

NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	30/03/2026 6:30:06 PM AEDT
Date Accepted for Filing:	30/03/2026 6:30:09 PM AEDT
File Number:	VID973/2024
File Title:	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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No VID 973 of 2024

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

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

and

COLES SUPERMARKETS PTY LTD (ACN 004 189 708)

Respondent

APPLICANT'S OPENING SUBMISSIONS

Filed on behalf of the Applicant, the ACCC
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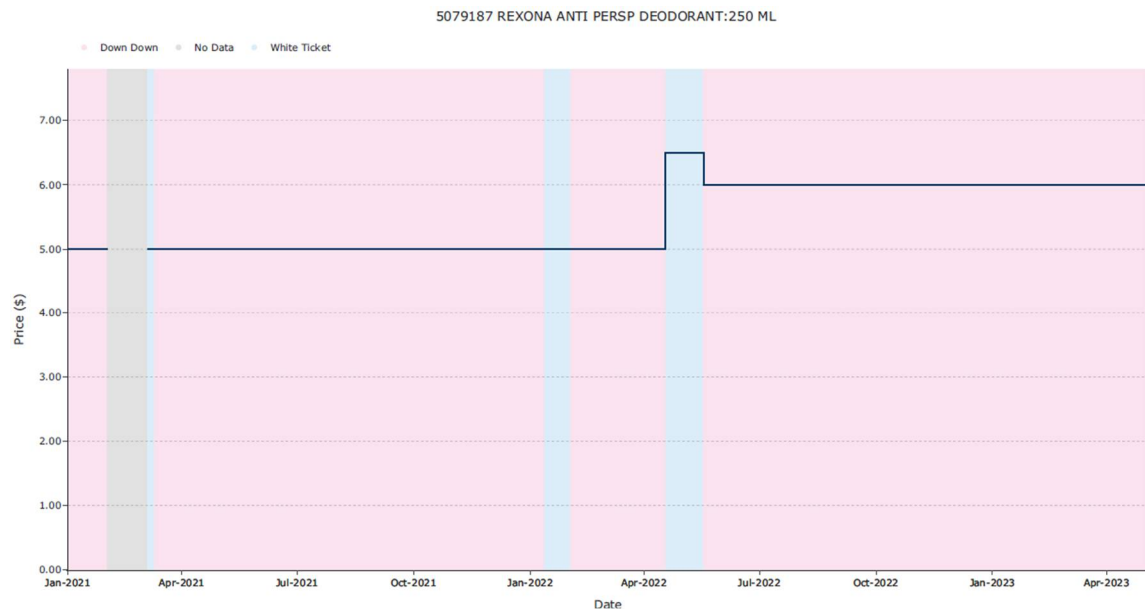
A INTRODUCTION

- 1 This proceeding concerns the making of false or misleading representations by the Respondent (**Coles**) in connection with its “Down Down” promotional program (**Down Down Program**).
- 2 Specifically, between February 2022 and May 2023 (**Relevant Period**), Coles temporarily increased the prices of 245 different products (**Affected Products**) before placing those products on Down Down promotions at prices which were (in 249 instances) higher than or (in six instances) the same as the regular price at which each product had been offered for sale prior to the temporary price spike.
- 3 In the case of all 255 Down Down promotions the subject of this proceeding (**Particularised Promotions**),¹ the relevant Affected Product had been offered for sale at its regular price (**Price 1**) for a minimum of 180 days, before having its price increased (to **Price 2**) for a maximum period of 45 days, and then being promoted at the advertised Down Down price (**Price 3**). In most cases, however, the Price 1 period was considerably longer and the Price 2 period materially shorter than the minimum and maximum periods just mentioned. The median period during which the Affected Products were offered for sale at Price 1 was 343 days, and the median period during which those products were offered for sale at the higher Price 2 before being promoted on Down Down was 28 days.²
- 4 Coles advertised the Particularised Promotions by displaying **Down Down Tickets**, being pricing labels placed within Coles’ physical stores and product tiles published on Coles’ website and within its app, in respect of each Affected Product. In many cases, Coles had already planned to place the product on a Down Down promotion before the temporary price spike occurred; that is, Price 3 was planned before Price 2 was being charged.
- 5 The pricing pattern described above is illustrated in the graph below by reference to one of the Affected Products – Rexona Anti-Perspirant Deodorant, 250 ML (5079187)

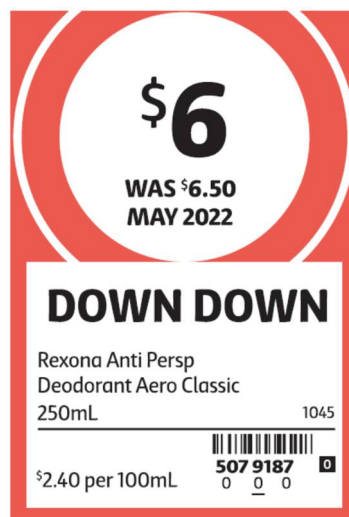
¹ The number of Particularised Promotions (255) is larger than the number of Affected Products (245) because the conduct occurred more than once in respect of certain Affected Products.

² CB 8 at 114-169 (Statement of Agreed Facts filed 13 June 2025 (**First SOAF**), Annexure 1, columns C and F). Note that (as explained in the key) the dates and number of days in columns C and F include the occasions on which there was a temporary price fluctuation due to a short-term Special for a few days or weeks or other temporary price fluctuations of seven days or less.

(**Rexona (5079187)**).³ This product was offered for sale at a price of \$5.00 (Price 1) from at least 5 March 2021 to 17 April 2022 (409 days). Then, for just 30 days (18 April to 17 May 2022), Coles increased the price by 30% to \$6.50 (Price 2). Coles then placed the product on a Down Down promotion at a price of \$6.00 (Price 3) – being 20% higher than Price 1 – from 18 May 2022 to 4 May 2023 (352 days).⁴



6 When Coles placed Rexona (5079187) on its Down Down Promotion on 18 May 2022, it displayed the following Down Down Ticket in its stores (as well as displaying other tickets online and within the Coles app):⁵



³ CB 22 at 1432-1434 (Expert report of Dawna Wright dated 3 September 2025 (**Wright Report**), Annexure E9 (1050794.023.001.0216)).

⁴ CB 8 at 131 (First SOAF at p. 26 (No. 175)).

⁵ CB 10 at 219, 232 (Statement of Agreed Facts, filed 17 November 2025 (**Third SOAF**) at Annexure 1, pp. 4, 17).

- 7 It will be noticed that the Down Down Ticket stated that the price of Rexona (5079187) was “DOWN DOWN”, conveying to consumers that the product’s price had gone down, even though the price it displayed (Price 3) was 20% higher than Price 1. It will also be noticed that the “was” or comparison price mentioned on the Down Down Ticket was Price 2, which constituted a 30% increase on Price 1 and had only applied for 30 days, whereas Price 1 had applied for more than a year immediately preceding those 30 days. Put differently, the “DOWN DOWN” price displayed on the ticket was in fact 20% higher than the price at which the product had ordinarily been offered for sale by Coles 31 days earlier, and for more than a year beforehand. Consumers were not told that the “was” price represented a 30% increase on the regular price which applied for over a year immediately before the date displayed on the ticket, or that the “was” price applied for only 30 days.
- 8 Coles engaged in similar conduct with respect to all 255 Particularised Promotions.⁶ The essential questions are whether that conduct was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law* (the **ACL**); and whether each Particularised Promotion conveyed a representation which was false or misleading with respect to the price of the Affected Products, in contravention of s 29(1)(i) of the ACL.
- 9 The ACCC submits that Coles’ conduct contravened both provisions. The information displayed on each Down Down Ticket, in respect of each Particularised Promotion, when viewed in context, conveyed a representation that the relevant product’s Down Down price was a genuine reduction to, or discount from, the product’s previous regular price (the **Down Down Representation**). By “previous regular price”, the ACCC means the price at which that product was ordinarily offered for sale for a reasonable period prior to the promotion.
- 10 The Down Down Representation was false, misleading or likely to mislead because the Down Down price of each Affected Product (Price 3) was, in 249 instances, higher than or (in six instances) the same as the previous regular price of that product (being Price 1). Coles had increased each Affected Product’s price from Price 1 to Price 2 for only a relatively short period immediately prior to the promotion (**Price Spike Period**), and any

⁶ CB 8 at 112-113 (First SOAF at [29]-[32], Annexure 1); CB 10 at 216-234 (Third SOAF at [3]-[4], Annexures 1 and 2).

“was” price appearing on the Down Down Ticket comprised that increased price. This was not disclosed or conveyed to consumers by the Down Down Ticket or otherwise.

- 11 In short, Coles’ conduct disguised price increases⁷ as discounts. Any reasonable consumer who knew the facts would conclude that Coles was tricking them: that Coles was not offering reduced prices on the Affected Products at all, but rather had increased (or in six instances maintained) the regular prices of those products and was passing those increased (or maintained) prices off as discounts.
- 12 The balance of these opening submissions is structured as follows:
 - 12.1 **Part B** briefly summarises the evidence on which the ACCC relies and outlines the evidence on which Coles relies;
 - 12.2 **Part C** sets out the factual background and outlines the evidence on which the ACCC relies;
 - 12.3 **Part D** sets out the applicable legal principles; and
 - 12.4 **Part E** sets out the ACCC’s argument as to Coles’ liability.
- 13 Before proceeding further, however, we should observe that, on 23 October 2024, the Court ordered that all matters of liability be heard and determined separately, before matters of relief. Further, on 23 May 2024, the Court ordered that a trial on all issues of liability be conducted with respect to a sample of the Affected Products. The parties subsequently agreed 12 such products, which are identified in the Agreed List of Sample Products filed on 17 June 2025 (**Sample Products**).

B THE EVIDENCE

- 14 The ACCC will tender three Statements of Agreed Facts (together, **SOAFs**), which the parties jointly filed and have agreed for the purposes of s 191 of the *Evidence Act 1995* (Cth). The SOAFs are dated 13 June 2025 (**First SOAF**), 21 August 2025 (**Second SOAF**), and 17 November 2025 (**Third SOAF**).⁸

⁷ Or, in six instances, regular prices remaining the same.

