dropped program onto EDLP program (rather than a high/low promotional strategy as initially proposed by Nestle Purina).⁷ This included the Lucky Dog Sample Product.⁸
- 7 On 8 February 2022, Joshua Sexton (a representative of Nestle Purina) provided Mr McCaig with Nestle Purina's second proposal, offering a [REDACTED] % improvement in GP on the overall deal.⁹ In respect of the Lucky Dog Sample Product, Nestle Purina maintained its requested net cost increase to [REDACTED] per unit, but proposed to place the product on the new RRP of \$6.50 for 8 weeks before moving to the Prices Dropped program at \$6.00 for 44 weeks (with scan funding of \$ [REDACTED] per unit).¹⁰
- 8 On 14 February 2022, Mr McCaig again proposed to place products (including the Lucky Dog Sample Product) onto EDLP program and indicated a preparedness to accept Nestle's overall proposal, subject to the adoption of that pricing strategy and other conditions including a \$ [REDACTED] m increase in deferred deals to bring the net impact of the overall cost increase to \$ [REDACTED] m.¹¹
- 9 On the same day, Nestle Purina submitted its third proposal to Mr McCaig.¹² In respect of the Lucky Dog Sample Product, Nestle Purina maintained its proposed net cost increase and the requested placement of the product on the Prices Dropped

⁶ McCaig Affidavit, [24]-[25] (CB Tab 24, p 602, 603).

⁷ McCaig Affidavit, [26]-[27] (CB Tab 24, p 603); MPL.0002.0005.1666 (CB Tab 556, p 6334); MPL.0002.0005.1667 (CB Tab 557, p 6336, see native file).

⁸ MPL.0002.0005.1667 (CB Tab 557, p 6336, see native file).

⁹ McCaig Affidavit, [32]-[34] (CB Tab 24, p 605, 606); MPL.0002.0005.1636 (CB Tab 559, p 6340); MPL.0002.0005.1637 (CB Tab 560, p 6344, see native file).

¹⁰ MPL.0002.0005.1637 (CB Tab 560, p 6344, see native file).

¹¹ McCaig Affidavit, [39]-[41] (CB Tab 24, p 607-609); MPL.0002.0005.0994 (CB Tab 563, p 6353); MPL.0002.0005.0995 (CB Tab 564, p 6365, see native file).

¹² McCaig Affidavit, [42]-[45] (CB Tab 24, p 609, 610); MPL.0002.0005.0987 (CB Tab 565, p 6366); MPL.0002.0005.0988 (CB Tab 566, p 6378, see native file).

program, as set out in its second proposal above, with an improvement in funding to support that pricing strategy.¹³

- 10 Between 15 February 2022 and 2 March 2022, Woolworths and Nestle Purina continued their negotiations in respect of Nestle Purina’s cost price increase request and associated promotional plans for the 114 products included in that request.
- 11 At 6.24pm on 2 March 2022, Nestle Purina provided its final proposal to Woolworths.¹⁴ In respect of the Lucky Dog Sample Product, Nestle Purina proposed a net cost increase to [REDACTED] per unit and a deferred deal of [REDACTED]% to place the product on the Prices Dropped program at \$6.00 for a period of 44 weeks after the sale of the product at the RRP of \$6.50 for 8 weeks.¹⁵ The total financial impact of Nestle Purina’s cost price increase request totalled approximately \$[REDACTED]m (or a 10.5% increase in Woolworths’ overall cost price for the 114 products).¹⁶
- 12 As indicated above, Mr McCaig initially proposed that the Lucky Dog Sample Product be placed on the EDLP program following the cost price increase. Despite this, Mr McCaig was ultimately comfortable placing the product on the Prices Dropped program with the relevant price establishment period.¹⁷ In his unchallenged evidence, Mr McCaig indicated he agreed to Nestle Purina’s request to place the product onto the Prices Dropped program for two reasons:¹⁸ *First*, Mr McCaig considered the utilisation of the program was beneficial to customers because Woolworths was bringing the price down “*from what it otherwise would have been (i.e., down from the new shelf price)*” (which was his “primary concern” in the negotiation: see T280.18-24 and T281.27-33) and *second*, Nestle Purina made their funding contribution conditional on the placement of the product onto the Prices Dropped program.¹⁹ Mr McCaig’s unchallenged evidence is that he believed, had he not agreed to that condition, Nestle Purina would not have funded a reduction in the

¹³ MPL.0002.0005.0988 (CB Tab 566, p 6378, see native file).

¹⁴ McCaig Affidavit, [65] (CB Tab 24, pp 616, 617); MPL.0002.0005.1738 (CB Tab 581, p 6558); MPL.0002.0005.1739 (CB Tab 582, p 6561, see native file, “DD Change Assortments” sheet).

¹⁵ McCaig Affidavit, [65]-[70] (CB Tab 24, p 616-618); MPL.0002.0005.1738 (CB Tab 581, p 6558); MPL.0002.0005.1739 (CB Tab 582, p 6561, see native file, “DD Change Assortments” sheet).

¹⁶ MPL.0008.0009.4348 (SCB Tab 762, p 176); MPL.0002.0005.1732 (CB Tab 584, p 6568); MPL.0002.0005.1733 (CB Tab 585, p 6570, see native file).

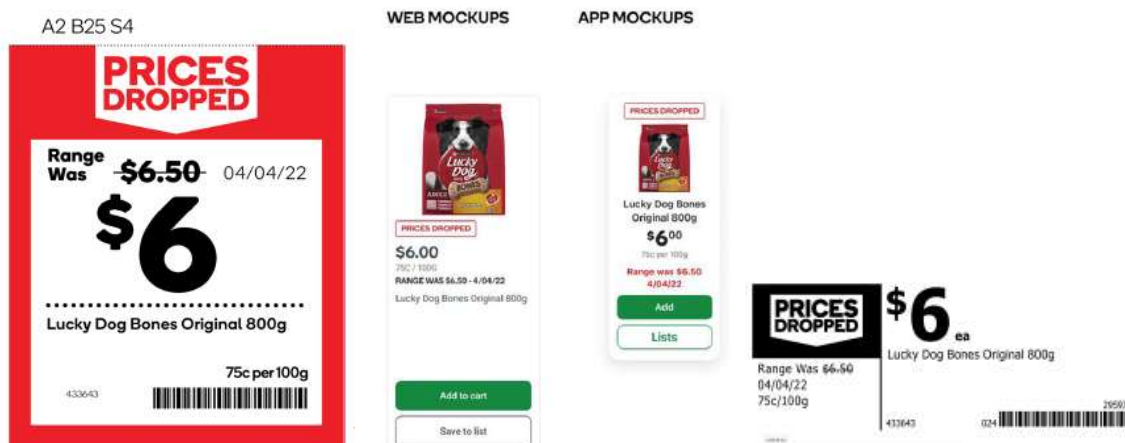
¹⁷ McCaig Affidavit, [72] (CB Tab 24, p 618, 619); T303.35-45.

¹⁸ McCaig Affidavit, [73] (CB Tab 24, p 619).

¹⁹ McCaig Affidavit, [73] (CB Tab 24, p 619).

product's retail price to the same extent as if the product was not placed onto the Prices Dropped program.²⁰

- 13 On 7 March 2022, the increase in the cost price for the Lucky Dog Sample Product took effect.²¹ Also on 7 March 2022, the Lucky Dog Sample Product was removed from the Prices Dropped program and offered for sale in Woolworths Supermarkets and Woolworths Online on a white ticket at Nestle Purina's RRP of \$6.50.²²
- 14 On 31 March 2022, Mr McCaig obtained internal approval to place the Lucky Dog Sample Product on the Prices Dropped Program, effective 4 April 2022.²³
- 15 In the period between 7 March and 4 April 2022 (i.e., approximately 4 weeks), the Lucky Dog Sample Product was sold at the RRP of \$6.50.
- 16 On 5 April 2022, the Lucky Dog Sample Product was placed on the Prices Dropped program at the price of \$6.00.²⁴
- 17 Examples of the "Prices Dropped" tickets that applied to the Lucky Dog Sample Product are as follows:²⁵



²⁰ McCaig Affidavit, [73(b)] (CB Tab 24, p 619).

²¹ McCaig Affidavit, [69] (CB Tab 24, p 618); SOAF, Annexure B, Row 108, (CB Tab 11, p 134).

²² SOAF, Annexure C, Row 108 (CB Tab 11, p 204). McCaig Affidavit, [17(c)] and [17(d)] (CB Tab 24, p 600).

²³ McCaig Affidavit, [79]-[80] (CB Tab 24, p 620, 621); MPL.0002.0005.0816 (CB Tab 590, p 6580).

