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

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No. VID 974 of 2024

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Australian Competition and Consumer Commission**

Applicant

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

Respondent

**WOOLWORTHS' OUTLINE OF CLOSING SUBMISSIONS**

## **A Introduction**

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- 1 Woolworths relies on its written and oral opening submissions.
- 2 These closing submissions supplement the opening submissions by addressing the key matters in dispute in light of the evidence adduced during the hearing and provide more detailed reasons as to why the Prices Dropped Ticket was not misleading in the specific case of each Sample Product. Those more detailed reasons are set out in a **Sample Product Schedule** annexed to these submissions.
- 3 These submissions are structured as follows: **Section B** explains why the ACCC ought not be permitted to depart from its pleaded case; **Section C** addresses the disputed issues concerning the characteristics of the ordinary and reasonable consumer; **Section D** addresses why the pleaded representation was not conveyed; **Section E** explains why the Prices Dropped Ticket was not misleading based on the length of the P2 period in light of the evidence that demonstrates the genuineness of the P2 price; and **Section F** explains why the price increase to P2 was not for the purpose of later claiming a price drop (i.e., the ACCC’s alternative basis for alleging that the Prices Dropped Ticket was misleading).

## **B The ACCC’s pleaded case**

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- 4 It is important to be clear about the limits of the ACCC’s case, both as to the *representation* it alleges was conveyed by the Prices Dropped Tickets and the *basis* on which it alleges that representation was false or misleading.
- 5 Paragraph 12 of the Concise Statement alleges that the representation conveyed by the Prices Dropped Ticket was that the Prices Dropped Price “*was a genuine reduction to, or discount from, the product’s previous regular price*”.<sup>1</sup> This is the only representation relied on in the pleading.
- 6 Woolworths sought particulars of the pleaded representation, namely an explanation of what is meant by the phrase “*previous regular price*”, and the meaning of the phrase “*the price at which each product had ordinarily been offered for sale prior to*

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<sup>1</sup> Concise Statement [12] (CB Tab 2, p 10).

*the temporary price spike*” in paragraph 1 of the Concise Statement.<sup>2</sup> The ACCC’s response was that “*previous regular price*” has its natural and ordinary meaning.<sup>3</sup> That response confused rather than clarified the issue, because the phrase “previous regular price” does not have an ordinary meaning. In the same answer, the ACCC went on to say that “*the price at which each product had ordinarily been offered for sale prior to the temporary price spike*” was “*the same as the regular price*” for the product, and the price at which it was offered before the “Price Spike Period” as that term is defined in paragraph 13(a) of the Concise Statement. The effect of that answer was to conflate the “regular” price or “previous regular price” of the product with the price charged for the product in P1.

7 Paragraph 13 of the Concise Statement alleges that the representation was false or misleading because Woolworths had increased the price of each Affected Product for “*only a relatively short period of time*” (i.e., the “Price Spike Period”), with that price being the “was” price on the Prices Dropped Ticket (i.e., the P2 price), in circumstances where the Prices Dropped price (i.e., the P3 price) was higher than or the same as the Affected Product’s “previous regular price” (i.e. the P1 price). In other words, the ACCC alleges that the representation was misleading because the P2 price was not the “*previous regular price*” due to its “*relatively short*” duration as compared to the P1 price.

8 The only other basis on which the ACCC suggests the representation was false or misleading is in paragraph 15 (as particularised). The ACCC appears to contend that in many cases, Woolworths had already planned to later place the Affected Product on Prices Dropped before the Price Spike Period and effected the “*temporary price increase for the purpose of ‘establishing’ a higher ‘was’ price*”.<sup>4</sup>

9 It follows that the ACCC’s pleaded case is limited to a representation about a genuine reduction to the “*previous regular price*”, which ordinary and reasonable consumers understood was the price previously offered for the product, excluding short-term specials or promotions, and that had been offered for a period longer than “*a relatively*

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<sup>2</sup> Letter from JWS to KWM providing further and better particulars of the Concise Statement, [8] (28 November 2024) (CB Tab 4, p 64).

<sup>3</sup> Letter from JWS to KWM providing further and better particulars of the Concise Statement, [8] (28 November 2024) (CB Tab 4, p 70).

<sup>4</sup> Letter from JWS to KWM providing further and better particulars of the Concise Statement, [12] (28 November 2024) (CB Tab 4, p 70).