⁸ The SOAFs use the term ‘Relevant Products’ rather than Affected Products. However, Affected Products is used in these submissions, including to clearly distinguish the 245 Affected Products from the 12 Sample Products.

- 15 The First SOAF contains background facts relating to Coles, its pricing and promotional practices;⁹ the Down Down Program and internal Coles policies applicable to that program;¹⁰ and detailed pricing information for each of the 255 Particularised Promotions, including the prices of the Affected Products throughout the Relevant Period.¹¹
- 16 The Second SOAF identifies, for each Particularised Promotion in respect of each Sample Product between 1 January 2021 and 4 May 2023: (a) pricing information and the period during which those prices applied; (b) the volume of the Sample Product that Coles sold during each of those periods; and (c) the “status” of each Sample Product during each of those periods, that is, whether it was offered as part of a particular promotion, or at a non-promotional price.
- 17 The Third SOAF depicts representative examples of Down Down Tickets that were used by Coles throughout the Relevant Period for the Particularised Promotions in respect of the Sample Products.¹²
- 18 The ACCC also proposes to tender documents produced by Coles in the course of the ACCC’s investigation or pursuant to discovery orders. These documents are identified in the ACCC’s tender bundle lists filed on 22 August 2025 and 19 December 2025 (together **ATB**). They include responses Coles made to notices issued under s 155 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) during the ACCC’s investigation. Those responses contain admissions by Coles, the most pertinent of which are identified in a table served on 23 December 2025.
- 19 Further, the ACCC relies on a report of Ms Dawna Wright of FTI Consulting, filed on 3 September 2025 (**Wright Report**). The Wright Report includes graphs and tables of the prices at which Coles offered the Sample Products for sale between January 2021 and May 2023, as agreed at Annexure 1 of the Second SOAF. The data and graphs contained in the Wright Report have been accepted as correct by Coles’ expert, Dr Geoff Edwards.¹³

⁹ CB 8 at 107-110 (First SOAF at [6]-[22]).

¹⁰ CB 8 at 110-112 (First SOAF at [23]-[28]).

¹¹ CB 8 at 112-113 (First SOAF at [29]-[33], Annexure 1).

¹² CB 10 at 215-234 (Third SOAF at [3] and Annexure 1 (examples of tickets for Coles’ physical stores) and Annexure 2 (examples of tickets for Coles Online and Coles App)).

¹³ CB 23 at 1458 (Expert Report of Dr Geoff Edwards dated 4 December 2025 (the **Edwards Report**) at [48]-[49] (COL.901.001.0001)).

- 20 Coles has served 11 affidavits and a tender bundle (**RTB**). Six of the affidavits have been made by Coles employees who were ‘Category Managers’ in respect of one or more of the Sample Products.¹⁴ Coles has also served:
- 20.1 an affidavit of Ms Katherine Ann Bailey (General Manager – Brand and Marketing) affirmed on 21 November 2025 (**Bailey**), which addresses the history of the Down Down Program and how it has been marketed, as well as how Coles communicated its various pricing mechanics to customers;
 - 20.2 an affidavit of Ms Debra Maree Galle (General Manager, Own Brand) affirmed 21 November 2025 (**Galle**), which addresses the nature of Coles’ supermarkets business, retail pricing and product ranging, tickets and pricing mechanics, as well as the promotional “guardrails” Coles had in place during the Relevant Period; and
 - 20.3 an affidavit of Mr Tony Peter Bullock (General Manager Finance – Commercial, Customer and Digital) affirmed 1 December 2025 (**Bullock**), which concerns data used in the Edwards Report.
- 21 Coles has also served the Edwards Report, which graphically depicts, for each day of the Relevant Period, the ‘Price’ of each Sample Product on a per unit basis; the ‘Status’ of the Sample Product; the ‘Cost Price’ of the Sample Product on a per unit basis; the total ‘Supplier Funding’ for the Sample Product on a per unit basis; and the ‘Cost Price’ less ‘Supplier Funding’ of the Sample Product on a per unit basis.¹⁵

¹⁴ CB 11 at 235-561 (Affidavit of Paul Francis Carroll sworn 18 November 2025 (**Carroll**) (COL.900.008.0001) (who addresses the Natures Gift West Dog Food 1.2kg (3589976) and Pedigree 1.2kg 5 Kinds of Meat Loaf (255409) (**Pedigree (255409)**) Sample Products)); CB 12 at 562-662 (Affidavit of Eleftheria (Via) Lavdas sworn 18 November 2025 (**Lavdas**) (COL.900.011.0001) (who addresses the Arnott’s Shapes Multipack (2992180) Sample Product)); CB 13 at 663-785 (Affidavit of Jack Eugene Jorgensen affirmed 20 November 2025 (**Jorgensen**) (COL.900.003.0001) (who addresses the Bragg Seasoning Nutritional Yeast (3139426) Sample Product)); CB 14 at 786-854 (Affidavit of James Andrew Cubbon affirmed 20 November 2025 (**Cubbon**) (COL.900.004.0001) (who addresses the Coca-Cola 2L (191736) Sample Product)); CB 15 at 855-881 (Affidavit of Edward Matthew McCutchan affirmed 20 November 2025 (**McCutchan**) (COL.900.002.0001) (who addresses the Coles Finest Quince Paste (3609315) Sample Product)); and CB 16 at 882-1066 (Affidavit of Matthew Peter Hankin affirmed 21 November 2025 (**Hankin**) (COL.900.007.0001) (who addresses the Colgate Original Toothpaste 200g (3401074), Rexona (5079187) and Karicare Follow on Formula (1023271) Sample Products)); CB 19 at 1127-1222 (Affidavit of Rebecca Thompson affirmed 24 November 2025 (**Thompson**) (COL.900.009.0001) (who also addresses the Arnott’s Shapes Multipack (2992180) Sample Product)); and CB 20 at 1223-1309 (Affidavit of Massimo Palmisciano affirmed 24 November 2025 (**Palmisciano**) (COL.900.006.0001) (who addresses the Danone Yopro Yoghurt (3246914) Sample Product)).

¹⁵ Capitalised terms are defined in the Edwards Report.

C FACTUAL CONTEXT

C.1 Coles

22 Coles is a subsidiary of Coles Group Limited and the operator of the second largest supermarket chain in Australia.¹⁶ As at June 2023, Coles had more than 840 supermarkets nationwide (**Coles Supermarkets**), including around 21 small-format “Coles Local” stores.¹⁷ Coles Local stores have a smaller range of standard grocery items compared to a usual Coles Supermarket.¹⁸ There are Coles Supermarkets located in every Australian State and Territory.¹⁹

23 Coles also operates an online retail platform known as **Coles Online**.²⁰ This offers consumers the ability to shop for groceries online, with the choice of home delivery or pick up from ‘Click&Collect’ locations. Coles Online may be accessed by consumers via the **Coles Website** (www.coles.com.au) or the **Coles App** (which may be used on smart mobile phones, tablets, and similar devices).²¹

C.2 Coles’ pricing

24 Subject to limited exceptions which the parties agree are not material to the issues of liability in this proceeding, the prices at which Coles offered the Affected Products for sale throughout the Relevant Period, both in Coles Supermarkets and via Coles Online, were as set out in Annexure 1 to the First SOAF.²² The information in that annexure, so far as it concerns the Sample Products, has been extracted for convenience at **Annexure A** to these submissions.

25 There are three categories of price identified in Annexure A,²³ namely:

25.1 ‘**Price 1**’ (set out in Column B), being the price at which the product was offered for sale immediately prior to Price 2. In the case of Rexona (5079187), Price 1 is the \$5.00 price that subsisted for 409 days.

¹⁶ CB 8 at 107 (First SOAF at [7], [9]).

¹⁷ CB 8 at 107 (First SOAF at [9]).

¹⁸ CB 8 at 107 (First SOAF at [9]).

¹⁹ CB 8 at 107 (First SOAF at [9]).

²⁰ CB 8 at 108 (First SOAF at [10]).

²¹ CB 8 at 108 (First SOAF at [10]).

²² CB 8 at 108, 112 (First SOAF at [11]-[14], [29]-[31]).

²³ Being the same three categories of price identified in Annexure 1: see CB 8 at 112 (First SOAF at [29]).

- 25.2 **‘Price 2’** (set out in Column E), being the price at which the product was offered for sale between the Price 1 and Price 3 periods. For all Particularised Promotions, Price 2 was higher than both Price 1 and Price 3. Moreover, in all instances where a “was” price appeared on the Down Down Tickets displayed during a Particularised Promotion, that “was” price was Price 2. In the case of Rexona (5079187), Price 2 is the \$6.50 price that subsisted for 30 days.
- 25.3 **‘Price 3’** (set out in Column H), being the price displayed on the Down Down Tickets (the **Down Down Price**) for each Particularised Promotion, following the Price 2 period. For all Particularised Promotions, the Down Down Price was lower than Price 2, but (in 249 instances) higher than or (in six instances) the same as, Price 1. In the case of Rexona (5079187), Price 3 is the \$6 price that subsisted for 352 days after the Price 2 or Price Spike Period.
- 26 In the balance of these submissions, the phrase **‘Price 1 Period’** is used to refer to the period during which each Affected Product was offered for sale at Price 1, **‘Price Spike Period’** is used to refer to the period during which the price of each Affected Product was increased to Price 2, and **‘Price 3 Period’** is used to refer to the period during which each Affected Product was offered for sale at Price 3 (being the Down Down Price).
- 27 Some Affected Products were also promoted on short-term specials or multi-buy promotions during one or more of the Price 1, Price Spike, or Price 3 Periods.²⁴ The data set out in Annexure 1 to the First SOAF and discussed herein does not identify these short-term price fluctuations.²⁵

C.3 Product tickets

- 28 Coles communicated the price and, if applicable, the promotional status of products to consumers in Coles Supermarkets and on Coles Online through pricing labels or product tiles (referred to collectively as “tickets”).²⁶ If a product was not on promotion, its price was conveyed using a white **‘standard shelf edge ticket’** or **‘white ticket’**.²⁷

²⁴ CB 8 at 112 (First SOAF at [31]).

²⁵ Note however that the Second SOAF does include such details in respect of the Sample Products (see CB 9 at 186 (Second SOAF at [2(b)] and [4(a)])).

²⁶ CB 8 at 109 (First SOAF at [20]).