²⁴ SOAF, Annexure C, Row 108 (CB Tab 11, p 205). McCaig Affidavit, [17], [82] (CB Tab 24, p 600, 621).

²⁵ MPL.0085.0001.0013 (Tab 596, p 6646).

18 During the P1, P2 and P3 periods, the Lucky Dog Sample Product sold in the following quantities:²⁶

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Lucky Dog Bones Original 800g (433643-EA)	2,319.2	997,275	1,644.5	47,690	1,456.5	324,797

H.2 Reasons why the P2 price was a genuine price charged for a reasonable period and subsequent price reduction were genuine

19 The Court would conclude that the Lucky Dog Sample Product was offered at the P2 price of \$6.50 for a “reasonable period,” given the P2 period was 29 days (being approximately 4 weeks).²⁷ That period was reasonable to establish the price on any view. Further, the reasonableness of this 29 day period is underscored by the fact that the P2 price of \$6.50, and the subsequent price reduction to \$6.00, were genuine. The Court would conclude that those prices were genuine for the following reasons.

20 *First*, the retail price increase was the direct result of a cost price increase from Nestle Purina. As Mr McCaig indicated in cross-examination, a supplier’s net cost is the “biggest determiner” of product pricing (T288.46-47) and Nestle Purina “*did have a legitimate cost to pass on to us*” (T282.27).

21 *Second*, the P2 price of \$6.50 was Nestle’s new RRP for the product, which Mr McCaig took to be market-wide across all retailers and was indicative of a competitive price (T280.35; T284.45-46; T299.39-300.20; 301.43-44 (McCaig)).

22 *Third*, there was a significant number of sales of the Lucky Dog Sample Product during the P2 period, being a total of 47,690 units (equating to 1,644.5 per day).²⁸ Notably, the number of units sold per day in the P2 period exceeded the average number of units sold per day in the P3 period (1,456.5 units).²⁹ That result demonstrates that the P2 price was genuine and not inflated or unreal.

²⁶ SOAF, Annexure C, Row 108 (CB Tab 11, p 204).

²⁷ SOAF, Annexure B, Row 108 (CB Tab 11, p 134).

²⁸ SOAF, Annexure C, Row 108 (CB Tab 11, p 204, 205).

²⁹ SOAF, Annexure C, Row 108 (CB Tab 11, p 204, 205).

- 23 *Fourth*, the P2 price of \$6.50 was identical to the white ticket shelf price in Nestle Purina’s original proposal of a high-low promotional strategy (i.e., \$6.50 at the white ticket shelf price for 40 weeks with yellow ticket specials of \$5.50 for 8 weeks and \$5.00 for 4 weeks).³⁰ This shows the P2 price of \$6.50 was not an artificial construct that was only implemented for the purpose of later claiming a “dropped” price. Rather, the P2 price, established over the P2 period, was a demonstration of Woolworths applying care and caution when making statements about savings following a cost price increase (T297.09-12; 298.26-28; 303.37-43 (McCaig)).
- 24 *Fifth*, a number of the 114 products in Nestle Purina’s request were subject to a high-low pricing strategy, where the white ticket shelf price was set at the relevant RRP. For example, for Fancy Feast Puree Kiss 40g, Woolworths adopted the RRP of \$3.75 for 40 weeks, with 12 weekly specials below that price.³¹ This reinforces the fourth point above. It simply cannot be said that the higher P2 price for Lucky Dog Bones (set at the supplier’s RRP) was *only* implemented to later claim a dropped price.
- 25 *Sixth*, as evidenced from the above chronology, Woolworths’ decision to approve Nestle Purina’s cost price increase was based on an assessment of the total net cost impact of the supplier’s proposal across all 114 products in the request. That net impact was \$█m, being a 10.5% increase in Woolworths’ overall costs for those products. As Mr McCaig indicated in cross-examination, the Lucky Dog Sample Product was “*one product in hundreds that we’re negotiating... it’s not a particularly important product to either party*” (T283.17-19). From this commercial context, it is apparent that it was not part of Woolworths’ purpose to manufacture an illusory discount; rather, Woolworths’ purpose was to reach an overall resolution on Nestle Purina’s cost increase.
- 26 *Seventh*, in circumstances where there was a cost price increase, Woolworths relied on “*supplier’s proposed funding to be able to get [the price] back down*” (T283.31-34). Indeed, Nestle Purina’s provision of funding for the reduction to the P3 (dropped)

³⁰ McCaig Affidavit, [23(b)] (CB Tab 24, p 602).

³¹ See, for example, MPL.0008.0010.1832 (CB Tab 545, p 6309), Row 1 for “Fancy Feast Puree Kiss 40g” combined with MPL.0002.0005.1739 (CB Tab 582, p 6561, see native file, “Fancy Feast 40g – 28.02” sheet, Rows 17-19); see also MPL.0008.0010.1832 (CB Tab 545, p 6307, Row 14 for “Fancy Feast 450g”); MPL.0002.0005.1739 (CB Tab 582, p 6561, see native file, “Fancy Feast 450g & 1.4kg – 28.2” sheet, Rows 17-19).

price was conditional on the placement of the product on the Prices Dropped program (see paragraph 12 above). These matters underscore the genuineness of the discount from the P2 price. In this regard, Mr McCaig observed he was concerned “*to ensure that any Prices Dropped price was a genuine reduction in the standard shelf price for the product in that it was below the price that would have been charged by Woolworths absent the supplier funding the price reduction offered as a result of the Prices Dropped Program.*”³² Ultimately, as Mr McCaig has observed, “*there’s a legitimate retail price change, and that price has been followed during an establishment period, so it’s a real price, and then the Dropped is a real discount from it.*” (T304.04-06).

- 27 Further, if the ACCC is permitted to pursue the new alternative case (that is, the Prices Dropped Ticket merely represents a “genuine reduction” in price, and that it was misleading because the P2 price of \$6.50 and/or the price reduction were not genuine), then the Court would reject that case for the same reasons as those outlined above.

³² McCaig Affidavit, [84(a)] (CB Tab 24, p 622).

I Nestle Cerelac Rice 4m 200g (379228-EA)

1 The ninth sample product is Nestle Cerelac Rice 4m 200g (379228-EA) (**Cerelac Sample Product**), a product which sits within the Baby Needs category of Woolworths and is sourced from Nestle Australia Ltd (**Nestle**).¹ The evidence relevant to the Cerelac Sample Product is found in the affidavit of Stuart Robert Alexander Robinson sworn on 21 November 2025 (**Robinson Affidavit**). Mr Robinson was the Category Manager responsible for the management of the product at the relevant time.

I.1 Chronology

2 From 17 February 2022 to 7 March 2023, the Cerelac Sample Product was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online at the white ticket shelf price of \$5.00 for 328 days (out of the total 384 days), subject to regular yellow ticket specials at a price of \$4.00.² The white ticket shelf price was consistent with Nestle’s RRP at the time (which was \$4.99).³

3 On 12 December 2022, Nestle submitted a request for a cost price increase in respect of the Cerelac Sample Product.⁴ In addition to that product, Nestle’s request also included a cost price increase for three other products within the same price family.⁵ In its covering letter, Nestle cited “*increases in our input costs*” as the basis for the cost price increase requests.⁶ Nestle also informed Woolworths that the new RRP for the Cerelac Sample Product was \$6.49, being a 30.1% increase in the RRP.⁷ Mr Robinson’s unchallenged evidence was that this increase in the RRP was consistent with increases sought for similar products from other suppliers at the time.⁸

4 On 20 December 2022, Nestle submitted its first proposal to Woolworths in respect of the cost price increase.⁹ In this proposal, Nestle proposed an increase to the net cost of

¹ Robinson Affidavit, [9] (CB Tab 28, p 700).

² SOAF, Annexure C, Row 168, (CB Tab 11, p 233-234). See also Robinson Affidavit, [27] (CB Tab 28, p 704).

³ MPL.0019.0006.4651 (CB Tab 598, p 6648).

⁴ Robinson Affidavit, [28]-[29] (CB Tab 28, p 705); MPL.0019.0006.4650 (CB Tab 597, p 6647);

MPL.0019.0006.4651 (CB Tab 598, p 6648).

⁵ MPL.0019.0006.4651 (CB Tab 598, p 6648).

⁶ Robinson Affidavit, [29] (CB Tab 28, p 705); MPL.0019.0006.4651 (CB Tab 598, p 6648).

⁷ MPL.0019.0006.4651 (CB Tab 598, p 6648); see also Robinson Affidavit, [30] (CB Tab 28, p 705).

⁸ Robinson Affidavit, [47] (CB Tab 28, p 710).