*short period of time*".<sup>5</sup> The ACCC's written opening described this as "*the price at which a product is **ordinarily** offered for sale to consumers by Woolworths for a **reasonable period of time***" (emphasis added).<sup>6</sup>

10 In oral opening, the ACCC, for the first time, sought to embrace an alternative representation. The ACCC suggested that if the Court rejects the pleaded representation and instead finds that the Prices Dropped Ticket merely conveyed there had been a "*genuine reduction*" in the price, it would be open to the Court to conclude that the Prices Dropped Tickets were nevertheless misleading (T8.26-30).

11 This alternative case is not open on the Concise Statement, because it involves a representation unwelded to the notion of a price drop relative to the "*previous regular price*". Paragraph 12 of the Concise Statement is clear about this. The pleaded representation is not simply that there had been a "genuine reduction" in price, but that it was a reduction relative to the "*previous regular price*", which the ACCC particularised as the P1 price. The two are expressly linked. The Court should not permit the ACCC to run this alternative case that is not open on the pleading. That is particularly so in circumstances where Woolworths sought particulars of the Concise Statement and the ACCC provided those particulars.

12 Further, even if this alternative form of representation were open on the Concise Statement, the basis on which the ACCC could allege it was misleading must be limited to the bases described in the pleading, namely that the P2 price was offered only for a "*relatively short period of time*" and that the P2 price was effected "*for the purpose of 'establishing' a higher 'was' price*". It would not be open to the ACCC to rely on any other factor to suggest that the reduction in price was not genuine. In civil penalty proceedings, Woolworths ought not be in a position where it is required to speculate as to what those matters are, depriving Woolworths of a full and fair opportunity to address those matters in its evidence.

13 Three examples of such prejudice will suffice. *First*, if the genuineness of the P2 price were to be challenged on the basis that it was not, objectively, a competitive price, that allegation could have been met with evidence of what rival retailers were charging for

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<sup>5</sup> Letter from JWS to KWM providing further and better particulars of the Concise Statement, [10] (28 November 2024) (CB Tab 4, p 70).

<sup>6</sup> AOS [160].

the same product in the relevant period. *Second*, if the genuineness of the P2 price were to be challenged on the basis that Woolworths' margins improved in respect of the product, evidence could have been adduced to explain the reasons for any margin improvement. *Third*, if the genuineness of the price were challenged having regard to the price point of the product at P2, evidence of the product's position in the product hierarchy within Woolworths at the time could have been adduced to demonstrate the appropriateness of that price relative to other products in the category. These are all matters only tangentially touched upon in Woolworths' evidence. That is because Woolworths did not understand there to be any challenge to the genuineness of the P2 price (or the P3 discount) at large, save on the basis that P2 was said to be in place for a "*relatively short period of time*" and on the basis of the alleged impugned purpose in setting the P2 price.

### **C The relevant class of consumers**

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- 14 For the reasons explained in Woolworths' opening submissions, the Court must identify the class of persons to whom the alleged conduct is directed and then objectively attribute characteristics and knowledge to a hypothetical ordinary or reasonable member of that class.<sup>7</sup>
- 15 It is uncontroversial that the Prices Dropped Ticket was directed toward actual and potential customers of Woolworths Supermarkets.
- 16 It is also uncontroversial that the hypothetical ordinary and reasonable Woolworths customer had the following attributes. *First*, they understood that Woolworths is one of Australia's largest supermarkets and sells products from its physical stores and online. *Second*, they could be from a range of different backgrounds, ages, levels of knowledge and life experiences.<sup>8</sup> *Third*, in conducting their shopping, they looked at promotional and pricing program tickets briefly but sufficiently to observe the features of the promotion or price reduction, and in respect of the Prices Dropped Ticket, they would have observed the words "Prices Dropped", together with the Prices Dropped Price, and the "was" date.<sup>9</sup> *Fourth*, they would appreciate that Woolworths had different types of promotional and pricing programs, that some were

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<sup>7</sup> *Self Care* at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

<sup>8</sup> AOS [153].

<sup>9</sup> AOS [151], [154].

of short duration (such as specials advertised on “yellow” price tickets<sup>10</sup>) and that some were mechanisms of longer duration, such as the Prices Dropped program.<sup>11</sup> *Fifth*, they likely would have purchased many of the same products on a repeat basis.<sup>12</sup>

17 The dispute is whether the hypothetical ordinary and reasonable Woolworths customer shopped frequently (and if so how frequently) and whether during the Relevant Period they understood that prices for supermarket products were subject to frequent changes and increasing (as opposed to stable) in the Relevant Period.