²⁷ CB 8 at 109 (First SOAF at [20]).

- 29 In-store tickets took the form of physical paper tickets and were typically displayed on the shelf immediately below the relevant product, or otherwise physically near the relevant product.²⁸ Online tickets took the form of individual product tiles which displayed a photograph of, and information about, a particular product on the Coles Website or in the Coles App.²⁹ Both in-store and online tickets included certain details about a product, including its name, price and, if applicable, any promotional offer applying to that product.³⁰ In some instances, the price of a product was also communicated to consumers through advertising channels such as catalogues, TV, and outdoor media.³¹
- 30 Products that were on short-term **Specials** (discounts typically offered for 1 week)³² or **Multi-buys** (where customers were offered savings if they bought more than 1 item)³³ were identified with a yellow promotional ticket displaying details of the relevant promotion for the duration of that promotion.³⁴
- 31 Products that were being promoted under the Down Down Program were identified in-store and online with distinctive Down Down Tickets,³⁵ which distinguished those products from products that were not on promotion and from those which were on a different promotion (e.g., Specials or Multi-buys).³⁶ Down Down Tickets are discussed in greater detail below.
- 32 Except if they were being promoted on a short-term Special or Multi-buy ticket, the Affected Products were identified with white tickets during the Price Spike Period and Down Down Tickets during the Price 3 Period. During the Price 1 Period (unless on a short-term Special or Multi-buy), the Affected Products were identified with either a white ticket or, if Price 1 was itself a Down Down Price, a Down Down Ticket.³⁷

²⁸ CB 8 at 110 (First SOAF at [21]).

²⁹ CB 8 at 110 (First SOAF at [21]).

³⁰ CB 8 at 110 (First SOAF at [21]).

³¹ CB 8 at 110 (First SOAF at [22]).

³² CB 8 at 109 (First SOAF at [19(a)]).

³³ CB 8 at 109 (First SOAF at [19(b)]).

³⁴ CB 8 at 113 (First SOAF at [32]). See also CB 17 at 1076, 1078 (Bailey at [37(a)] and [37(d)]).

³⁵ See the representative examples at CB 10 at 215-234 (Third SOAF [3], Annexures 1 and 2).

³⁶ CB 8 at 110 (First SOAF at [23]).

³⁷ CB 8 at 110 (First SOAF at [32]). This was the case for 12 of the 14 Particularised Promotions involving a Sample Product (indicated by red shading in Column B of Annexure A to these submissions).

C.4 The Down Down Program

Nature of the program

- 33 The **Down Down Program** is a national, long-term promotional campaign that was introduced by Coles in June 2010.³⁸ Coles has admitted that, throughout its history, the Down Down Program has been promoted to customers as offering sustained reductions to the regular shelf prices of its products.³⁹ The program comprised a key aspect of Coles’ marketing through to at least the end of the Relevant Period.⁴⁰
- 34 The Down Down Program was advertised in a variety of ways before and during the Relevant Period,⁴¹ including on TV,⁴² radio,⁴³ in print⁴⁴ and on social media.⁴⁵ The advertisements promoted to consumers that the Down Down Program involved a sustained reduction in the regular prices of the promoted products. As Coles noted in a s 155 response,⁴⁶ this was achieved through statements such as, “Down Down, Prices are Down”;⁴⁷ “Down Down and staying down”;⁴⁸ and “Regular prices are down”.⁴⁹ Coles’ media releases also emphasised that products on the Down Down Program were subject

³⁸ CB 30 at 1623 (1050794.002.001.0001).

³⁹ CB 30 at 1623 and 1633 (1050794.002.001.0001) ; ; CB 33 at 1675 (Coles s 155 Response (16 February 2024) (**Response to December 2023 Notice – Tranche 1**), Annexure A at item 1 (1050794.007.001.0001 at .0003)); and CB 34 and 1000 at 1708-1709 (Coles s 155 Response (8 March 2024) (**Response to December 2023 Notice – Tranche 2**), Annexure A at items 4 and 5 (1050794.008.001.0001 at 0004, 0005)).

⁴⁰ CB 29 at 1603 (Coles s 155 Response (9 June 2023) (**Response to May 2023 Notice – Tranche 1**) at Item 2 and Annexure A at [2] (1050794.003.001.0004 at .0004)).

⁴¹ See generally: CB 967 at 3972 (COL.500.010.0412 at .0436 (‘Down Down Executional Journey’ 2010 to 2017)).

⁴² CB 900 at 2860 (COL.500.020.0547); CB 17.8 at 1093 (COL.500.020.0550); CB 17.9 at 1094 (COL.500.020.0007); CB 17.11 at 1096 (COL.500.020.0389).

⁴³ CB 897 at 2858 (COL.500.020.0040); CB 898 at 2859 (COL.500.020.0041); CB 905 at 2862 (COL.500.032.0080); CB 893 at 2856 (COL.500.020.0556); CB 895 at 2857 (COL.500.020.0562).

⁴⁴ CB 926 at 3256 (COL.500.020.0108); CB 891 at 2854 (COL.500.020.0549).

⁴⁵ CB 903 at 2861 (COL.500.020.0006); CB 923 at 3251 (COL.500.020.0034).

⁴⁶ CB 30 at 1633-1635 (1050794.002.001.0001); CB 34 at 1708-1709 (Response to December 2023 Notice – Tranche 2, Annexure A at items 4 and 5 (1050794.008.001.0001 at .0004, .0005)).

⁴⁷ See, e.g., CB 900 at 2860 (COL.500.020.0547). See also CB 17 at 1072 (Bailey at [16(d)]).

⁴⁸ See, e.g., CB 897 at 2858 (COL.500.020.0040). See also CB 17 at 1072 (Bailey at [16(d)]).

⁴⁹ CB 30 at 1634 (1050794.002.001.0001); CB 891 at 2854 (COL.500.020.0549).

to a sustained price reduction.⁵⁰ The marketing also sought from the outset to distinguish the Down Down Program from short-term promotions such as Specials.⁵¹

- 35 In contrast to Specials, which typically involved discounting the prices of products for one week (and were called out to consumers by yellow tickets), the promotional focus of the Down Down Program (which had a distinct red and white colour scheme) was on reducing regular shelf prices on a longer-term basis.⁵² During the Relevant Period, Coles promoted products on the Down Down Program for at least 12 weeks, although many remained on Down Down for substantially longer.⁵³ Being a national program, the same products were offered at the same prices on Down Down promotions across Coles' national store network (and online).⁵⁴

Effectiveness of the Down Down Program

- 36 According to Coles itself, placing products on the Down Down Program “generally resulted in a substantial and sustained increase in sales volumes”.⁵⁵ Herein lies the economic incentive which explains much of Coles' conduct.

Down Down Tickets

- 37 As noted above, Coles identified products on a Down Down promotion in-store and online using Down Down Tickets, which distinguished those products from products that were not on promotion or were on other forms of promotion, including Specials.⁵⁶ The Third SOAF contains representative examples of Down Down Tickets that were used by Coles throughout the Relevant Period in respect of the Sample Products.

⁵⁰ CB 909 at 2865 (COL.500.008.0003 at .0003); CB 913 at 2870 (COL.500.008.0013 at .0013). See also: CB 30 at 1635 (1050794.002.001.0001).

⁵¹ CB 898 at 2859 (COL.500.020.0041); CB 893 at 2856 (COL.500.020.0556); CB 895 at 2857 (COL.500.020.0562). See further: CB 951 at 3594 (COL.500.004.0589 at .0667, the ‘Behavioural science-led Store Comm[unication]s Blueprint’ dated December 2021, apparently prepared for Coles by ‘Decision Design’, which stated that the Big Red Hand – an important element of Coles' Down Down branding – was ‘[w]ell understood as a Price Drop mechanic (although more strongly associated with permanent price drop, not for fixed time)’).

⁵² CB 8 at 109 (First SOAF at [19]); CB 30 at 1633 ((1050794.002.001.0001); CB 33 at 1675 (Response to December 2023 Notice – Tranche 1, Annexure A at [1] (1050794.007.001.0001 at .0003)).

⁵³ CB 30 at 1635(1050794.002.001.0001). See also CB 18.3 at 1124 (COL.500.001.0004 at .0004).

⁵⁴ CB 33 at 1688 (Response to December 2023 Notice – Tranche 1, Annexure A (1050794.007.001.0001 at .0016)).

⁵⁵ CB 33 at 1675 (Response to December 2023 Notice – Tranche 1 at Item 1 (1050794.007.001.0001 at .0003)).

⁵⁶ CB 8 at 110 (First SOAF at [23]).

- 38 Down Down Tickets were displayed in Coles Supermarkets, on the Coles Website, and in the Coles App in the forms of:
- 38.1 in-store paper tickets in Coles Supermarkets (typically located on the shelf below the relevant product, or otherwise physically near the relevant product);
 - 38.2 online product tiles on the Coles Website; and
 - 38.3 online product tiles in the Coles App.⁵⁷
- 39 The precise design of Down Down Tickets varied over time and depending on whether the ticket was a physical ticket displayed in-store or a digital one displayed online. However, it is common ground that there were no material changes to, or differences between, the appearance, layout, or wording of Down Down Tickets over the Relevant Period.⁵⁸
- 40 All Down Down Tickets shared at least the following features:⁵⁹
- 40.1 a red and white colour scheme;
 - 40.2 details of the relevant product, including its name;
 - 40.3 the words ‘Down Down’; and
 - 40.4 the price at which the product was offered for sale (i.e., Price 3).
- 41 In most cases, the Down Down Tickets also contained a “was” price for the relevant product (being Price 2), plus the month and year when the product was offered for sale at that price (for example, “Was \$10 July 2024”).⁶⁰
- 42 Down Down Tickets were also larger in size compared to white tickets.⁶¹

The Down Down Policies

- 43 Prior to and throughout the Relevant Period, Coles had in place internal policies governing matters such as how long a product was required to be sold at a particular price before it could be promoted on Down Down.⁶² The stated purpose of these policies was

⁵⁷ CB 8 at 110 (First SOAF at [24]).

⁵⁸ CB 8 at 110 (First SOAF at [26]).

⁵⁹ CB 8 at 110 (First SOAF at [25]); CB 10 at 217-234 (Third SOAF at Annexures 1 and 2).