⁹ Robinson Affidavit, [32] (CB Tab 28, p 706); MPL.0002.0009.7499 (CB Tab 599, p 6649); MPL.0002.0009.7500 (CB Tab 600, p 6652, see native file).

the products to Woolworths by approximately 48% (from \$ [REDACTED] to \$ [REDACTED] per unit).¹⁰ Nestle also proposed to place the products onto the Prices Dropped program at the price of \$6.00,¹¹ supported by scan funding of \$ [REDACTED] per unit.¹²

5 Between 3 and 16 February 2023, Woolworths negotiated with Nestle in respect of the cost price increase request as a whole, including the associated promotional plan for all four Nestle products included in the request.¹³ Ultimately, in respect of the Cerelac Sample Product, Woolworths agreed to accept a net cost price increase of \$ [REDACTED] per unit (when accounting for the scan funding of \$ [REDACTED] per unit).¹⁴ Nestle offered (and Woolworths agreed) that this funding would support the placement of the product onto the Prices Dropped program at \$6.00.

6 Between 1 and 2 March 2023, Mr Robinson sought and obtained approval from James Hepworth (Commercial Director - Everyday Needs) in respect of the overall pricing proposal and commercial outcome of the negotiation with Nestle, including the placement of the Cerelac Sample Product onto the Prices Dropped program.¹⁵ The total forecasted increase in the cost price increase totalled approximately \$ [REDACTED] (or a 24.2% increase in Woolworths' costs for the relevant Nestle products in the Cerelac Sample Product's price family).¹⁶

7 On 8 March 2023, the retail price of the Cerelac Sample Product increased to \$6.50, which was consistent with Nestle's RRP (which was \$6.49), with a white ticket placed on the product.¹⁷ From 8 March to 29 March 2023 (i.e., 3 weeks), the Cerelac Sample Product was offered to consumers in Woolworths Supermarkets and Woolworths Online at that white ticket price of \$6.50.¹⁸

¹⁰ Robinson Affidavit, [38]-[39] (CB Tab 28, p 707); MPL.0002.0009.7499 (CB Tab 599, p 6649); MPL.0002.0009.7500 (CB Tab 600, p 6652, see native file).

¹¹ Robinson Affidavit, [41] (CB Tab 28, p 708); see also T201.25-41.

¹² Robinson Affidavit, [40]-[41] (CB Tab 28, p 708); MPL.0002.0009.7500 (CB Tab 600, p 6652, see native file).

¹³ Robinson Affidavit, [44]-[53] (CB Tab 28, p 709-712).

¹⁴ Robinson Affidavit, [52] and [53] (CB Tab 28, p 712); MPL.0002.0009.7464 (CB Tab 607, p 6699, see native file).

¹⁵ Robinson Affidavit, [55], [56] and [58] (CB Tab 28, p 713,714); MPL.0002.0004.0295 (CB Tab 608, p 6710); MPL.0002.0004.0294 (CB Tab 609, p 6711).

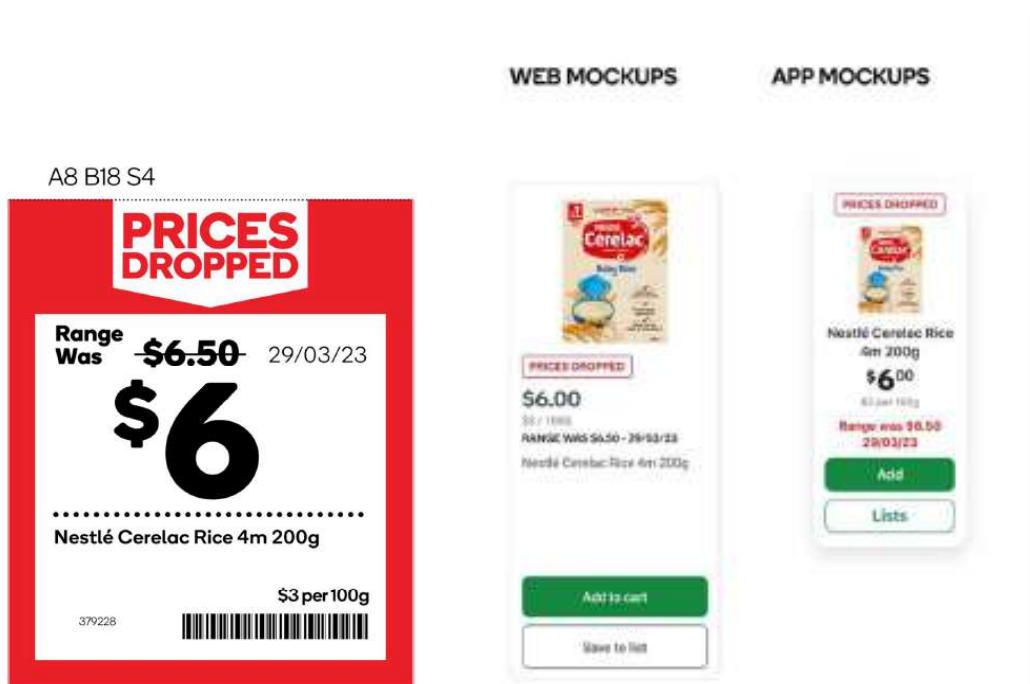
¹⁶ See MPL.0002.0004.0295 (CB Tab 608, p 6710).

¹⁷ Robinson Affidavit, [62] (CB Tab 28, p 715); MPL.0019.0006.4651 (CB Tab 598, p 6648).

¹⁸ Robinson Affidavit, [62] (CB Tab 28, p 715); SOAF, Annexure C, Row 168 (CB Tab 11, p 234).

8 On 30 March 2023, the Cerelac Sample Product was placed on the Prices Dropped program at the price of \$6.00.¹⁹ Prior to placing the Cerelac Sample Product onto the Prices Dropped program, Mr Robinson obtained confirmation and approval from the Better Buying team that the 3-week rest period (i.e., the period from 8 March to 29 March 2023) was “*within the rules*”.²⁰

9 Examples of the “Prices Dropped” tickets that applied to the Cerelac Sample Product are as follows:²¹



10 During the P1, P2 and P3 periods, the Cerelac Sample Product was sold in the following quantities while on a white ticket (that is, excluding specials):²²

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Nestle Cerelac Rice 4m 200g (379228-EA)	348.6	114,350	346.5	7,624	370.8	13,349

¹⁹ SOAF, Annexure C, Row 168, (CB Tab 11, p 234). See also Robinson Affidavit, [53(b)] and [62(b)] (CB Tab 28, p 712, 715); MPL.0002.0009.7464 (CB Tab 607, p 6700, see native file).

²⁰ Robinson Affidavit, [57] (CB Tab 28, p 713); MPL.0002.0004.0295 (CB Tab 608, p 6710).

²¹ See MPL.0085.0001.0014 (CB Tab 615, p 6747).

²² SOAF, Annexure C, Row 168 (CB Tab 11, p 233-234).

I.2 Reasons why the P2 price period was reasonable and the P2 price and subsequent price reduction were genuine

- 11 The Court would conclude that the Cerelac Sample Product was offered at the P2 price of \$6.50 for a “reasonable period.” This is because the P2 period was 22 days (i.e., approximately 3 weeks). That period was not *de minimis*. The reasonableness of this 22 day period is underscored by the fact that the P2 price of \$6.50, and the subsequent price reduction to \$6.00, were genuine. The Court would find that those prices were genuine for the following reasons.
- 12 *First*, the retail price increase was the direct result of a cost price increase request from Nestle.
- 13 *Second*, the P2 price of \$6.50 was Nestle’s new RRP for the product. The consistent evidence of Woolworths’ category managers is that suppliers’ RRP’s are typically assumed by Woolworths to be market-wide across all retailers and channels (T229.27-32; T238.16-37 (O’Leary); T280.35; T284.45-46; T299.26-32; T299.39-T300.20 (McCaig)). As such, the supplier’s new RRP following a price increase is indicative that that price will be competitive (T229.27-32 (O’Leary); T301.43-44 (McCaig)).
- 14 Moreover, as recorded above, during the P1 period, Woolworths sold the Cerelac Sample Product at the then-applicable RRP for most of the period.²³ It would be surprising in those circumstances if the same supplier’s new RRP in respect of the same product were found to be anything other than a genuine price.
- 15 *Third*, there was a significant number of sales of the Cerelac Sample Product during the P2 period, being a total of 7,624 units (which equates to 346.5 units per day). Notably, the average number of units sold per day in the P2 period (346.5 units) was almost identical to the average number of units sold per day in the P1 period at the white ticket price (348.6 units). It was also very close to the average number of units sold per day in the P3 period (370.8 units).
- 16 *Fourth*, Nestle provided funding for the reduction to the P3 (dropped) price, underscoring the genuineness of the discount from the P2 price.