18 As to shopping frequency, the evidence establishes that Woolworths customers do shop frequently at Woolworths. Mr Harker gave evidence that Woolworths customers shop at Woolworths (in-store or online) approximately 2.5 times each week on average.<sup>13</sup> While this figure was based on Mr Harker’s recollection, it is reliable because it is based on Woolworths Rewards customer data and is a figure commonly discussed within Woolworths.<sup>14</sup> It is also likely to reflect the position during the Relevant Period, given Mr Harker’s evidence that Woolworths customer shopping frequency had returned to post-COVID levels by the time it was revising its Prices Dropped policy during late 2021 and January 2022.<sup>15</sup> This evidence was not challenged.

19 As to awareness of whether supermarket shelf prices changed frequently and were increasing, the evidence establishes that Woolworths customers had this awareness. In particular:

(a) *First*, while there had been a period of low inflation in Australia prior to about June 2021<sup>16</sup>, this changed from around mid-2021 onwards such that high inflation existed throughout the Relevant Period (T160.6, 29-30). The annual change in the Consumer Price Index (**CPI**) reached 3.8% in June 2021, peaked at 7.8% in December 2022, and was 7.0% in March 2023.<sup>17</sup> This inflation also

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<sup>10</sup> First Harker Affidavit, [13(a)], [15]-[16] (CB Tab 22, p 551-552); see also AOS [155].

<sup>11</sup> First Harker Affidavit, [13(c)], [14], [21]-[22] (CB Tab 22, p 551, 553); SOAF, [12]-[15], [27] (CB Tab 11, p 102-103, 105); see also AOS [155].

<sup>12</sup> AOS [156].

<sup>13</sup> First Harker Affidavit, [60(c)] (CB Tab 22, p 568-569).

<sup>14</sup> T177.6-7, 9-11, 19-22, 37-38.

<sup>15</sup> T177.26-27, 40-47.

<sup>16</sup> SOAF, [57] (CB Tab 11, p 111); T118.13; T119.31-32; T123.10-13; T135.32-33; T180.36-39.

<sup>17</sup> MFI-C, Respondent’s Inflation Data Aide Memoire, Section 1, p 1-3.

affected food price inflation during the Relevant Period. The annual change in CPI for food and non-alcoholic beverages started increasing from June 2021, peaked at 9.2% in December 2022, and was at 8.0% in March 2023.<sup>18</sup>

- (b) *Second*, the ANZ-Roy Morgan Inflation Expectations Index shows that consumers not only experienced higher inflation during the Relevant Period but were expecting high inflation. Monthly consumer inflation expectations began increasing from late 2020 and peaked at 6.5% in November 2022.<sup>19</sup>
- (c) *Third*, consistent with this inflation, Woolworths started experiencing an unprecedented level of cost price increase requests from suppliers from mid-2021 onwards and the retail price of many items sold in Woolworths Supermarkets increased.<sup>20</sup> By February 2022, Woolworths had agreed to cost price increases from suppliers in FY22 accounting for 22.8% of its cost base (with the increase being about 5.3%) and was negotiating cost price increases in FY22 from suppliers accounting for 25.6% of its cost base.<sup>21</sup> During FY22 as a whole, Woolworths agreed to cost price increases from suppliers accounting for 62% of its cost base (with the increase being about 6.6%).<sup>22</sup> During the period April 2022 to March 2023, Woolworths agreed to (or was negotiating) cost price increases from suppliers accounting for 43% of its cost base.<sup>23</sup>
- (d) *Fourth*, it was common during the Relevant Period for Woolworths to experience cost price increases on the *same* product more than once. For example, in respect of the Lucky Dog Sample Product, Woolworths received two cost price increase requests from the supplier within an 8 month period.<sup>24</sup> More generally, during FY22, 120 suppliers submitted a cost price increase on the same product more than once.<sup>25</sup> During the period April 2022 to March 2023, 185 suppliers submitted a cost price increase on the same product more

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<sup>18</sup> MFI-C, Respondent's Inflation Data Aide Memoire, Section 2, p 3-4.

<sup>19</sup> MFI-C, Respondent's Inflation Data Aide Memoire, Section 3, p 5-7.

<sup>20</sup> T180.36-39; First Harker Affidavit, [35]-[38] (CB Tab 22, p 556-561); Woodcock Affidavit, [21]-[22] (CB Tab 31, p 764).

<sup>21</sup> MPL.0001.0008.0020 (CB Tab 100, p 2104).

<sup>22</sup> MPL.0001.0008.0017 (CB Tab 113, p 2542).