⁶⁰ CB 8 at 110 (First SOAF at [25]); CB 10 at 217-234 (Third SOAF at Annexures 1 and 2).

⁶¹ CB 18 at 1113 (Galle at [33]).

⁶² CB 8 at 111 (First SOAF at [27], [28]).

to ensure the promotion of a product “is not considered misleading and deceptive advertising”.⁶³ The relevant policies comprised the **Down Down Factsheet**,⁶⁴ the **Promotion Guardrails Factsheet**,⁶⁵ and the **Value Guardrails**⁶⁶ (collectively, the **Down Down Policies**).

- 44 The Down Down Policies varied over time. The period during which each version was in force is set out at [28] of the First SOAF.
- 45 From at least September 2019 until January 2022, if Coles wished to increase the price of a product that was being promoted on the Down Down Program, the Down Down Policies required (among other things) that the product be removed from the Down Down Program, then sold at a higher, white ticket price for at least two weeks, before it could be advertised using a different promotional mechanic, ‘**Every Day Price**’.⁶⁷ Crucially, a product removed from the Down Down Program for any reason could not be returned to the Down Down Program for at least 9 months.⁶⁸ As for products that were not previously being promoted on the Down Down Program, Coles’ rules prohibited them from being included in the Down Down Program if they had been sold at a lower, non-promotional price during the preceding 12 weeks.⁶⁹
- 46 These requirements recognised the reality that it would be misleading to represent to consumers that the Down Down price was a reduction or discount from the product’s

⁶³ CB 18.1 at 1118 (COL.500.001.0010 at .0010); CB 18.2 at 1121 (COL.500.001.0001 at .0001); CB 18.3 at 1124 (COL.500.001.0004 at .0004); CB 948 at 3439 (COL.500.001.0007 at .0007).

⁶⁴ CB 18.1 at 1118 (COL.500.001.0010); CB 18.2 at 1121 (COL.500.001.0001); CB 18.3 at 1124 (COL.500.001.0004); CB 948 at 3439 (COL.500.001.0007).

⁶⁵ CB 959 at 3816 (COL.500.001.0396); CB 963 at 3920 (COL.500.001.0389); CB 964 at 3927 (COL.500.001.0409); CB 965 at 3934 (COL.500.001.0416); CB 966 at 3941 (COL.500.001.0402).

⁶⁶ CB 908 at 2863 (COL.500.001.0429); CB 912 at 2868 (COL.500.001.0433); CB 916 at 3015 (COL.500.001.0013); CB 935 at 3385 (COL.500.001.0435); CB 968 at 3980 (COL.500.001.0431).

⁶⁷ CB 18.1 at 1119 (COL.500.001.0010 at 0011). ‘Every Day Price’ was a different longer-term promotional mechanic that involved products being offered at a consistent price for a period of at least six months (three months for fresh products) during which period the product could not be promoted on a Special. Tickets for products on this mechanic did not include any “was” price or “save” claim: see CB 18.1 at 1120 (COL.500.001.0010 at 0012); see also CB 13 at 666-667 (Jorgensen at [23]), CB 20 at 1229 (Palmisciano at [41]), and CB 18 at 1113 (Galle at [31(f)]).

⁶⁸ CB 18.1 at 1119 (COL.500.001.0010 at .0011); see also CB 33 at 1678 (Response to December 2023 Notice — Tranche 1, Annexure A at item 7).

⁶⁹ CB 18.1 at 1118 (COL.500.001.0010 at .0010); CB 18.2 at 1121 (COL.500.001.0001 at .0001). The Down Down Policies at this time refer to the ‘regular “N” price’, which the ACCC understands refers to the regular non-promotional price.

previous regular price unless that product had been offered for sale at that price for a reasonable period prior its inclusion in the Down Down Program.⁷⁰

- 47 Had these aspects of the Down Down Policies remained in place and been complied with during the Relevant Period, it is unlikely that the contraventions the subject of this proceeding would have occurred.⁷¹ However, Coles removed these important guardrails against misleading conduct in two stages, and even then, did not comply with its own weakened policies in several instances.
- 48 In January 2022, Coles amended the Down Down Policies to permit a product removed from the Down Down Program with a view to effecting a price increase to either be placed on an ‘Every Day Price’ promotion after two weeks or returned to Down Down after being sold at a white ticket price for a minimum of 12 weeks (instead of 9 months).⁷² Coles also reduced the period of time before a product which had been removed from the Down Down Program for other reasons could be returned to Down Down from 9 months to 6 months.⁷³
- 49 In March 2022, Coles further amended the Down Down Policies. The requirement that a product must not have been sold at a lower non-promotional price in the previous 12 weeks before being promoted on Down Down was reduced to 4 weeks. Further, if Coles wished to increase the price of a product being promoted on the Down Down Program, its rules permitted the product to be taken off the Down Down Program, offered for sale

⁷⁰ See, CB 29 at 1604 (Response to May 2023 Notice — Tranche 1, Annexure A at item 6 (1050794.003.001.0004 at .0005)).

⁷¹ For all but six of the 255 Particularised Promotions, Price 2 was in place for less than 12 weeks and Price 1 was lower than Price 3: CB 8 at 114-169 (First SOAF at Annexure 1, columns F and K). Those Particularised Promotions therefore would not have complied with the aspects of the Down Down Policies described in the last two sentences of [45] above (had that been in place during the Relevant Period) regardless of the Affected Products’ promotional status during the applicable Price 1 Period.

The remaining six Particularised Promotions were those for which Price 1 was the same as Price 3, namely the Affected Products in the Pedigree Dog Food 1.2kg product line: CB 8 at 146-147 (First SOAF at Annexure 1, items 148-153). The Pedigree (255409) Sample Product was part of that product line and involved a Down Down Promotion less than 9 months prior to the Particularised Promotion: CB 8 at 178 (First SOAF at Annexure 2, item 69); and CB 9 at 188-214 (Second SOAF at Annexure 1) and CB 22 at 1412-1414 (Wright Report at Annexure E3). Affected Products were part of a product line with other Affected Products for the purpose of pricing: CB 8 at 113 (First SOAF, [33]). It can therefore be inferred that all of the remaining six Particularised Promotions would not have complied with the aspect of the Down Down Policies described in the penultimate sentence of [45] above (had that been in place during the Relevant Period).

⁷² CB 18.2 at 1122 (COL.500.001.0001 at 0002); see also CB 33 at 1678-1679 (Response to December 2023 Notice — Tranche 1, Annexure A at item 7 (1050794.007.001.0001)).

⁷³ CB 18.2 at 1122 (COL.500.001.0001 at 0002); see also CB 33 at 1678-1679 (Response to December 2023 Notice — Tranche 1, Annexure A at item 7 (1050794.007.001.0001)).

at a higher price for 4 weeks (instead of 12 weeks), and then returned to the Down Down Program.⁷⁴ The minimum period of time before a product which had been removed from the Down Down Program for other reasons could be returned to Down Down remained 6 months.⁷⁵

50 The contraventions the subject of this proceeding began in March 2022, at about the same time as Coles made these internal policy changes. As is apparent from Annexure A to these submissions, none of the Sample Products was offered at Price 2 for more than 42 days (i.e., 6 weeks) after being removed from the Down Down Program.⁷⁶ Thus, none of the 12 Particularised Promotions involving a Sample Product that had been on the Down Down Program immediately prior to the Price Spike Period would have complied with Coles' own policies but for the March 2022 amendments.⁷⁷

51 Moreover, five of those 12 Particularised Promotions did not even comply with the Down Down Policies as amended in March 2022: the relevant Sample Products were offered at Price 2 for less than 4 weeks after being removed from the Down Down Program.⁷⁸ A sixth Particularised Promotion did not comply with the Down Down Policies as amended in March 2022 for a different reason:⁷⁹ although the relevant product was not on Down Down during the Price 1 Period, its Price Spike Period lasted only 27 days, which was contrary to Coles' (weakened) policy requirement that the price of a product not already on the Down Down Program must be established for four consecutive weeks prior to launch on Down Down.⁸⁰

52 While the Down Down Policies are not decisive of whether Coles' conduct was false, misleading or deceptive in contravention of the ACL, it is telling that, prior to March 2022, Coles' own policies – policies that were designed to ensure its promotions were not

⁷⁴ CB 18.3 at 1124 (COL.500.001.0004); see also CB 33 at 1678-1679 (Response to December 2023 Notice — Tranche 1, Annexure A at item 7 (1050794.007.001.0001)). See also CB 18 at 1116-1117 (Galle at [60]).

⁷⁵ CB 18.3 at 1125 (COL.500.001.0004 at 0005).

⁷⁶ The longest Price Spike Period in Annexure A to these submissions is 42 days (Item 2, CCA Soft Drink).

⁷⁷ The 12 Particularised Promotions involving a Sample Product that had been on the Down Down Program immediately prior to the Price Spike Period are indicated by red shading in Column B of Annexure A to these submissions.

⁷⁸ See, Annexure A to these submissions, Items 1, 4, 11B, 12A, 12B. Although Item 4 refers to a Price Spike Period of 28 days, that period included a 1-week Special, such that the product was not offered at Price 2 for a consecutive period of 4 weeks, as required by the March 2022 policy: CB 948 at 3440 (COL.500.001.0007 at 0008).

⁷⁹ See, Annexure A to these submissions, Item 5.

⁸⁰ CB 948 at 3440 (COL.500.001.0007 at 0007).

misleading – prohibited what occurred in respect of 13 of the 14 Particularised Promotions involving a Sample Product (and for the other Particularised Promotion, what occurred was prohibited by the pre-January 2022 policies).⁸¹ Indeed, what occurred in respect of six of those 14 Particularised Promotions was still prohibited under Coles’ own policies even after March 2022.⁸²

C.5 The pricing behaviour which accompanied the Down Down Representation

53 As outlined above, the Down Down Representation was made during the Price 3 Period for each Affected Product, in circumstances where Coles had engaged in the following pricing behaviour:⁸³

53.1 For all Affected Products, Price 1 was in place for at least 180 days and a median period of 343 days, including any short-term Specials or other temporary price fluctuations of seven days or less.⁸⁴ In the case of the Sample Products only, the median Price 1 Period was 307 days, including days on Special, etc (or 278 days excluding such short-term promotions).⁸⁵ Given Price 1 was in place for 6 months or more, Price 1 was established as the regular price of the product.