²³ SOAF, Annexure C, Row 168, (CB Tab 11, p 233-234); MPL.0019.0006.4651 (CB Tab 598, p 6648).

- 17 *Fifth*, Mr Robinson gave active consideration to the genuineness of the P2 price. Notwithstanding his concern in respect of the percentage increase in the proposed average sell price for the product, his unchallenged evidence is that the percentage increase “*was consistent with the increases sought for similar products from other suppliers in CPI requests [he] received at the time*”.²⁴
- 18 The ACCC appears to rely on the following matters as demonstrating that the P2 price was not genuine.
- (a) *First*, Woolworths’ and Nestle’s above described negotiation on gross profits was based solely on a calculation of the product being placed on the Prices Dropped program (T204.8-10; T205.15-17; T208.19-20 and T208.32-33);
 - (b) *Second*, in obtaining approval to place the product on the Prices Dropped program, Mr Robinson did not specify the P2 period. The ACCC appears to suggest that this matter was irrelevant to Woolworths, as it had “*already been agreed*” that the product would be placed onto the Prices Dropped program (T211.08-14); and
 - (c) *Third*, Woolworths would not have sold the Cerelac Sample Product at the P2 price on an ongoing basis (T212.01-22).
- 19 The ACCC’s reliance on these matters is misplaced.
- 20 At the core of the ACCC’s contentions is the proposition that, in order to be genuine, the P2 price had to be a price that Woolworths would charge “on an ongoing basis” (T212.01-03; T212.23-24; T213.27-29). That proposition is not correct. The vast majority of products in Woolworths supermarkets are sold on some sort of promotion; few are sold indefinitely at the white ticket price (T111.24-33 (Harker); T315.04-05 (Davies); T340.10-14 (Moffatt)). For that reason, it is unsurprising that Mr Robinson accepted in cross-examination that, absent agreement between Woolworths and Nestle to place the Cerelac Sample Product on Prices Dropped supported by supplier funding, Woolworths would have “*sought to negotiate some other kind of deal or reached some other arrangement*” (T215.19).²⁵

²⁴ Robinson Affidavit, [47] (CB Tab 28, p 710).

²⁵ See also Robinson Affidavit, [18] (CB Tab 28, p 702).

- 21 None of that negates the proposition that the P2 price was a genuine price. If, for example, the product was sold on a high/low program (as it had been during the P1 period), the white ticket shelf price on such a program would likely have been the same — i.e., \$6.50. That was the retail price that reflected the cost change from Nestle (T213.15-16; T214.09-11), absent the funding Nestle made conditional on placing the product on the Prices Dropped program (T207.11-12). It is again to be recalled in this context that, in the P1 period, the Cerelac Sample Product was usually sold on a white ticket at the RRP. That fact corroborates Mr Robinson’s evidence that, at least in the absence of supplier funding, the RRP of \$6.50 was likely to be the price charged by Woolworths (T213.18-20; T214.07-11).²⁶ That is so even accepting the obvious reality that Woolworths would likely have endeavoured to negotiate an alternative promotion plan if agreement could not be reached to put the product on the Prices Dropped program.
- 22 Finally, there existed a possibility that the P2 price would be charged at a future point, notwithstanding the agreement for the product to be sold on the Prices Dropped program (T271.32-T272.02 (Deery)). That is because, while Nestle offered funding for the placement of the Cerelac Sample Product on the Prices Dropped program, as a number of Woolworths’ witnesses have said, such an agreement was not regarded by Woolworths as permanent or set in stone as a supplier could withdraw funding at any time or the product could be removed if it is underperforming on the program (T142.12-16 and T185.16-20 (Harker); T260.18-40 (Deery); T287.36-41 (McCaig)). For that reason, Woolworths priced each product at the white ticket price in a way that ensured that price could and would be charged in its own right on an ongoing basis if required.
- 23 Further, if the ACCC is permitted to pursue the new alternative case (that is, the Prices Dropped Ticket merely represents a “genuine reduction” in price, and that it was misleading because the P2 price of \$6.50 and/or the price reduction were not genuine), then the Court would reject that case for the same reasons as those outlined above.

²⁶ Robinson Affidavit, [63] (CB Tab 28, p 715); see also T321.03-25 (Davies); T300.05-09 (McCaig).

J Oreo Family Pack Original 370g (73032-EA)

- 1 The tenth sample product is Oreo Family Pack Original 370g (73032-EA) (**Oreo Sample Product**), supplied by Mondelez.
- 2 The evidence pertaining to the Oreo Sample Product is found in the affidavits of the Merchandise Manager for Impulse and Snacking, Barry O’Leary sworn on 15 December 2025 (**First O’Leary Affidavit**) and 14 April 2026 (**Second O’Leary Affidavit**).

J.1 Chronology

- 3 Between 1 January 2021 to 27 November 2022, the Oreo Sample Product was offered to consumers at Woolworths Supermarkets and Woolworths Online on the Prices Dropped program, at a Prices Dropped price of \$3.50 with a “Range Was” price of \$4.50.¹
- 4 On 2 September 2022, Mondelez submitted a cost price increase request in respect of 11 Oreo products in the Biscuit category, increasing the list price by between 20.4% - 25.7% for each of those products as a result of “*rising transport and commodity costs*”.² Mondelez proposed to increase the first cost price for the Oreo Sample Product by \$■■■■ from \$■■■■ to \$■■■■.³
- 5 When Mr O’Leary learned of Mondelez’s cost price increase notification, he reminded the Category Manager, Zoe Pipan, of the need to ensure that any plans with Mondelez adhered to existing price establishment rules and the “Christmas Freeze Period” (when changes to retail prices were discouraged so as not to overburden busy stores).⁴
- 6 In the cost price increase simulator that Mr O’Leary received,⁵ it appeared that Mondelez had included \$4.50 as against the standard shelf price, whereas this was the

¹ SOAF, Annexure C, Row 188, (CB Tab 11, p 245); 1050794.002.001.0013 (CB Tab 42, Sheet 1, Row 56803, Column G).

² MPL.0002.0002.5457 (CB Tab 619, p 6753).

³ MPL.0062.0001.0013 (CB Tab 622, p 6761, see native file).

⁴ First O’Leary Affidavit, [70] (CB Tab 26, p 671).

⁵ MPL.0062.0001.0013 (CB Tab 622, p 6760, see native file); First O’Leary Affidavit, [71] (CB Tab 26, p 671).

proposed “Prices Dropped” price. The error was corrected by the Category Manager, who inserted a standard shelf price of \$5.00 in the return proposal.⁶

- 7 On around 17 November 2022, Mondelez submitted a revised cost price increase proposal, which proposed that the Oreo Sample Product be sold at a shelf price of \$5.00 for 4 weeks, followed by 48 weeks at a price of \$4.50.⁷
- 8 On around 18 November 2022, Ms Pipan, emailed Assistant Category Managers and asked that they (a) implement the agreed retail pricing proposal by removing the Prices Dropped ticket from the Oreo Sample Product and changing the retail price to the RRP of \$5.00 effective 28 November 2022; and (b) liaise with the Better Buying Team to confirm the process for placing the Oreo Sample Product on Prices Dropped, since the placement would occur within the “Christmas Freeze Period”.⁸ The Assistant Category Managers confirmed they had taken those actions.⁹
- 9 On 18 November 2022, the Buying Support Team responded to the Assistant Category Managers’ queries, advising that approval for placement onto Prices Dropped would need to be obtained from the Merchandise Manager and Justin Riley (being the national Trade and Event Activation Manager at Woolworths).¹⁰
- 10 Subsequently, one of the Assistant Category Managers emailed Mr Riley and Mr O’Leary seeking their approval for the placement of the Oreo Sample Product onto the Prices Dropped program.¹¹ In that email, Ms Nevoa said that the product could be placed on the Prices Dropped Program 21 days after the shelf price increase occurs, and that this would fall within the Christmas Freeze Period. In response, both Mr O’Leary and Mr Riley provided their approval.¹² Mr O’Leary accepted in cross-examination that, with the benefit of hindsight, this was an error as the period should have been four weeks as under the applicable Woolworths’ policy at the time (T237.41-45).

⁶ MPL.0002.0002.5281 (CB Tab 626, p 6765).

⁷ First O’Leary Affidavit, [76] (CB Tab 26, p 675); MPL.0002.0002.5293 (CB Tab 635, p 6800-6801).

⁸ First O’Leary Affidavit, [77] (CB Tab 26, p 675); MPL.0002.0015.0931 (CB Tab 632, p 6780).

⁹ First O’Leary Affidavit, [78] (CB Tab 26, p 675).

¹⁰ First O’Leary Affidavit, [79] (CB Tab 26, p 675); MPL.0002.0002.5291 (CB Tab 634, p 6793).