<sup>23</sup> MPL.0001.0008.0014 (CB Tab 153, p 3844).

<sup>24</sup> McCaig Affidavit, [20]-[21] and [83] (CB Tab 24, p 601 and 621); MPL.0008.0010.1831 (CB Tab 544, p 6305-6306); MPL.0008.0010.1832 (CB Tab 545, p 6307-6309).

<sup>25</sup> MPL.0001.0008.0017: see figure under graph on RHS (CB Tab 113, p 2542).

than once, including 13 of Woolworths' 20 largest suppliers by cost value that had submitted a cost price increase, and 50 of its largest 100 suppliers by cost value that had submitted a cost price increase.<sup>26</sup> This reinforces the notion that even at the level of individual products, prices were not "stable" because they could be subject to multiple price increases within a relatively short period of time.

- 20 The ACCC ignores the above macroeconomic context in which the alleged conduct took place and is thus wrong to contend that consumers understood that supermarket shelf prices were "stable" during the Relevant Period (T5.38-43, T12.20-24). To the contrary, ordinary and reasonable consumers would not have had that view, because supermarket shelf prices during the Relevant Period were generally increasing, with some products experiencing more than one price increase.

#### **D The pleaded representation was not conveyed by the Prices Dropped Tickets**

- 21 For the reasons explained in Woolworths' opening submissions, the pleaded representation was not conveyed when regard is had to the nature of the ordinary and reasonable consumer. Further, the fact that ordinary and reasonable consumers were aware during the Relevant Period that supermarket shelf prices changed regularly and were increasing (cf. paragraph 19 above) reinforces this conclusion, because they were not expecting price stability. The ACCC's case therefore fails entirely at Step 3 of *Self Care*.

#### **E The Prices Dropped Tickets were not misleading**

- 22 The ACCC's case also fails at Step 4 of *Self Care*. That is, even if the Court were to find that the pleaded representation was conveyed by the Prices Dropped Ticket, it would not find that that representation was misleading. As the Sample Product Schedule demonstrates, the ACCC's case must fail on all Sample Products, because it cannot be said that P2 for any Sample Product was charged for less than a "reasonable period", particularly given the many factors that show it was a genuine price.

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<sup>26</sup> MPL.0001.0008.0014: see figure under graph on RHS (CB Tab 153, p 3844).

## E.1 P2 was offered for a reasonable period

- 23 Several matters demonstrate that each Sample Product was offered in Woolworths Supermarkets at P2 for a period sufficient to make it a “reasonable period” in the relevant sense.
- 24 *First*, the P2 period for the Sample Products ranged from 19 days (i.e., almost 3 weeks) to 45 days (i.e., over 6 weeks). That is a long time for “fast moving consumer goods” that are purchased frequently and repeatedly (T184.14-19 (Harker)). None of those periods was *de minimis* or so short as to give rise to a question as to whether the P2 price was genuinely offered to consumers.
- 25 The ACCC’s case appears to depend on the proposition that P2 was “*relatively short*” compared to P1. That, however, is a meaningless comparison given the change in macroeconomic environment from a period of relatively low inflation to high inflation, and the circumstance that what changed between P1 and P2 was that the supplier increased its price to Woolworths (save in the case of the Bragg Sample Product, addressed below), with the consequence that the existing supplier support for the product was also up for renegotiation (T148.25-35, T184.43; T185.2 (Harker)). It is a particularly meaningless comparison for ordinary and reasonable consumers who, when grocery shopping, have to deal with the reality of higher prices as a result of inflation; for such consumers, the details of superseded and unavailable prices that have been overtaken by inflation are not an informative or useful reference. Ordinary and reasonable consumers are not naïve when it comes to inflation and cost pressures;<sup>27</sup> they do not expect retail price stability where wholesale costs are rising rapidly and significantly (including as a result of changes in the level of supplier support). Thus, if the ACCC’s pleaded representation was conveyed, the period of time that was “reasonable” must accommodate the macroeconomic reality.
- 26 *Second*, the existence of several other factors that demonstrate the genuineness of P2 (see Section E.2 below) provide further *support* for a finding that the P2 period was reasonable in each case. This is because, as explained in Woolworths’ opening submissions (in writing at [28]-[29] and orally at T35.31-35), the notion of a “was” price being charged for a “reasonable period” in the context of “was/now” pricing is

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<sup>27</sup> MFI-C, Respondent’s Inflation Data Aide Memoire, Section 3, p 5-7.

merely a period that is not so short as to deny the relevant price the quality of genuineness. Thus, the existence of factors that demonstrate genuineness mean that any temporal requirement is at least very short if not negligible (i.e., much shorter than the period of weeks that applies to each Sample Product).