53.2 For all Affected Products, the Price Spike Period preceded the Price 3 Period and was at most 45 days and a median period of 28 days. In the case of the Sample Products only, the median Price Spike Period was also 28 days. Price 2 was at least 15% higher than Price 1. The median increase was 32% (for all Affected Products) and 35.5% (for the Sample Products only).⁸⁶

53.3 For all Affected Products, Price 3 was lower than Price 2 and, in 249 instances, higher than, and (in six instances) the same as, Price 1. The median increase relative

⁸¹ Being the 12 Particularised Promotions involving a Sample Product that had been on the Down Down Program immediately prior to the Price Spike Period (indicated by red shading in Column B of Annexure A to these submissions), plus Item 5. See footnote 71 in respect of the remaining Particularised Promotion (the Pedigree (255409) Sample Product).

⁸² See, Annexure A to these submissions, Items 1, 4, 5, 11B, 12A, 12B.

⁸³ The price and the duration of each pricing period, for each Affected Product, are to be found in CB 8 at 114-169 (First SOAF at Annexure 1)

⁸⁴ CB 8 at 114-169 (First SOAF, Annexure 1, columns C and F).

⁸⁵ CB 9 at 188-214 (Second SOAF, Annexure 1, column F (read with columns B-D)), having regard to the Price 1 Period set out in CB 8 at 114-169 (First SOAF at Annexure 1, column C).

⁸⁶ CB 8 at 114-169 (First SOAF, Annexure 1, column D (in respect of the Sample Products, see Annexure A to these submissions)).

to Price 1 was 14% (for all Affected Products) and 13% (for the Sample Products only).⁸⁷

54 It should be noticed that the data relied upon in the Edwards Report shows that, for all but one of the Sample Products, Coles' margin (i.e., the difference between the retail price and the cost paid to Coles' supplier less promotional "funding" contributed by that supplier) was essentially maintained or increased, as between the Price 1 and Price 3 Periods.⁸⁸ The relevant data is summarised in Annexure B to these submissions. It shows that the end result of the pricing pattern employed by Coles with respect to the Sample Products was that: (i) in every case, consumers were paying a higher price for that product during the Price 3 Period than during the Price 1 Period (or in the case of the Pedigree (255409) Sample Product, the same price); and (ii) in all but one case, Coles' margin on that product during the Price 3 Period was higher than or about the same as (i.e., within █% of) Coles' margin during the Price 1 Period.

D LEGAL PRINCIPLES

55 Section 18(1) of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

56 Section 29(1)(i) of the ACL relevantly provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or in connection with the promotion by any means of the supply or use of goods, make a false or misleading representation with respect to the price of goods. The "price" of goods is relevantly defined in s 2 of the ACL as "the amount paid or payable (including any charge of any description) for their acquisition".

⁸⁷ CB 8 at 114-169 (First SOAF, Annexure 1, column J (in respect of the Sample Products, see Annexure A to these submissions)).

⁸⁸ See, Annexure B to these submissions. In respect of the 14 Particularised Promotions involving a Sample Product, Coles' margin essentially remained the same (i.e., increased or decreased by █% or less) in five instances; increased by more than █% in eight instances; and decreased by more than █% in one instance.

- 57 The terms “misleading or deceptive” and “false or misleading”, as they appear in ss 18 and 29(1)(i), are synonymous.⁸⁹ A false or misleading representation with respect to a price discount falls within the ambit of s 29(1)(i).⁹⁰
- 58 The ACCC bears the onus of establishing the contraventions it alleges on the balance of probabilities.⁹¹ In deciding whether the ACCC has discharged that onus, the Court must have regard to the gravity of the allegations made, including the fact that, if Coles is found to have contravened s 29(1)(i), Coles may be ordered to pay a pecuniary penalty.⁹²
- 59 The applicable principles are settled. As recently summarised by the High Court in *Self Care*, determining whether a person has contravened s 18 or s 29(1)(i) of the ACL involves four steps, as follows:⁹³
- 59.1 *First*, to identify with precision the conduct said to contravene the provisions and to ascertain whether the evidence establishes that the respondent engaged in that conduct.
- 59.2 *Secondly*, to consider whether the identified conduct was “in trade or commerce”.
- 59.3 *Thirdly*, to consider what meaning or representation was conveyed by that conduct to its intended audience.
- 59.4 *Fourthly*, to determine whether the conduct, in light of that meaning, was false, misleading or deceptive, or likely to mislead or deceive, for the purposes of ss 18 and/or 29(1)(i) of the ACL.
- 60 In this case, the first step is unlikely to be controversial. The contravening conduct comprises the promotion, communicated to consumers by Down Down Tickets, of each Affected Product on the Down Down Program. That communication took place in circumstances where Coles had engaged in the pricing behaviour identified above. In this regard, it is common ground that Coles promoted each of the Affected Products on the

⁸⁹ *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; 317 ALR 73 (*Coles Baked Fresh*) at [40], [44] (Allsop CJ); *ACCC v TPG Internet Pty Ltd* [2020] FCAFC 130; 278 FCR 450 (*TPG Internet FCAFC 2020*) at [21] (Wigney, O’Byrne and Jackson JJ); *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8; 277 CLR 186 at [84] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

⁹⁰ See, e.g., *ACCC v Kogan Australia* [2020] FCA 1004; 145 ACSR 609 at [3], [4], [100] (Davies J).

⁹¹ *Evidence Act 1995* (Cth) (*Evidence Act*), s 140(1).

⁹² *Evidence Act*, s 140(2)(c); *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336.

⁹³ *Self Care* at [80]-[82] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

Down Down Program during the Relevant Period.⁹⁴ It is agreed that Coles communicated those promotions to consumers in Coles Supermarkets and via Coles Online through Down Down Tickets,⁹⁵ whose form and content were materially the same as the Example Tickets at Annexures 1 and 2 of the Third SOAF.⁹⁶ It is also common ground that Coles offered the Affected Products for sale at the prices specified in Annexure 1 to the First SOAF during the Price 1, Price 2 and Price 3 Periods identified in that document.

61 The second step does not appear to be in dispute. In any event, there is no doubt that the contravening conduct relied upon was “in trade or commerce”.

62 As to the third step – identifying the meaning or representation conveyed by the conduct to its intended audience – the following principles are pertinent.

62.1 The Court must characterise, as an objective matter, the notional effects of the contravening conduct, judged by reference to its context, on the state of mind of the relevant class of persons.⁹⁷

62.2 Where, as here, “the conduct was directed to the public or part of the public, the third and fourth steps must be undertaken by reference to the effect or likely effect of the conduct on the ordinary and reasonable members of the relevant class of persons”.⁹⁸ It is necessary to isolate an ordinary and reasonable “representative member” (or members) of that class, to objectively attribute the characteristics and knowledge of that hypothetical person (or persons), and to consider the effect or likely effect of the conduct on their state of mind.⁹⁹ The question is what such a person (or persons) would have thought the conduct conveyed, in context.¹⁰⁰

62.3 To undertake that analysis, it is not necessary to adduce evidence from members of the public: the task of evaluating the objective character and meaning of advertising

⁹⁴ CB 8 at 112-113 (First SOAF at [29]-[32], Annexure 1).

⁹⁵ CB 8 at 109-110 (First SOAF at [20], [21], [23]-[26]).

⁹⁶ CB 10 at 216 (Third SOAF at [3]-[4]).

⁹⁷ *Self Care* at [82] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

⁹⁸ *Self Care* at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

⁹⁹ *Self Care* at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

¹⁰⁰ See, *Self Care* at [113] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

or promotional material in the minds of reasonable members of the public is one for the Court.¹⁰¹

62.4 The meaning derived from the conduct must be judged by reference to the conduct as a whole and in its proper context.¹⁰² That context includes the immediate context – all the words in the document or other communication and the manner in which those words are conveyed, not just a word or phrase in isolation – as well as the broader context of the relevant surrounding facts and circumstances.¹⁰³ That broader context includes, “the types of goods and services being supplied, the manner in which they are supplied and the habits and characteristics of purchasers of those goods and services”.¹⁰⁴

62.5 In a context such as the present, involving the purchase of groceries in a supermarket, the reasonable member of the public “may be intelligent or not, may be well educated or not, will not likely spend any time undertaking an intellectualised process of analysis, will often be shopping for many other items, and will likely be affected by an intuitive sense of attraction rather than by any process of analytical or logical choice.”¹⁰⁵

62.6 Where (as here) the impugned conduct concerns advertising or promotional material, the “dominant message” of that material will be of crucial importance.¹⁰⁶ Many persons will only absorb the dominant message or general thrust of such material,¹⁰⁷ making it important to identify that message.¹⁰⁸

62.7 Although the meaning conveyed by the conduct must be ascertained objectively, the intention of the representor may be relevant. Specifically, “where a representation is made in terms apt to create a particular mental impression in the representee, and is intended to do so, it may properly be inferred that it has had that

¹⁰¹ *Coles Baked Fresh* at [45] (Allsop CJ), citing *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202; *TPG Internet FCAFC 2020* at [22(c)] (Wigney, O’Bryan and Jackson JJ); *Kogan* at [16] (Davies J).

¹⁰² *Coles Baked Fresh* at [41] (Allsop CJ).

¹⁰³ *Self Care* at [82] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

¹⁰⁴ *ASIC v Vanguard Investments Australia Ltd* [2024] FCA 308 at [110] (O’Bryan J); *Coles Baked Fresh* at [41] (Allsop CJ).

¹⁰⁵ *Coles Baked Fresh* at [43] (Allsop CJ).

¹⁰⁶ *ACCC v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 (*TPG Internet HCA*) at [45] (French CJ, Crennan, Bell and Keane JJ); *Coles Baked Fresh* at [42] (Allsop CJ).

¹⁰⁷ *TPG Internet HCA* at [51]-[52], [54] (French CJ, Crennan, Bell and Keane JJ).