¹¹ First O’Leary Affidavit, [80] (CB Tab 26, p 675-676); MPL.0002.0002.5164 (CB Tab 633, p 6791).

¹² First O’Leary Affidavit, [80] (CB Tab 26, p 675-676); MPL.0002.0002.5164 (CB Tab 633, p 6791).

- 11 On 24 November 2022, Ms Pipan reviewed and approved the revised Mondelez cost price increase request.¹³ On 28 November 2022, the Oreo Sample Product was offered for sale to consumers at Woolworths Supermarkets and Woolworths Online at a price of \$5.00 on a white ticket.¹⁴ This was the beginning of the P2 period.
- 12 21 days later, on 20 December 2022, the Oreo Sample Product was placed on the Prices Dropped program at the price of \$4.50.¹⁵ Examples of the Prices Dropped tickets applied to the Oreo Sample Product are as follows:¹⁶



- 13 During the P1, P2 and P3 periods, the Oreo Sample Product sold in the following quantities:

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Oreo (73032-EA)	2,621.0	1,824,250	2,022.1	44,486	2,129.9	289,673

J.2 Reasons why the P2 period was reasonable and the P2 price and subsequent price reduction were genuine

- 14 The Court would conclude that the P2 period of 21 days was sufficient to establish the “white ticket” price of \$5.00. During that period, over 44,000 units were sold. Those sales are a conservative measure of consumers’ exposure to the P2 price of the Oreo Sample Product, given that shoppers are likely to see the price of the product more often than they purchase it. While Woolworths’ internal price establishment policy called for a price establishment of four weeks, that policy is not the touchstone of

¹³ MPL.0002.0002.5293_N (CB Tab 635, p 6796).

¹⁴ SOAF, Annexure C, Row 188 (CB Tab 11, p 245).

¹⁵ SOAF, Annexure C, Row 188 (CB Tab 11, p 245).

¹⁶ SOAF, Annexure A, (CB Tab 11, p 113).

compliance with the law. Technical non-compliance with an internal policy does not support a conclusion that the P2 period was unreasonable.

- 15 That conclusion (that is, that 21 days is sufficient) is supported by the factors illustrating the genuineness of the P2 price set out below. Where the price is demonstrably genuine, the need for it to be in place for a “reasonable period” falls away, or the period is, at least, very short.
- 16 The P2 price of \$5.00 for the Oreo Sample Product, and the price reduction to \$4.50, was genuine for the following reasons:
- (a) *first*, Woolworths increased the white ticket price from \$4.50 to \$5.00 as a result of a cost price increase request from Mondelez, which Mondelez had said was, in turn, a consequence of rising transport and commodity costs.¹⁷
 - (b) *second*, the white ticket price of \$5.00 appears to have been Mondelez’s RRP for the product.¹⁸
 - (c) *third*, the P3 price was facilitated by a deferred deal of \$ [REDACTED] per unit,¹⁹ which was part of the promotional plan that Mondelez was prepared to agree if Woolworths agreed to the placement of the product on Prices Dropped. The Court would infer that, absent that funding, the P3 price would have been higher.
 - (d) *fourth*, there is no evidence to suggest the RRP had been inflated. The increase in the “was” price from \$4.50 to \$5.00 was smaller than the \$ [REDACTED] increase in the net cost of the Oreo Sample Product.²⁰
 - (e) *fifth*, during the three week P2 period, a total of 44,486 units of the Oreo Sample Product were sold (being an average of 2,022.1 per day). Even without more, that is sufficient to establish that the unit price of \$5.00 was a real and genuine price. This conclusion is supported by the fact that the average sales per day shown in the table at paragraph 13 above did not differ markedly across the P1, P2 and P3 periods.

¹⁷ First O’Leary Affidavit, [68] (CB Tab 619, p 6753).

¹⁸ First O’Leary Affidavit, [76] (CB Tab 26, p 675).

¹⁹ MPL.0002.0002.5293 (CB Tab 635, p 6801).

²⁰ First O’Leary Affidavit, [74] (CB Tab 26, p 673).

17 For those reasons, the Court would not conclude that the P2 price of \$5.00 was not a real and genuine price, or that the subsequent price reduction was not a genuine discount.

K Sakata Rice Cracker Plain 100g (41814-EA)

- 1 The eleventh sample product is Sakata Rice Cracker Plain 100g (41814-EA) (**Sakata Sample Product**), supplied by Smith's, which is part of the Pepsico Group.
- 2 The evidence concerning the Sakata Sample Product is found in the Affidavit of Cormac Deery sworn on 15 December 2025 (**Deery Affidavit**), paragraphs [83] to [86] of the Affidavit of Barry O'Leary sworn on 15 December 2025 (**Second O'Leary Affidavit**) and in documentary evidence addressed below.
- 3 Mr Deery was the Merchandise Manager for Impulse, Beverage & Tobacco between late May 2019 and late August 2022, but was on leave from 15 July 2022 to 26 August 2022. Mr O'Leary covered Mr Deery's leave and then occupied the role.¹ While in the role, Mr Deery, and then Mr O'Leary, was Zoe Pipan's line manager. Ms Pipan was the Category Manager responsible for managing the Sakata Sample Product.² She ceased to be an employee of Woolworths on 18 May 2023.³

K.1 Chronology

- 4 From at least 1 January 2021 to 27 July 2022, save for short term specials, the Sakata Sample Product was sold on the Prices Dropped program at the price of \$2.00,⁴ with a "was" price of \$2.30.⁵
- 5 On 2 May 2022, Smith's sent a cost price increase request to Woolworths in respect of 29 of Smith's chips and biscuits products. In respect of the Sakata Sample Product, Smith's proposed to increase the List Price from \$██████ to \$██████ (being a ██████% increase) and set an RRP of \$2.75. Smith's said that the cost price increase was a result of "*difficult commodity and operating inflationary conditions which impact the cost of manufacturing and supplying products in Australia*"⁶ and said that the Sakata product range had not been subject to a significant cost price increase in the preceding

¹ Deery Affidavit, [4], [91] (CB Tab 21, p 518, 542); Second O'Leary Affidavit, [4] (CB Tab 26, p 655).

² Deery Affidavit, [15] (CB Tab 21, p 519).

³ Crawford Affidavit, [23] (CB Tab 18, p 470).

⁴ SOAF, Annexure C, Row 209 (CB Tab 11, p 252-253).

⁵ 1050794.002.001.0013, Sheet titled "Part5", Row 411695, Column G (CB Tab 42, p 845, see native file).

⁶ MPL.0003.0029.9147_N (CB Tab 644, p 6839).

10 years and that the increase was “*in essence, a multi-year increase, given the commodity movement over the past decade that the assortment has absorbed.*”⁷

- 6 The deal sheets and simulators that were exchanged between Woolworths and Smith’s in the course of negotiations sometimes listed the proposed Prices Dropped price as the “Standard Shelf” or “Shelf” price. This was an error, possibly explained by the fact that the Sakata Sample Product was not an important component of the Smith’s broader cost price increase request (T270.1-17). The deal sheets should have used the RRP (\$2.75) as the standard shelf price.
- 7 After receiving the Smith’s cost price increase, Mr Deery considered how Smith’s proposal fitted in with the other products in the category, writing to Ms Pipan on 21 June 2022 in respect of the Sakata family, “[H]ow does this leave them with Peckish? – [I] don’t see how base lines volume increase... If we are making more % margin on Peckish then we should not look to make less % margin on Sakata... wouldnt make sense.”⁸ Peckish was another brand of rice cracker in the same category (T272.15).
- 8 In mid-July 2022, Woolworths accepted Smith’s cost price increase but not its promotional plan.⁹ In approving this course, Mr Deery wished to avoid a scenario in which Woolworths did not agree the amount of the cost price increase before the effective date notified by Smith’s (being 1 August 2022). There was a risk that Smith’s would decline to supply Woolworths with Sakata products if the CPI request was not resolved before that date.¹⁰ Mr Deery wrote to Ms Pipan:¹¹

“All good with your counter to Smiths.

We can wait it out on this one.

Sakata they will probably get a bit emotional but we can just hold off running the promos at HP and leave the baselines given we have peckish to trade in the short term.”

⁷ MPL.0002.0002.6048 (CB Tab 657, p 6882).

⁸ Deery Affidavit, [71] (CB Tab 21, p 536); MPL.0003.0028.9182 (CB Tab 652, p 6858).

⁹ Deery Affidavit, [85]-[90] (CB Tab 21, p 540-542).

¹⁰ Deery Affidavit, [85]-[86] (CB Tab 21, p 540).

¹¹ Deery Affidavit, [85] (CB Tab 21, p 540); MPL.0003.0028.6310 (CB Tab 673, p 6960).