27 *Third*, for the reasons explained in Woolworths’ opening submissions at [56] – [64], Woolworths’ Prices Dropped policies are not the touchstone of legal compliance and therefore do not affect the analysis of “reasonable period”. Those policies were consistent with ACCC guidance. They were also directed at ensuring the principles underlying the Prices Dropped program were achieved (T123.9-16; T135.3-10). Thus, the ACCC’s reliance on Woolworths’ policies as being somehow probative of the applicable “reasonable period” is misconceived. Further, in any event, the following aspects of Mr Harker’s oral evidence reinforced why Woolworths’ policies are not probative of any applicable “reasonable period” in this case:

- (a) While Mr Harker agreed there needed to be a price establishment period to ensure that the representation about the “was” price was true, this was not what determined the *length* of the price establishment period that Woolworths included in its Prices Dropped policies (T124.29-34, T126.39-47, T133.39-47, T134.43-46).
- (b) Rather, Woolworths set the price establishment period in its 2020 Guidelines<sup>28</sup> of 8 to 12 weeks (subject to the inter-purchase interval) and the resting period of 6 months to disincentivise suppliers and Category Managers from moving products on and off the Prices Dropped program without a legitimate commercial justification, so that in a low inflation environment the program achieved its aim of lowering the shelf price of products on a longer term basis.<sup>29</sup> Mr Harker consistently repeated this view throughout his evidence and it was not put to him that this evidence was mistaken or untrue. His evidence should be accepted (T123.37-44, T124.4-6, T127.34-43, T128.1-4).
- (c) The shorter price establishment periods in the January 2022 and September 2022 policies of 3 to 6 weeks, or in some instances, 4 to 6 weeks, (depending

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<sup>28</sup> MPL.0001.0005.0031 (CB Tab 73, p 1121).

<sup>29</sup> First Harker Affidavit, [47(e)], [47(f)] (CB Tab 22, p 563-564); T119.12-19, 28-38; T122.19-29; T123.8-16; T123.37-39; T124.4-13; T132.44; T133.3; T144.17-27.

on the inter-purchase interval)<sup>30</sup> were directed toward different circumstances – namely, a period of high inflation (T144.8-15; T175.7-10). However, even these shorter guidelines were not the minimum that Mr Harker thought was necessary to ensure that the representation was true (T177.40-178.12).

## **E.2 The P2 price, and the P3 discount, were genuine**

28 There are several additional reasons why the P2 price and the reduction from the P2 Price on each Sample Product was genuine.

29 *First*, the price increase from P1 to P2 on each Sample Product (apart from Bragg Apple Cider Vinegar) arose from a cost price increase imposed by the supplier.<sup>31</sup> That circumstance alone removes any suggestion that Woolworths merely increased the price for the purpose of being able to claim a drop in price to P3. In this way, the present case is very different to *Kogan* and *Prouds*.

30 As to Bragg Apple Cider Vinegar, the increase from P1 to P2 arose from Woolworths discovering that its existing shelf price was below both the supplier RRP and market price for the product.<sup>32</sup> The price increase was wholly unrelated to the subsequent placement on a seasonal Prices Dropped campaign.<sup>33</sup> This likewise removes any suggestion that Woolworths merely increased the price in order to claim a drop to P3.

31 *Second*, the P2 price in each case reflected the supplier’s proposed new RRP once the cost price increase became effective,<sup>34</sup> save for Essentials Pasta (which was an Own Brand product that did not have a supplier RRP) and Kleenex (where Mr Moffatt determined to adopt a white ticket price lower than the RRP).<sup>35</sup> This is significant, because, as the Court heard from numerous witnesses, Woolworths operates on the basis that supplier RRPs are typically consistent as between all retailers and channels,

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<sup>30</sup> January 2022 Guidelines, MPL.0001.0005.0047 (CB Tab 96, p 1818); September 2022 Price Trust Policy, MPL.0001.0005.0063 (CB Tab 130, p 2812).

<sup>31</sup> See Sample Product Schedule at Schedule A at [17(a)]; Schedule B at [15(a)]; Schedule D at [23]; Schedule E at [18(a)]; Schedule F at [21]; Schedule G at [18]; Schedule H at [20]; Schedule I at [12]; Schedule J at [16(a)]; Schedule K at [17(a)]; Schedule L at [21].

<sup>32</sup> See Sample Product Schedule at Schedule C at [5].