¹⁰⁸ *ACCC v TPG Internet Pty Ltd* [2011] FCA 1254 at [43] (Murphy J).

effect.”¹⁰⁹ Further, “[s]uch an inference may be drawn more readily where the business of the representor is to make such representations and where the representor’s business benefits from creating such an impression.”¹¹⁰

63 As to the fourth step – whether the conduct, in light of the meaning which it conveyed, was false, misleading or deceptive, or likely to mislead or deceive:

63.1 Conduct will be misleading or deceptive if it has a tendency to lead into error; that is, to cause a reasonable consumer to form an erroneous assumption or conclusion about some fact or matter.¹¹¹

63.2 Conduct will be “likely” to mislead or deceive for the purposes of s 18 if there is a real and not remote chance or possibility that a person will be misled or deceived, even though that possibility is less than 50 per cent.¹¹²

63.3 It is not necessary for the applicant to show that a “not insignificant number” of the relevant class of persons was or is likely to have been misled or deceived by the impugned conduct.¹¹³ It is sufficient to show that ordinary or reasonable members of the class of consumers to whom the conduct was directed were or are likely to have been misled or deceived.¹¹⁴

¹⁰⁹ *TPG Internet HCA* at [55] (French CJ, Crennan, Bell and Keane JJ).

¹¹⁰ *TPG Internet HCA* at [55] (French CJ, Crennan, Bell and Keane JJ). See also *Bed Bath ‘N’ Table Pty Ltd v Global Retail Brands Australia Pty Ltd* [2025] HCA 50 at [52]-[57] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

¹¹¹ *TPG Internet HCA* at [39] (French CJ, Crennan, Bell and Keane JJ); *Self Care* at [81] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ); *TPG Internet FCAFC 2020* at [22] (Wigney, O’Byryan and Jackson JJ); *Coles Baked Fresh* at [39] (Allsop CJ).

¹¹² *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87 (Bowen CJ, Lockhart and Fitzgerald JJ); *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 at [112] (McHugh J); *TPG Internet FCAFC 2020* at [22(a)] (Wigney, O’Byryan and Jackson JJ).

¹¹³ *TPG Internet FCAFC 2020* at [23] (Wigney, O’Byryan and Jackson JJ); *Trivago NV v ACCC* [2020] FCAFC 185; 384 ALR 496 at [190]-[193] (Middleton, McKerracher and Jackson JJ).

¹¹⁴ *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199 (Gibbs CJ), 210 (Mason J); *Campomar Sociedad Limitada v Nike International Limited* [2000] HCA 12; 202 CLR 45 at [102]-[103], [105] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Google Inc v ACCC* [2013] HCA 1; 249 CLR 435 (*Google HCA*) at [7] (French CJ, Crennan and Kiefel JJ); *TPG Internet FCAFC 2020* at [23(b)], [23(f)], [24] (Wigney, O’Byryan and Jackson JJ).

63.4 Statements which are literally true may at the same time be misleading or deceptive or carry with them a false representation.¹¹⁵ Among other things, this may be because the statement, though true, does not disclose an important qualifying fact.¹¹⁶

63.5 Something also should be said about “half-truths”. The position was succinctly summarised by Allsop CJ in *Coles Baked Fresh* at [46], where his Honour observed that half-truths “may be misleading by the insufficiency of information that permits a reasonably open but erroneous conclusion to be drawn”. This is particularly so in respect of advertising or promotional material which is not selective as to its audience. Advertisers are not entitled to assume that their audience will be able to supply for themselves omitted facts or resolve ambiguities.¹¹⁷ Thus, where impugned promotional material is capable of more than one meaning, the question of whether the conduct is misleading or deceptive must be tested against each meaning which is reasonably open. The material will be misleading or likely to mislead if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error.¹¹⁸

E THE ACCC’S ARGUMENT

64 As noted already, in the present case, the first two of the four steps identified in *Self Care* are uncontroversial. It follows that the two key issues which arise in respect of Coles’ liability are these:

64.1 *First*, what meaning or representation did Coles’ conduct – i.e., the display of Down Down Tickets in-store and online in respect of the 255 Particularised Promotions – objectively convey to consumers? Put differently, did Coles make the Down Down Representation? **Section E.1** below addresses this question.

¹¹⁵ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 227-228 (Stephen J, Jacobs J agreeing).

¹¹⁶ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357 at [23] (French CJ and Kiefel J).

¹¹⁷ *CRW Pty Ltd v Sneddon* (1972) AR(NSW) 17 at 28, (Sheldon and Sheppard JJ), quoted in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 50 (Hill J) and *Coles Baked Fresh* at [46] (Allsop CJ).

¹¹⁸ *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 50 (Hill J); *Coles Baked Fresh* at [46]-[47] (Allsop CJ).

64.2 *Secondly*, if Coles made the Down Down Representation, was it false, misleading or deceptive, or likely to mislead or deceive? **Part E.2** below addresses this question.

65 It is the ACCC's case that Coles did make the Down Down Representation and that representation was false, misleading or deceptive, or likely to mislead or deceive, in contravention of ss 18 and 29(1)(i) of the ACL.

E.1 Coles made the Down Down Representation

66 When viewed in its immediate and broader context, Coles' conduct in displaying Down Down Tickets in respect of each of the 255 Particularised Promotions conveyed the Down Down Representation to consumers who visited Coles Supermarkets and Coles Online during the Relevant Period.

67 The Down Down Representation was that the relevant Affected Product's Down Down Price was a genuine reduction to, or discount from, that product's previous regular price. By "previous regular price", the ACCC means the price at which the product was ordinarily offered for sale for a reasonable period prior to the promotion.

Reasonable member of the relevant class

68 Coles' conduct was directed at members of the general public whilst they were shopping for groceries within Coles Supermarkets or via Coles Online. As Allsop CJ observed, an ordinary or reasonable member of that broad class, "may be intelligent or not, may be well educated or not, will not likely spend any time undertaking an intellectualised process of analysis, will often be shopping for many other items, and will likely be affected by an intuitive sense of attraction rather than by any process of analytical or logical choice."¹¹⁹ It is essential to bear this in mind when considering the effect or likely effect of Coles' conduct on the state of mind of a reasonable member of the relevant class. A reasonable member of that class is likely only to absorb the general thrust of Coles' promotional material, and their reaction to it will be impressionistic, not reasoned.

¹¹⁹ *Coles Baked Fresh* at [43] (Allsop CJ).

Down Down Tickets

- 69 Each of the Down Down Tickets contained the words “Down Down”.¹²⁰ Those words conveyed to a reasonable consumer that the price displayed on the relevant ticket had gone down; that is, that the Down Down price constituted a reduction to, or discount from, a previous price.
- 70 Further, those words, together with the distinct appearance of the Down Down Tickets – including their red and white colour scheme, which was apt to draw the attention of shoppers and distinguish them from White Tickets or Specials – implicitly conveyed to a reasonable consumer that the reduction or discount being offered constituted a meaningful or genuine saving for them, compared to the regular price at which the product was ordinarily offered for sale.
- 71 Such a comparison was implicit in the words “Down Down”, which necessarily conveyed a reduction to or discount from a previous price. A reasonable consumer within the relevant class would think that comparator price was the price they would ordinarily have expected to pay for the same product in the past; that is, its previous regular price. They would consider that price to be the appropriate benchmark against which to measure the saving or discount that was being offered to them by Coles.
- 72 Put simply, a reasonable consumer shopping for groceries would think that Coles was offering each Affected Product for sale at a price which was lower than, and represented a genuine discount from, its previous regular price. This was the dominant message or general thrust of the Down Down Tickets. It was this attractive notion or favourable impression that would have been absorbed by a reasonable member of the relevant class.

“Was” prices

- 73 In most cases, the Down Down Tickets explicitly invited consumers to compare the Down Down Price (Price 3) with a “was” price (Price 2).¹²¹ The “was” price was typically accompanied by a month and year, denoting when the product was last offered at Price 2 (but not the length of time that Price 2 had applied).¹²²

¹²⁰ See, CB 10 at 216-234(Third SOAF at [3]-[4], Annexures 1 and 2).

¹²¹ CB 8 at 110 (First SOAF at [25]); CB 10 at 217-234 (Third SOAF at Annexures 1 and 2); CB 30 at 1624, 1626 and 1627 (1050794.002.001.0001).

¹²² CB 30 at 1624 and 1627 (1050794.002.001.0001).

74 The presence of “was” prices and dates did not alter the dominant message or general thrust of the Down Down Tickets. Rather, they reinforced that message, by explicitly inviting a favourable comparison between the “was” price and Price 3, and conveying to a reasonable consumer within the relevant class that the “was” price constituted the regular price of the Affected Product, prior to the specified date, and thus an appropriate benchmark against which to measure the saving or discount that was now being offered to them by Coles.

Nature of the Down Down Program

75 The dominant message conveyed by the Down Down Tickets was reinforced by the nature of the Down Down Program.

76 As noted at [33] and [34] above, the Down Down Program has been running since June 2010,¹²³ and it was promoted to consumers for many years prior to the Relevant Period as offering sustained reductions to the regular shelf prices of supermarket products.¹²⁴ Many reasonable consumers within the relevant class would be familiar with this characteristic of the Down Down Program: they would understand that it offered a sustained reduction in the regular shelf price of the products to which it applied. A reasonable consumer with that understanding would naturally think, upon seeing a Down Down Ticket, that Coles was offering the relevant product at a price which was a genuine reduction to, or discount from, its previous regular price.

Regular price

77 As mentioned already, a reasonable consumer would think that the comparator price – whether it be the “was” price identified on the Down Down Ticket, or the unidentified price from which the Down Down price had been reduced – was the price which the consumer would ordinarily have expected to pay for the same product prior to the Down Down promotion; that is, its previous regular price. They would intuit that this regular price applied for a reasonable period prior to the Down Down promotion.

¹²³ CB 30 at 1633 (1050794.002.001.0001).

¹²⁴ CB 30 at 1623 and 1633 (1050794.002.001.0001) ; CB 33 at 1675 (Response to December 2023 Notice — Tranche 1, Annexure A at item 1 (1050794.007.001.0001 at .0003)); and CB 34 at 1708-1709 (Response to December 2023 Notice — Tranche 2, Annexure A at items 4 and 5 (1050794.008.001.0001 at .0004 and .0005)).