- 9 By “leave the baselines”, Mr Deery was referring to selling the product on a white ticket at the standard shelf price, which in the case of the Sakata Sample Product was \$2.75 (T269.21-32; T271.18-25).
- 10 On 19 July 2022, Smith’s sent an email to Ms Pipan seeking confirmation that the white ticket would reflect the “new RRP of \$2.75”.¹²
- 11 Ultimately, Smith’s agreed to provide a deferred deal of ██████% to support the P3 price and the placement of the product onto Prices Dropped. The deferred deal was reduced for the duration of the price establishment period.¹³
- 12 On 28 July 2022, the Sakata Sample Product was removed from the Prices Dropped program and placed on a white ticket with a price of \$2.75 for 35 days.¹⁴ This includes one day, on 22 August 2022, when instructions were erroneously issued to launch the Sakata Sample Product on the Prices Dropped Program. This was quickly reversed on 23 August 2022.¹⁵
- 13 The Sakata Sample Product was placed on the Prices Dropped program on 1 September 2022 at the price of \$2.30.¹⁶ Examples of the Prices Dropped tickets applied to the Sakata Sample Product are set out below.¹⁷

¹² MPL.0002.0002.6552 (CB Tab 686, p 7080); see also MPL.0002.0002.6229 (CB Tab 689, p 7088) which confirms this RRP.

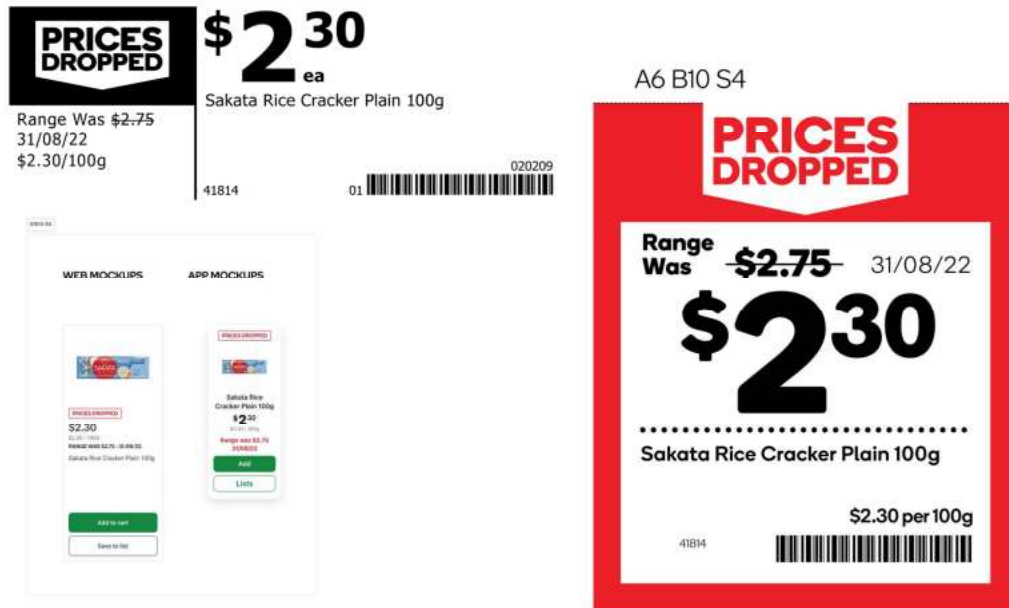
¹³ MPL.0002.0002.6243 (CB Tab 690, p 7092).

¹⁴ SOAF, Annexure C, Row 209 (CB Tab 11, p 253).

¹⁵ Second O’Leary Affidavit, [84] (CB Tab 26, p 676); MPL.0071.0001.2805 (CB Tab 697, p 7182).

¹⁶ SOAF, Annexure C, Row 209 (CB Tab 11, p 253).

¹⁷ MPL.0085.0001.0015 (CB Tab 707, p 7308).



14 During the P1, P2 and P3 periods, the Sakata Sample Product sold in the following quantities:¹⁸

SAMPLE PRODUCT	P1		P2		P3	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Sakata (41814-EA)	6,550.7	3,065,739	5,674.4	198,605	6,167.4	1,344,499

K.2 Reasons why the P2 period was reasonable and the P2 price and subsequent price reduction were genuine

15 On any view, the P2 period of 35 days (5 weeks) was ample time to establish the new RRP of \$2.75. During that period, 198,605 units were sold.¹⁹ That is a conservative measure of the exposure of the P2 price of the Sakata Sample Product, given that thousands of other consumers purchased one of the other Sakata product flavours in the same Sakata Crackers 90/100g price family,²⁰ and many more than that will have seen the price of the Sakata Sample Product without purchasing it. The duration of the price establishment period complied with the relevant internal guidelines, given the IPI was 2.7 weeks.²¹

¹⁸ SOAF, Annexure C, Row 209 (CB Tab 11, p 252-253).

¹⁹ SOAF, Annexure C, Row 209 (CB Tab 11, p 253).

²⁰ SOAF, Annexure D, Row 93 (CB Tab 11, p 326).

²¹ 1050794.015.001.0020 (CB Tab 69, p 1061).

- 16 That 35 days was sufficient to establish the price is further supported by several factors that demonstrate that the P2 price was genuine. In those circumstances, any required “reasonable period” would be negligible or very short.
- 17 The factors illustrating that the P2 price of \$2.75 was a genuine price, and the P3 price of \$2.30 represented a genuine discount from the P2 price include the following:
- (a) *First*, the new white ticket price was increased from \$2.30 to \$2.75 as a result of a cost price increase from Smith’s. Smith’s had not submitted a significant cost price increase for the Sakata family of products for 10 years, and the increase in 2022 was considered a multi-year increase to address the commodity costs absorbed by the product line in that time (see paragraph 5 above).
 - (b) *Second*, the P2 price was the same as Smith’s RRP.²² The Court would infer that the RRP was competitive, because typically, RRP’s are shared by suppliers to all retailers in the market, and there is no reason to think that did not occur here (T229.27-31 (O’Leary)).
 - (c) *Third*, there is no evidence that the RRP of \$2.75 was inflated. Mr Deery’s evidence was that he would expect the Category Manager to assess the RRP, having regard to the place of the product in the category hierarchy, and that he would not expect this analysis to necessarily be documented (T268.31-45). Mr Deery’s email to Ms Pipan comparing the position of the Sakata proposal to Peckish is an example of this analysis.²³ Moreover, because of the misalignment between Woolworths and Smith’s in respect of the promotional plan for Sakata, there was every possibility that the Sakata Sample Product would not be put on the Prices Dropped program, and would be sold at its RRP (T269.28-32).²⁴
 - (d) *Fourth*, the P3 price and placement on Prices Dropped was facilitated by a deferred deal of over █%.²⁵ Given the negotiations around the deferred deal

²² MPL.0003.0029.9147_N (CB Tab 644, p 6840).

²³ Deery Affidavit, [72] (CB Tab 21, p 536); MPL.0003.0028.9182 (CB Tab 652, p 6858).

²⁴ Deery Affidavit, [85]-[86] (CB Tab 21, p 540).

²⁵ Deery Affidavit, [88] (CB Tab 21, p 541).

(T269.28-32),²⁶ the Court would infer that, absent that funding, the Sakata Sample Product would not have been placed on Prices Dropped.

- (e) *Fifth*, very substantial volumes (over 198,000 units) were sold in P2. Moreover, the average number of daily sales of the Sakata Sample Product in the P2 period was comparable to the average in both the P1 and P3 periods. That evidence undermines the ACCC's attempt to characterise the P1 price and P3 price as "genuine" prices, but the P2 price as artificial.

18 Having regard to those matters, it is plain that the P2 price of \$2.75, and the subsequent discount to P3, was genuine.

²⁶ Deery Affidavit, [85] (CB Tab 21, p 540).

L Stayfree Pad Ultra-Thin Wing Night 10pk (44861-EA)

1 The twelfth and final sample product is Stayfree Pad Ultra-Thin Wing Night 10pk (44861-EA) (**Stayfree Sample Product**), being a product which sits within the Paper Goods, Period & Contenance Care category and supplied to Woolworths by Johnson and Johnson (**J&J**).¹ The evidence relevant to the Stayfree Sample Product is found in the Moffatt Affidavit. Mr Moffatt was the Category Manager responsible for the management of the Stayfree Sample Product at the relevant time.