<sup>33</sup> Jordan Affidavit [51], [63] (CB Tab 23, p 585, 588).

<sup>34</sup> The RRP for the Oreo Sample Product can be discerned from MPL.0002.0002.5293 (CB Tab 635, p 6803-6804) where the “baseline” of \$5.00, being the highest price point, is logically the RRP.

<sup>35</sup> See Sample Product Schedule at Schedule A at [17(b)]; Schedule B at [15(b)]; Schedule C at [4], [15]; Schedule D at [24]; Schedule F at [22]; Schedule G at [22]; Schedule H at [21]; Schedule I at [13]; Schedule J at [16(b)]; Schedule K at [17(b)]; Schedule L at [22].

and therefore consistent across the market (T229.27-31, T238.14-37 (O’Leary); T280.35-36, T301.31-36 (McCaig); T314.31-36 (Davies)). The RRP is therefore inherently likely to be a competitive price (T229.27-34 (O’Leary)).

32 *Third*, in almost all cases, the placement of the Sample Products on Prices Dropped at the P3 price was facilitated by supplier funding which formed part of a promotional plan. The Court would therefore infer that but for that supplier funding, P3 would have been higher, or the product would not have been placed on the Prices Dropped program at all. That is a strong indicator that the discount from P2 to P3 was genuine.

33 *Fourth*, the ACCC has not adduced any evidence to suggest that suppliers’ RRPs were inflated or anything other than genuine prices that suppliers intended retailers would charge. In any event, during the Relevant Period, the Woolworths’ Prices Dropped policies required the Commercial Team to ensure that the “was” price was both “reasonable”<sup>36</sup> and a price that Woolworths would charge if supplier funding to support placement on the Prices Dropped program were withdrawn.<sup>37</sup> It was Mr Harker’s expectation as Chief Commercial Officer that the Commercial Team would set the “was” price with “care” such that it genuinely represents the price absent any “deal” from suppliers at the new cost (T152.4-6, 23-32; T153.20-22; T154.24-25, 33-35; T164.25-31, 36-43). Category Managers were aware of this expectation too.<sup>38</sup> It was also commercially important that the “was” price be set at this level, because suppliers could remove discretionary supplier funding for placement on the Prices Dropped program such as a deferred deal at any time, in which case the shelf price would revert to this level.<sup>39</sup> This tells against any incentive to artificially inflate RRPs or the P2 price.

34 At times, the ACCC has attempted to make something of the absence of contemporaneous price analyses to assess the competitiveness of P2 prices. In truth, the absence of such documents is not evidence that such analysis was not done

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<sup>36</sup> MPL.0001.0005.0031 (CB Tab 73, p 1121); MPL.0001.0010.0053 (CB Tab 131, p 2866).

<sup>37</sup> MPL.0001.0005.0047 (CB Tab 96, p 1819); T150.15-18; T153.39-41 (Harker); T260.18-27; T261.1-2 (Deery).

<sup>38</sup> Woodcock Affidavit, [39] (CB Tab 31, p 769); Robinson Affidavit, [63] (CB Tab 28, p 715); McCaig Affidavit, [84(a)] (CB Tab 24, p 622); see also T339.40-46, T340.41-46 (Moffatt).

<sup>39</sup> T185.16-20 (Harker); T153.20-22 (Harker); T252.45-47; T254.19-27; T260.4-7, 9-10, 18-27; T271.32-T272.2 (Deery); T341.8-14, 31-33 (Moffatt); T281.23-27 (McCaig). The Price Trust Training Slides also made clear that the shelf price must return to the white ticket “was” price when the product was removed from Prices Dropped: MPL.0001.0010.0053 (CB Tab 131, p 2856).

(T268.41-45; T269.38-44 (Deery)). The analysis is of a type that Woolworths Category Managers and Merchandise Managers perform every day for a large number of products on the run.<sup>40</sup> For example, Mr O’Leary was able to confirm in the witness box without assistance from the documents that the Tim Tam Sample Product at the RRP of \$6.00 represented good value for customers when compared to the core Tim Tam product, even having regard to the core specials (T233.31-37).

35 Moreover, the notion that RRPs may have been inflated and selected only for the purpose of anchoring a “was” claim is inconsistent with the commercial reality of the negotiations between the supplier and Woolworths. For example, in many cases, the supplier’s proposed increase to the RRP on the Sample Product was consistent with the supplier’s proposed increase in RRP on other products not planned for the Prices Dropped program.<sup>41</sup> In those cases the supplier was recommending that the RRP be charged as the white ticket price for the foreseeable future, perhaps subject only to “yellow” ticket promotions from time to time, or in some cases as the shelf price on a red Low Price program ticket. The ACCC’s case is that those prices were “real” and “genuine”, but there is no reason to conclude that any less care was exercised in selecting and testing the RRPs for the few products that were planned for the Prices Dropped program.