78 This temporal aspect flows from the expectations of reasonable consumers that the reduction or discount being offered constituted a meaningful or genuine saving for them, compared to the regular price at which the product was ordinarily offered for sale. Such consumers are not likely to regard the reduction or discount as offering them a meaningful or genuine saving if, in fact, the comparison price had not applied for a reasonable period before the Down Down price.¹²⁵ A reasonable consumer would not expect the comparison price to be a temporarily spiked price, as that would conflict with the dominant message that Coles was offering the product at a price which represented a genuine discount from its previous regular price.

Coles' intended meaning

79 As explained at [62.7] above, if a representation is made in terms apt to create a particular mental impression, and is intended to do so, it may properly be inferred that the representation has had that effect on consumers, particularly where the representor's business benefits from creating such an impression.¹²⁶

80 In the present case, Coles' subjective intention as to what the Down Down Tickets would convey to consumers is entirely consistent with the Down Down Representation relied upon by the ACCC.

81 Among other things, Coles' s 155 responses state that:

81.1 "When a product is placed on Down Down, the product's regular shelf price drops to a new lower regular shelf price".¹²⁷

81.2 "the Down Down Program is a promotional campaign which involves reducing a product's regular shelf price (the Benchmark Price) to a new lower regular shelf price for a longer period than the usual weekly specials".¹²⁸

81.3 "The Rules [i.e., the Down Down Policies] outline the requirements in place to ensure that any representation offering a saving or a discount off a regular price is genuine and is based off a regular price that has been offered for a reasonable

¹²⁵ See, e.g., *Kogan* at [71]-[73], [81], [84]-[86].

¹²⁶ *TPG Internet HCA* at [55] (French CJ, Crennan, Bell and Keane JJ).

¹²⁷ CB 29 at 1603 (Response to May 2023 Notice – Tranche 1 at Item 2 (1050794.003.001.0004 at .0004) (our emphasis)).

¹²⁸ CB 33 at 1675 (Response to December 2023 Notice – Tranche 1 at Item 1 (1050794.007.001.0001 at .0003) (our emphasis)). See also: CB 30 at 1623 and 1633 (1050794.002.001.0001); CB 34 at 1708 (Response to December 2023 Notice – Tranche 2 at Item 4 (1050794.008.001.0001 at .0004)).

period, in reasonable numbers immediately before the price reduction representation is made”.¹²⁹

82 It is also plain from the Down Down Policies (see [43] to [49] above) that Coles appreciated and intended that its Down Down promotions would convey to consumers that the previous regular price had applied for a reasonable period prior to the promotion. That is precisely why Coles imposed guardrails (albeit they were ultimately inadequate) to prevent products being placed on the Down Down Program until after they had been offered at the regular price for a reasonable period. Coles recognised that it would be misleading to represent to consumers that the Down Down price was a genuine reduction or discount from the previous regular price if the product had not been offered for sale at that price for a reasonable period beforehand.

83 This recognition is captured in an email from Coles’ Head of Pricing and Value. In response to a proposal from a Senior Category Manager to move certain products onto the Down Down Program after less than four weeks at an undiscounted price, the Head of Pricing and Value said:¹³⁰

You can drop your SEL shelf price back down now. **But you can’t run a Down Down unless you price establish** - but further, waiting 4 weeks to then say ‘Down Down was \$31.50 now \$22.50’ while compliance wise is allowed, *is not in the spirit of what DD is, when only 4 weeks earlier it was \$21.50 ...*

84 To similar effect, Coles’ consumer protection manual stated, in a section headed ‘‘Was/Now’ or ‘strike through’ pricing’, that:¹³¹

In determining whether the represented saving will be achieved, we need to consider whether relevant consumers would have paid the ‘was’ or ‘strike through’ price to purchase that item for a reasonable period before the sale commenced.

85 In short, Coles intended that its Down Down Tickets would convey to consumers that the relevant product’s Down Down price was a genuine reduction to, or discount from, that product’s previous regular price, being a price at which that product was ordinarily offered for sale for a reasonable period prior to the promotion. It should be inferred that

¹²⁹ CB 26 at 1555 (Voluntary Response dated 1 August 2022 at p. 5 (our emphasis) (1050794.001.001.0002)).

¹³⁰ CB 681 at 2360 (COL.500.029.6771 at .6771 (underlined emphasis in original; italicised emphasis added)).

¹³¹ CB 987 at 4331 and 4332 (‘Consumer Protection — Displaying Prices’ (COL.500.002.0053 at .0058; see also at .0057 (our emphasis))).

the Down Down Tickets did, indeed, convey a representation to this effect to reasonable consumers within the relevant class.

E.2 The Down Down Representation was false or misleading

86 The Down Down Representation was false, misleading or likely to mislead. Coles' own Head of Pricing and Value squarely identified the problem when he said that telling customers the price "was" \$31.50 and is now "Down Down" to \$22.50 "is not in the spirit of what DD is, when only 4 weeks earlier it was \$21.50".¹³² In short, if the price has actually gone up, relative to the price which customers would have expected to pay only 4 weeks (or at most, no more than 45 days) before the promotion began, to make consumers think the price of that product has reduced – gone "Down Down" – is to lead them into error. Within a short space of time, Coles effected an increase in the price of each Affected Product, relative to the price which had applied for many months beforehand. At the Down Down Price, consumers were paying more, not less, than they ordinarily would have paid for that product.¹³³ By its conduct, Coles disguised those price increases¹³⁴ as discounts.

Identifying a product's previous regular price

87 As noted above, a reasonable consumer would think that the comparator price from which the Down Down price had been reduced was the price which the consumer would ordinarily have expected to pay for the same product in the past; that is, its previous regular price, one which applied for a reasonable period prior to the promotion. They would think that the reduction or discount being promoted constituted a meaningful or genuine saving for them, compared to the regular price at which the product had been offered for sale over a reasonable period.

88 What constitutes a "reasonable period", and therefore what a reasonable consumer would consider to be a product's previous regular price, will depend on various factors. A significant factor will be the pricing history of the product itself: at what price(s) and for how long had the product been offered for sale at those prices, prior to the promotion. Speaking generally, a reasonable consumer is unlikely to consider a price that applied for just a few days or weeks to be the regular price of a product, if that same product was

¹³² CB 681 at 2360 (COL.500.029.6771 at .6771).

¹³³ Or, in the case of six Particularised Promotions, paying the same price.

¹³⁴ Or, in the case of six Particularised Promotions, regular prices remaining the same.

offered for sale at a different price for several months or more than a year immediately beforehand.

- 89 No doubt there will be borderline cases where it is difficult to be certain whether a reasonable consumer would regard one regular price as having been replaced by a more recent regular price. This is not one of those cases.
- 90 As we have outlined at [53] above, in the case of the Affected Products,¹³⁵ Price 1 applied for at least 180 days (i.e., about 26 weeks) and a median period of 343 days (i.e., about 49 weeks), including any short-term Specials or other temporary price fluctuations of seven days or less. In the case of the Sample Products, the Price 1 Period ranged from 794 days to 187 days, with a median of 307 days (i.e., about 44 weeks) including days on Special, etc (or 278 days (i.e., about 40 weeks) excluding short-term promotions).¹³⁶ This was sufficient time to establish Price 1 as the price which reasonable consumers would ordinarily expect to pay for the Affected Products.
- 91 In contrast, the Price Spike Period which preceded the Down Down promotions lasted for a maximum of 45 days (i.e., about 6 weeks) and a median period of only 28 days (i.e., 4 weeks). In the case of the Sample Products, the Price Spike Period ranged from 7 to 42 days, with a median period of 28 days.¹³⁷ The median Price Spike Period was thus about one tenth of the duration of the median Price 1 Period; and the maximum Price Spike Period was about 6 weeks, whereas the absolute minimum Price 1 Period was 20 weeks longer than that.
- 92 Given these facts, in the case of each Particularised Promotion, the previous regular price of the Affected Product immediately prior to the Down Down promotion was Price 1, not the price which applied during the relatively short Price Spike Period.

The conduct had a tendency to lead consumers into error

- 93 Coles' conduct had a tendency to lead reasonable consumers into error; that is, to cause reasonable consumers to form an erroneous assumption or conclusion about some fact or matter.

¹³⁵ The price and the duration of each pricing period, for each Affected Product, are to be found at CB 8 at 114-169 (First SOAF at Annexure 1, columns C, F and I).

¹³⁶ See Annexure A to these submissions.

¹³⁷ See Annexure A to these submissions.

94 For example, a reasonable consumer viewing Coles' Down Down promotion in respect of the first Sample Product, Karicare Follow On Formula (1023271) (**Karicare (1023271)**), would think that the Down Down Price of \$21.00 represented a genuine reduction to, or discount from, that product's previous regular price.¹³⁸ The Down Down Ticket displayed in the supermarket conveyed to them that the previous regular price of that product was \$24.00.¹³⁹ But what was not disclosed to the consumer was that the \$24.00 price had subsisted for a mere 23 days, and for 794 days immediately beforehand, the regular price of Karicare (1023271) was actually \$18.00. While the consumer was led to think the Down Down Price of \$21.00 was a reduction from the regular price of Karicare (1023271), the Down Down Price was in fact a 17% increase on the regular price of that product. Put differently, excepting short-term Specials, the Down Down Price promoted by Coles was higher than the price which the consumer could expect to pay for the product on all but 23 of the 817 days which immediately preceded the Down Down promotion.

95 Similarly, a reasonable consumer viewing Coles' Down Down promotion in respect of the second Sample Product, Coca Cola Soft Drink (2L) (191736) (**Coca Cola (191736)**), would think that the Down Down Price of \$3.50 represented a genuine reduction to, or discount from, that product's previous regular price.¹⁴⁰ The Down Down Ticket displayed in the supermarket conveyed to them that the previous regular price of that product was \$4.40.¹⁴¹ But what was not disclosed to the consumer was that the \$4.40 price had only subsisted for 42 days (or just 28 days taking into account short-term Specials)¹⁴², and for at least 239 days (or at least 204 days taking into account short-term Specials)¹⁴³ immediately beforehand, the regular price of Coca Cola (191736) was actually \$2.75. While the consumer was led to think the Down Down price of \$3.50 was a reduction from the regular price of Coca Cola (191736), the Down Down Price was in fact a 27% increase on the regular price of that product. Put differently, even including days on short-term Specials, the Down Down Price was higher than the price which the consumer could

¹³⁸ See Annexure A to these submissions.