L.1 Chronology

2 From 1 January 2021 until 15 March 2022, the Stayfree Sample Product was offered and sold to consumers at Woolworths Supermarkets and Woolworths Online on a “high-low” promotional strategy, with the white ticket shelf price being \$4.50.²

3 On 6 December 2021, Jade Caton (National Account Manager - Woolworths at J&J), submitted a cost price increase request to Woolworths in respect of 18 products.³ This included the Stayfree Sample Product. As part of this initial request, J&J informed Woolworths of an increase in the RRP for the Stayfree Sample Product from \$4.81 to \$5.29 (erroneously noted to include GST) and an increase in the invoice cost (or first cost price) from \$█ to \$█ per unit.⁴

4 Upon receiving requests for cost price increases, Mr Moffatt’s usual practice was to assess the proposal in accordance with the pricing hierarchy described in the Kleenex Sample Product schedule above.⁵

5 On 16 December 2021, following a discussion they had that day, Mr Moffatt received a WIP report for Period Care from Ms Caton,⁶ which did not contain any proposed cost structure, but did include J&J’s proposed promotional plan for the Stayfree

¹ Moffatt Affidavit, [3(a)] (CB Tab 25, p 628).

² SOAF, Annexure C, Row 233 (CB Tab 11, p 273-274); Moffatt Affidavit, [17(a)] (CB Tab 25, p 631).

³ Moffatt Affidavit, [19], [22] (CB Tab 25, p 632, 633); MPL.0021.0007.7602 (CB Tab 708, p 7309); MPL.0021.0007.7603 (CB Tab 709, p 7311); MPL.0021.0007.7604 (CB Tab 710, p 7312, see native file, Row 14).

⁴ Moffatt Affidavit, [22]-[23] (CB Tab 25, p 633); MPL.0021.0007.7604 (CB Tab 710, p 7312, see native file, Row 14).

⁵ Moffatt Affidavit, [24] (CB Tab 25, p 633-634); T325.36-40.

⁶ Moffatt Affidavit, [25] (CB Tab 25, p 634); MPL.0002.0014.1592 (CB Tab 711, p 7313); MPL.0002.0014.1593 N (CB Tab 712, p 7315).

Sample Product – namely, the placement of the product on the Prices Dropped program at \$4.80 for 35 weeks, with specials at \$3.80 (10 weeks) and \$3.36 (7 weeks).⁷ While J&J did not include a rest period in the WIP report, Mr Moffatt understood the proposal to reflect the promotional plan that would apply after the establishment period for the new white ticket price (T327.23-45; T328.16-22). This accords with his understanding that Woolworths would not include the product on the Prices Dropped program at \$4.80 without first selling the product at the white ticket price for a period of time.⁸

6 Between 21 December 2021 and 17 February 2022,⁹ Mr Moffatt and Ms Caton negotiated the proposed cost price increase and associated promotional plan for the Stayfree Sample Product, including the funding that J&J would provide (by way of deferred deal or scan funding).¹⁰ Ultimately, on 17 February 2022, J&J proposed an increase in net cost of \$ [REDACTED] for the Stayfree Sample Product, with a deferred deal of [REDACTED]% (or \$ [REDACTED] per unit) for the placement of the product onto the Prices Dropped program at \$4.80.¹¹ Following further negotiation, the proposal (including in respect of the number of weeks at which the product would be sold on the Prices Dropped program, and on special from the Prices Dropped price, and supplier funding), was finalised on 3 March 2022: see paragraph 9 below.

7 On 24 February 2022, Mr Moffatt confirmed with Ms Caton that he planned to accept J&J's proposal, but noted that a number of deferred deals were missing from that submission, including in respect of the Stayfree Sample Product.¹² On the same day, Ms Caton entered the cost price changes for the Stayfree Sample Product into Partner Hub (Woolworths system that was utilised by suppliers to request changes in respect of product data),¹³ with an increase to the first cost price from [REDACTED] to \$ [REDACTED] and an increase in the deferred deal from \$ [REDACTED] to \$ [REDACTED] per unit¹⁴ (which, from the above

⁷ Moffatt Affidavit, [26]-[27] (CB Tab 25, p 634-635); MPL.0002.0014.1593 N (CB Tab 712, p 7323).

⁸ Moffatt Affidavit, [35] (CB Tab 25, p 638).

⁹ Moffatt Affidavit, [30]-[41] (CB Tab 25, p 636-640); MPL.0002.0014.1575 (CB Tab 713, p 7328); MPL.0002.0014.1576 (CB Tab 714, p 7333).

¹⁰ In relation to supplier funding, see for example Moffatt Affidavit [29] (CB Tab 25, p 636), [31(a)] (CB Tab 25, p 637), [38] (CB Tab 25, p 638) and [43] (CB Tab 25, p 634).

¹¹ Moffatt Affidavit, [40]-[41] (CB Tab 25, p 639, 640); MPL.0050.0009.1463 (CB Tab 724, p 7398, see native file at sheet "Stayfree", Rows 4 to 13); see also the 'final plan agreed' at Moffatt Affidavit [48]-[49] (CB Tab 25, p 641-642) and Partner Hub submission at Moffatt Affidavit [52] (CB Tab 25, p 642).

¹² Moffatt Affidavit, [42] (CB Tab 25, p 640); MPL.0002.0003.3646_N (CB Tab 725, p 7407).

¹³ Moffatt Affidavit, [20] (CB Tab 25, p 632).

¹⁴ Moffatt Affidavit, [44] (CB Tab 25, p 640); MPL.0081.0001.0198 (CB Tab 726, p 7409).

proposal, can be inferred to be an error given the agreed deferred deal was \$ [REDACTED] per unit).¹⁵ Later that same day, Mr Moffatt approved the cost price increase, with effect from 28 February 2022.¹⁶

8 On 1 March 2022, Mr Moffatt requested that James Goudie (Category Assistant), implement a price focus flag in Woolworths' SAP system for the placement of the Stayfree Sample Product on the Prices Dropped program at \$4.80 with a "was" price of \$5.30, effective 4 April 2022.¹⁷ The SAP system is an internal Woolworths system utilised to implement changes to product pricing and descriptions and to set up "price focus flags" (being a mechanism for the movement from white ticket shelf prices to a long-term pricing program, like the Prices Dropped program, indicated by red tickets).¹⁸

9 On 3 March 2022, Ms Caton provided Woolworths with J&J's final proposal in respect of the promotion of the Stayfree Sample Product.¹⁹ The proposed promotional prices and frequency included the placement of the product on the Prices Dropped program at \$4.80 for 35 weeks with specials at \$3.80 (for 7 weeks) and \$3.36 (for 10 weeks). The net cost per unit was shown as \$ [REDACTED] including a [REDACTED] % deferred deal.²⁰

10 On 1 April 2022, Mr Goudie implemented the pricing changes for the Stayfree Sample Product, including the new RRP of \$5.30, and a red ticket flag at \$4.80 to take effect from 4 April 2022.²¹

11 On 2 April 2022, Mr Moffatt approved in Partner Hub a correction in the deferred deal for the Stayfree Sample Product from \$ [REDACTED] (as submitted on 24 February 2022) to \$ [REDACTED]² (as agreed between the parties). The updated net cost price was \$ [REDACTED]²³

¹⁵ MPL.0081.0001.0206 (CB Tab 733, p 7438). See also Moffatt Affidavit, [52] (CB Tab 25, p 642-643).

¹⁶ Moffatt Affidavit, [45] (CB Tab 25, p 640).

¹⁷ Moffatt Affidavit, [47] (CB Tab 25, p 641); MPL.0002.0013.9475 (CB Tab 729, p 7423).

¹⁸ Moffatt Affidavit, [16] (CB Tab 25, p 631).

¹⁹ Moffatt Affidavit, [48]-[49] (CB Tab 25, p 641, 642); MPL.0002.0003.3836_N (CB Tab 730, p 7425);

MPL.0002.0003.3837 (CB Tab 731, p 7427, see native file at sheet "Stayfree", Rows 4 to 13).

²⁰ Moffatt Affidavit, [48] (CB Tab 25, p 641, 642); MPL.0002.0003.3837 (CB Tab 731, p 7427, see native file at sheet "Stayfree", Rows 4 to 15).

²¹ Moffatt Affidavit, [50] (CB Tab 25, p 642).

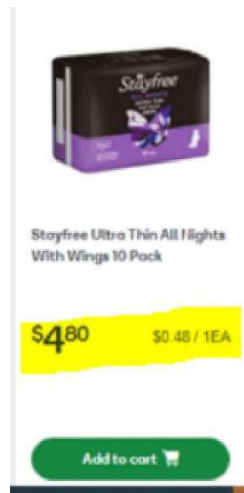
²² Moffatt Affidavit, [52] (CB Tab 25, p 642-643); MPL.0081.0001.0205 (CB Tab 732, p 7436);

MPL.0081.0001.0206 (CB Tab 733, p 7438).

²³ MPL.0081.0001.0206 (CB Tab 733, p 7438).