36 Finally on this point, the allegation that Woolworths’ Category Managers (or suppliers) deliberately inflated RRPs so as to anchor a higher “was” claim is a serious one, and the ACCC offers no concrete evidence in support of it. If the submission is maintained, the Court would reject it for that reason.

37 *Fifth*, in some cases, the P2 price that Woolworths was contemplating remained constant over the course of Woolworths’ negotiation with the supplier, notwithstanding that the pricing strategy evolved from placing the product on a pricing program or promotion different from the ultimately agreed position of placing the product on the Prices Dropped program. This reinforces the genuineness of P2 in those cases, because insofar as a “yellow” ticket promotional strategy had been considered initially, P2 reflected a white ticket price that would be charged on an ongoing basis and there was no incentive to inflate the P2.

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<sup>40</sup> T229.27-40, 44-46; T230.1-6 (O’Leary); T337.1-21 (Moffatt).

<sup>41</sup> See Sample Product Schedule at Schedule A at [17(d)]; Schedule at [15(c)]; Schedule D at [24]; Schedule G at [21]; Schedule J at [16(d)]; Schedule K at [17(c)]; Schedule L at [26].

- 38 *Sixth*, each Sample Product was offered and sold at the P2 price in substantial volumes during the P2 period.<sup>42</sup> Further, the average sales of most Sample Products (in units per day) did not materially differ across the P1, P2 and P3 price periods (and in the case of Lucky Dog Sample Product, the sales in the P2 period *exceeded* those in P3 periods).<sup>43</sup> It cannot be said that P2 was not genuine in circumstances where the products were sold in substantial quantities at that price.
- 39 *Seventh*, in addition to the cost price increases notified by suppliers, Woolworths also experienced significant increases to its cost of doing business during the Relevant Period.<sup>44</sup> It reported this fact to Treasury in August 2022, December 2022 and March 2023, namely that it faced significant cost increases on wages, transport, energy and payroll tax in the year ahead.<sup>45</sup> This fact also supports the genuineness of the increase to P2 on each Sample Product. Further, insofar as the ACCC appears to suggest that cost price increases do not explain the full extent of the increase in shelf price, Woolworths' increasing costs of doing business scotches any notion that an increase in product-level gross profit would undermine the genuineness of the P2 price.
- 40 In addition to these general factors, there are also other factors present in the case of specific Sample Products that further reinforce the genuineness of the P2 price. These additional factors are set out where applicable in the Sample Product Schedule.
- 41 Based on these matters, it cannot be said that P2, or the reduction from P2, on any of the Sample Products was not genuine. The effect of this is that any "reasonable period" for which the "was" price had to be charged in order to ensure it was genuine is either negligible or very short.

### **E.3 The alternative case on "genuine" price reduction**

- 42 The matters described in Section E.2 above (as supplemented by the Sample Product Schedule) also explain why, if the ACCC were permitted to rely on the new

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<sup>42</sup> See Sample Product Schedule at Schedule A at [17(f)]; Schedule B at [15(e)]; Schedule C at [18]; Schedule D at [27]; Schedule E at [18(d)]; Schedule F at [24]; Schedule G at [19]; Schedule H at [22]; Schedule I at [15]; Schedule J at [16(e)]; Schedule K at [17(e)]; Schedule L at [24].

<sup>43</sup> See Sample Product Schedule at Schedule A at [17(f)]; Schedule B at [15(e)]; Schedule C at [18]; Schedule D at [27]; Schedule E at [18(d)]; Schedule H at [22]; Schedule I at [15]; Schedule J at [16(e)]; Schedule K at [17(e)].

<sup>44</sup> First Harker Affidavit, [38] (CB Tab 22, p 560-561); Deery Affidavit, [22] (CB Tab 21, p 521).

<sup>45</sup> MPL.0002.0020.2169 (CB Tab 117, p 2666); MPL.0002.0021.8218\_N (CB Tab 139, p 3182); MPL.0002.0020.0497 (CB Tab 150, p 3781).

alternative case, that case must fail too. That is, if the representation merely conveyed that there was a “genuine reduction” in price, the ACCC has not established that P2 was not genuine or that the reduction in price from P2 was not genuine. In circumstances where there are other factors that establish genuineness of the “was” price, the need for a reasonable period to establish genuineness effectively falls away.