12 Between 16 March and 3 April 2022, the Stayfree Sample Product was offered for sale at J&J's RRP of \$5.30 using a white ticket.²⁴

13 On 4 April 2022, the Stayfree Sample Product was placed on the Prices Dropped price of \$4.80.²⁵ On the same day, Ms Caton sent the below screenshot from Woolworths Online to Mr Moffatt, informing him that the Stayfree Sample Product (among others) “do not have the “dropped” red box and call out on them however they are supposed to”:²⁶



14 Around this time, Mr Moffatt instructed Nathan Connor (Assistant Category Manager) to investigate the issue.²⁷ In the afternoon on 4 April 2022, Mr Goudie shared a screenshot from the SAP system, which recorded the code “D1” “Price Drop 1 – AU/NZ” against the Price Focus field, signifying an instruction for a change in the ticketing style from a white ticket to a red ticket for the Stayfree Sample Product.²⁸ The screenshot also recorded the “Price Focus Ticket Valid From” date as being 3 April 2022.²⁹ From his experience, Mr Moffatt understood dates entered in the SAP system were “always the day before the required pricing change”.³⁰ That is, the 3 April date signified the last date that the Stayfree Sample Product was to be sold on a

²⁴ SOAF, Annexure C, Row 233, (CB Tab 11, p 274). See also Moffatt Affidavit, [17(b)] and [17(c)] (CB Tab 25, p 631).

²⁵ Moffatt Affidavit, [17(c)], [47], [52] and [53] (CB Tab 25).

²⁶ Moffatt Affidavit, [54] (CB Tab 25, p 643); MPL.0002.0003.3179 (CB Tab 734, p 7439, 7440).

²⁷ Moffatt Affidavit, [55] (CB Tab 25, p 643).

²⁸ Moffatt Affidavit, [58]-[59] (CB Tab 25, p 643, 644); MPL.0002.0003.3187 (CB Tab 736, p 7449).

²⁹ Moffatt Affidavit, [59] (CB Tab 25, p 644); MPL.0002.0003.3187 (CB Tab 736, p 7449).

³⁰ Moffatt Affidavit, [59] (CB Tab 25, p 644).

white ticket at the shelf price before the red ticket (for Prices Dropped) was to be implemented.³¹

15 Having regard to these matters, and his experience with the SAP system, Mr Moffatt believed that the instruction to move the Stayfree Sample Product to a Prices Dropped ticket had been correctly implemented, but there was a mistake in the system which prevented a change from a white ticket to a red Prices Dropped ticket, even though it showed the correct Prices Dropped price.³²

16 On 28 April 2022, Mr Moffatt requested that Ms Caton confirm that the Prices Dropped ticket was now correctly displayed in the Woolworths Online store.³³ The next day, Ms Caton confirmed the correction had been made, providing Mr Moffatt with the below screenshot from Woolworths Online:³⁴



17 As can be seen from the screenshot, the Stayfree Sample Product correctly displayed the red Prices Dropped box, with the Prices Dropped price of \$4.80 and a statement “*Was \$5.30 03/04/2022*”. Thus, the “was” message ultimately implemented on the Prices Dropped ticket was accurate and correctly identified the “was” price and date. Mr Moffatt believes that the above ticketing change was implemented by no later than 29 April 2022, with the result that the Stayfree Sample Product was sold on

³¹ Moffatt Affidavit, [59] (CB Tab 25, p 644).

³² Moffatt Affidavit, [61] (CB Tab 25, p 645).

³³ Moffatt Affidavit, [62] (CB Tab 25, p 645); MPL.0050.0007.2751 (CB Tab 739, p 7465).

³⁴ MPL.0050.0007.4677 (CB Tab 740, p 7467); see also Moffatt Affidavit, [17(d)], [50]-[65] (CB Tab 25, p 632, 642-646).

Woolworths Online between 4 and 29 April 2022 at the Prices Dropped price of \$4.80 with a white ticket instead of a red ticket for Prices Dropped.³⁵

18 In addition to those tickets set out at paragraph 16 above, examples of the “Prices Dropped” tickets that applied to the Stayfree Sample Product are as follows.³⁶



19 During the P1, P2 and P3 periods, the Stayfree Sample Product sold in the following quantities (sales on white ticket only (that is, excluding specials)):³⁷

SAMPLE PRODUCT	P1		P2		P3 (FROM 4 APRIL 2022	
	Avg Unit/Day	Total	Avg Unit/Day	Total	Avg Unit/Day	Total
Stayfree Pad Ultra-Thin Wing Night10pk (44861-EA)	448.2	118,318	392.3	7,453	540 ³⁸	61,559 ³⁹

L.2 Reason why the P2 price was a genuine price charged for a reasonable period and subsequent price reduction were genuine

20 The Court would conclude that the Stayfree Sample Product was offered at the P2 price of \$5.30 for a “reasonable period,” given the P2 period was 19 days (just short of 3 weeks). Mr Moffatt gave evidence that this period reflected a “*balanced approach*”, set to allow customers to see and experience the new white ticket price while delivering value in a speedy fashion (T334.23-31). The period was a reasonable period of time to establish the new white ticket shelf price for the product. Further,

³⁵ Moffatt Affidavit, [63]-[64] (CB Tab 25, p 645, 646).

³⁶ MPL.0085.0001.0016 (CB Tab 741, p 7470).

³⁷ SOAF, Annexure C, Row 233 (CB Tab 11, p 273-275).

³⁸ Figure is calculated by the units sold of the Stayfree Sample Product extracted from SOAF Annexure C, divided by 114 days (being the days in the period 4 April 2022 to 30 August 2022 excluding days product sold on specials).

³⁹ Figure is calculated by the units sold of the Stayfree Sample Product extracted from SOAF Annexure C in the period 4 April 2022 to 30 August 2022 excluding days product sold on special.

the reasonableness of this 19 day period is highlighted by the fact that the P2 price of \$5.30, and the subsequent price reduction to \$4.80, were genuine. The Court would conclude that those prices were genuine for the following reasons.

- 21 *First*, the increase in Woolworths' retail price was the direct result of a cost price increase request from J&J, which was accepted by Woolworths.
- 22 *Second*, the P2 price was consistent with J&J's RRP of \$5.29. The Court would infer that the RRP was competitive, including because RRPs are typically shared with all retailers in the market, with no evidence to suggest that did not occur here.⁴⁰
- 23 *Third*, it was Mr Moffatt's practice to undertake an assessment of any proposed retail price increase, including to ensure the fairness of any new retail price: see paragraph 4 above. The Court would infer that Mr Moffatt undertook that process and accepted that the RRP was a fair price in the circumstances.
- 24 *Fourth*, there was a substantial number of sales of the Stayfree Sample Product during the P2 period, being a total of 7,453 units (which equates to an average of 392.3 units per day). Despite the average number of units sold in this period being comparatively lower than the P1 period (448.2 units per day) and P3 period (540 units per day), the total volume of sales across the entire P2 period is sufficient to demonstrate the P2 price was offered for a reasonable period of time, and that the P2 price was real and genuine.
- 25 *Fifth*, J&J provided a deferred deal of ██████% for the reduction to the P3 Prices Dropped price, underscoring the genuineness of the discount from the P2 price.
- 26 *Sixth*, a number of the products in J&J's request were subject to a high-low pricing strategy, where the white ticket shelf price was set at J&J's RRP. For example, for the product Carefree Liners - Barely There (Unscented 42s), Woolworths adopted J&J's RRP of \$4.99 for 42 weeks, with 10 weeks of specials below that price.⁴¹ It therefore

⁴⁰ T229.27-32 (O'Leary).

⁴¹ See, for example, RRP for Carefree Liners - Barely There (Unscented 42s) in Cell 8H of MPL.0021.0007.7604 (CB Tab 710, p 7312, see native file) combined with the promotional plan for Carefree Liners - Barely There (Unscented 42s) in the final agreed plan for J&J's cost price increase request (as confirmed by Moffatt Affidavit, [49] (CB Tab 25, p 642)) at MPL.0002.0003.3837 (CB Tab 731, p 7427, see native file), sheet titled "Carefree Liners" at Rows 43J-K to 45J-K. See also 1050794.002.001.0013, Sheet titled "Part5" for Product Number 200074-EA, Column G (CB Tab 42, p 845, see native file).

could not be said that the higher P2 price for the Stayfree Sample Product (also set by reference to J&J's RRP) was only implemented to later claim a dropped price.

- 27 Further, if the ACCC is permitted to pursue the new alternative case (that is, the Prices Dropped Ticket merely represents a “genuine reduction” in price, and that it was misleading because the P2 price of \$5.30 and/or the price reduction were not genuine), then the Court would reject that case for the same reasons as those outlined above.