**F P2 was not implemented for the purpose of establishing a higher ‘was’ price**

43 The ACCC’s second (and only other) basis on which it alleges that the Prices Dropped Tickets were misleading is its suggestion that P2 was implemented only “*in order to establish a higher “Was” price for the purpose of permitting it to then advertise Price 3 to consumers as a “discounted” price*”.<sup>46</sup> That proposition is not supported by the evidence.

44 *First*, the ACCC failed to put its purpose case to most of Woolworths’ witnesses. That case was not put to Mr Harker. Nor was it put to Mr Woodcock, Mr Robinson, Mr O’Leary, Mr McCaig or Mr Moffatt, or to Mr Jordan and Mr Rojas (who were not cross-examined). In those circumstances, the case must fail insofar as it is advanced generally. It is only maintainable where the proposition was put to the relevant witness in respect of a specific product. The sole example of that is the Fab Sample Product. That example is addressed in the Sample Product Schedule.

45 *Second*, there was clear and affirmative evidence of what Woolworths’ relevant employees were actually seeking to do in setting the P2 price, and that evidence is not consistent with the alleged impugned purpose. Mr Deery’s evidence was that real consideration was given to the P2 price because of the possibility that supplier funding would change in the future (T254.19-32; T259.14-43). Mr McCaig said that, while profitability was “certainly a factor” in his discussions with Nestle Purina, his goal in relation to the Lucky Dog Sample Product was “*not drive profit but just try and... limit the amount of increase in the price points*” (T281.40-45). Mr Moffatt said that he tried to take a “balanced” approach, that was intended to allow “*customers to see the new white-ticket price point and experience that new white-ticket price point whilst also, yes, delivering them value in a speedy fashion*” (T334.27-31). None of that evidence was challenged. What is more, it was consistent with Mr Harker’s

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<sup>46</sup> AOS, [193].

evidence that he expected the commercial team to set all prices, including P2 prices, “with care” (T153.20-22; T152.4-6; T164.36-43).

46 *Third*, several of the matters mentioned in Section E.2 above apply equally to this issue and remove any suggestion that Woolworths increased the price to P2 merely for the purpose of subsequently claiming a drop to P3 Price. Those are the matters discussed in paragraphs 29 to 37 above.

47 *Fourth*, the full commercial context in which the P2 prices were implemented reveals that Woolworths was typically negotiating an *overall* commercial position across a range of products and set its pricing strategy on a portfolio-wide, rather than individual product-by-product, basis. That overall commercial position included both a cost structure component for a number of the supplier’s products and an associated (and consequential) promotional plan for those products (most of which were not on the Prices Dropped program).<sup>47</sup> In most cases, the negotiation concerned a significant number of products across the relevant category, all with new RRPs that in many cases would become the long-term white ticket price because the product would be subject only to “yellow” ticket high/low promotions. The RRP with respect to those products was envisaged to be the shelf price for the long term. On the ACCC’s case, those prices were “real” and “genuine”. Yet there is nothing differentiating those RRPs from those allocated to products intended for the Prices Dropped program, and no evidence that either the supplier or Woolworths was less thoughtful about the appropriate RRP for those products. The Court would infer they took the same approach.

## **G Conclusion**

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48 The ACCC’s case fails because the pleaded representation was not conveyed, and even if it were conveyed, that representation would not have been misleading. Each Sample Product was offered at the “was” price identified on the Prices Dropped Ticket for a sufficiently lengthy period to be viewed as reasonable, namely a period of weeks. This is particularly so given the factors which demonstrate that the “was” price (i.e., P2) was a genuine price quite apart from the period during which that price was offered.

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<sup>47</sup> See, for example, Moffatt Affidavit, [69(b)] (CB Tab 25, p 647-648); MPL.0050.0006.2415 (CB Tab 533, p 6224, see native file).

49 Further, the alternative case that the ACCC embraced in oral opening is not open to it on the pleadings and would fail even if it were to be permitted. This is because the ACCC has not established that the “was” price identified on the Prices Dropped Ticket was not a genuine price and the same factors mentioned above conclusively establish that “was” price on each Sample Product was in fact genuine.

50 Accordingly, the proceedings should be dismissed with costs.

Robert Yezerki

**Banco Chambers**

Peter Strickland

**Banco Chambers**

Amelia Smith

**Fifth Floor St James' Hall**

Jacqueline Ibrahim

**Banco Chambers**