¹³⁹ CB 10 at 218 (Third SOAF, Annexure 1, p. 3).

¹⁴⁰ See Annexure A to these submissions.

¹⁴¹ CB 10 at 217 (Third SOAF, Annexure 1, p. 2).

¹⁴² CB 9 at 189-192 (Second SOAF, Annexure 1).

¹⁴³ CB 9 at 189-192 (Second SOAF, Annexure 1).

expect to pay for the product on all but 42 of the 281 days which immediately preceded the Down Down promotion.

- 96 It is not necessary to multiply the examples, but observations to similar effect may be made in respect of the remaining 10 Sample Products and the Particularised Promotions associated with them.
- 97 Any reasonable consumer who knew the facts would conclude that Coles was tricking them: that Coles was not offering reduced prices on the Sample Products at all, but rather had increased (or in one case maintained) the regular prices of those products and was passing those increased (or maintained) prices off as discounts.

Coles' response

- 98 Coles' Concise Statement in Response, and much of its affidavit evidence, stress that Price 2 reflected cost increases incurred by Coles' wholesale suppliers, and hence by Coles itself, and that Price 3 represented a genuine discount from Price 2. Those propositions will be examined at trial, including during cross-examination. In particular, it will be seen that, more often than not, Price 3 was pre-planned;¹⁴⁴ that is, the so-called genuine discount was agreed between Coles and its supplier before Price 2 was ever charged, such that, in most cases, Price 2 was always going to be temporary, pending the introduction of Price 3. The notion that Price 3 constitutes a genuine discount, even though Price 2 was only ever going to be temporary and seems only to have existed in order that Price 3 could later be promoted to consumers as a discount, prefers form over substance and should not be accepted.
- 99 But it does not ultimately matter. The ACCC's complaint is not that Coles lacked sound commercial reasons for increasing Price 1 to Price 2 or Price 3. Its complaint is that, rather than be frank with its customers about the fact that regular prices of the Affected Products had increased, Coles made its customers think that those regular prices had gone down.
- 100 Nor is the ACCC's complaint that Price 3 was not a reduction compared with Price 2. Plainly it was. The ACCC's complaint is that consumers were led to believe that Price 2 was the previous regular price of the product, which had been offered for a reasonable period prior to the promotion, when that was not so; and that Price 3 was in fact higher

¹⁴⁴ All of the 14 Particularised Promotions involving the Sample Products were pre-planned. In some of these instances, Price 3 was being planned as an 'Every Day Price' promotion before the plan changed to it being a Down Down price.

than or (in six instances) the same as the previous regular price of the product (Price 1), when consumers were led to think that Price 3 was lower.

F CONCLUSION

101 For the reasons outlined above, which will be developed at trial, it is respectfully submitted that the Court should find, with respect to each Affected Product, that Coles made the Down Down Representation; that conduct was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL; and that representation was also false or misleading with respect to the price of the Affected Products, in contravention of s 29(1)(i) of the ACL.

16 January 2026

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ANNEXURE A: OVERVIEW OF PRICING AND PROMOTIONS FOR SAMPLE PRODUCTS

Explanatory Notes

1. The information in Columns A to K has been extracted from Annexure 1 to the First SOAF. The figures in Column D were calculated using the equation: $(P2 - P1 / P1) \times 100$. The same methodology has been applied for Columns G and K.
2. Where “#” appears next to a price, this indicates that the relevant Price 1, Price 2, and/or Price 3 price was subject to fluctuations during the date ranges specified in Column C, F, or I (as applicable) due to the Sample Product being promoted on one or more short-term Specials of a few days or weeks, or being the subject of other price fluctuations lasting seven days or less. Where this has occurred, the date range and number of days in Column C / F / I include some days on which the Sample Product was not offered for sale at the price identified in Column B / E / H (as applicable) by reason of those fluctuations.
3. Columns B, E, and H use the following colour coding system to communicate the promotional status of the prices identified in those columns, as recorded in Annexure 1 to the Second SOAF dated 21 August 2025: **red** means that the relevant price was a Down Down Price; and **teal** means that the relevant price was a Non-Promotional Price. In a number of cases, a Sample Product was removed from the Down Down Program but continued to be sold at the same price for a short time immediately before a Price Spike Period, consistently with Coles’ Down Down Policies.
4. Where a cell in the “No.” column has been shaded **dark grey**, this indicates that, on the ACCC’s analysis, the Particularised Promotion described in that row did not comply with the Down Down Policies then in effect, as further explained in the accompanying end note. These instances comprise 6 out of the 14 Particularised Promotions which concern the Sample Products.

	A	B	C	D	E	F	G	H	I	J	K	
No.	Sample Product	Price 1		% change P1 vs P2	Price 2		% change P2 vs P3	Price 3			% change P1 vs P3	Ann. 1 Row
		Price	Period		Price	Period		Price	Period	Days on DD		
1. ⁱ	KARICARE FOLLOW ON FORMULA: 900 GRAM (1023271)	\$18.00	01/01/21 - 05/03/23 (794 days)	+33%	\$24.00	06/03/23 - 28/03/23 (23 days)	-13%	\$21.00	29/03/23 - 04/05/23 (37 days)	37 days	+17%	81
2.	CCA SOFT DRINK: COLA:::2 LITRE (191736)	\$2.75 [#]	08/06/21 - 01/02/22 (239 days)	+60%	\$4.40 [#]	02/02/22 - 15/03/22 (42 days)	-20%	\$3.50 [#]	16/03/22 - 04/05/23 (415 days)	359 days	+27%	27
3.	PEDIGREE ADULT WET DOG FOOD WITH 5 KINDS OF MEAT LOAF 1.2KG CAN:FIVE KINDS MEAT:::1.2 KG (255409)	\$4.50	09/03/22 - 11/09/22 (187 days)	+22%	\$5.50	12/09/22 - 09/10/22 (28 days)	-18%	\$4.50 [#]	10/10/22 - 04/05/23 (207 days)	186 days	0%	151
4. ⁱⁱ	ARNOTTS SHAPES MULTIPACK VARIETY 15 PACK:375 GRAM (2992180)	\$5.00	08/06/21 - 17/05/22 (344 days)	+30%	\$6.50 [#]	18/05/22 - 14/06/22 (28 days)	-15%	\$5.50	15/06/22 - 04/05/23 (324 days)	205 days	+10%	6
5. ⁱⁱⁱ	BRAGG SEASONING NUTRITIONAL YEAST PREMIUM QUALITY:127 GRAM (3139426)	\$13.20 [#]	15/11/21 - 28/09/22 (318 days)	+44%	\$19.00	29/09/22 - 25/10/22 (27 days)	-13%	\$16.50	26/10/22 - 04/05/23 (191 days)	191 days	+25%	16
6.	DANONE YOPRO YOGHURT:VANILLA:::700 GRAM (3246914)	\$6.00 [#]	10/06/21 - 11/09/22 (459 days)	+30%	\$7.80	12/09/22 - 09/10/22 (28 days)	-14%	\$6.70	10/10/22 - 18/04/23 (191 days)	191 days	+12%	41

	A	B	C	D	E	F	G	H	I	J	K	
No.	Sample Product	Price 1		% change P1 vs P2	Price 2		% change P2 vs P3	Price 3			% change P1 vs P3	Ann. 1 Row
		Price	Period		Price	Period		Price	Period	Days on DD		
7.	COLGATE TOTAL ORIGINAL TOOTHPASTE 200G:200 GRAM (3401074)	\$5.50 [#]	09/06/21 - 08/03/22 (273 days)	+27%	\$7.00	09/03/22 - 05/04/22 (28 days)	-14%	\$6.00 [#]	06/04/22 - 04/05/23 (394 days)	303 days	+9%	36
8.	COLES FINEST QUINCE PASTE 100G:100 GRAM (3609315)	\$3.00	29/09/21 - 03/07/22 (278 days)	+50%	\$4.50	04/07/22 - 31/07/22 (28 days)	-30%	\$3.15	01/08/22 - 04/05/23 (277 days)	277 days	+5%	32
9.	REXONA ANTI PERSP DEODORANT:250 ML (5079187)	\$5.00	05/03/21 - 17/04/22 (409 days)	+30%	\$6.50	18/04/22 - 17/05/22 (30 days)	-8%	\$6.00	18/05/22 - 04/05/23 (352 days)	352 days	+20%	175
10.	LURPAK SLIGHTLY SALTED SPREADABLE TUB 250 GRAM:BUTTER: :250 GRAM (5393910)	\$5.00 [#]	08/06/21 - 14/06/22 (372 days)	+20%	\$6.00	15/06/22 - 12/07/22 (28 days)	-8%	\$5.50 [#]	13/07/22 - 02/05/23 (294 days)	224 days	+10%	101
11A.	NATURE'S GIFT ADULT ALL BREEDS WET DOG FOOD LOAF CHICKEN-RICE & VEGETABLES	\$3.50 [#]	08/06/21 - 08/03/22 (274 days)	+57%	\$5.50	09/03/22 - 17/04/22 (40 days)	-27%	\$4.00 [#]	18/04/22 - 17/01/23 (275 days)	268 days	+14%	116
11B.iv	1.2KG: CHICKEN VEGETABLE AND RICE::1.2 KG (3589976)	\$4.00 [#]	18/04/22 - 07/02/23 (296 days)	+50%	\$6.00	08/02/23 - 14/02/23 (7 days)	-25%	\$4.50	15/02/23 - 04/05/23 (79 days)	79 days	+13%	117

	A	B	C	D	E	F	G	H	I	J	K	
No.	Sample Product	Price 1		% change P1 vs P2	Price 2		% change P2 vs P3	Price 3			% change P1 vs P3	Ann. 1 Row
		Price	Period		Price	Period		Price	Period	Days on DD		
12A.v	VIVA PAPER TOWEL WHITE SELECT A SIZE 3 PACK:3 PACK (3823600)	\$4.00 [#]	09/06/21 - 03/05/22 (329 days)	+38%	\$5.50	04/05/22 - 29/05/22 (26 days)	-18%	\$4.50	30/05/22 - 22/01/23 (238 days)	238 days	+13%	236
12B.vi		\$4.50	30/05/22 - 06/02/23 (253 days)	+44%	\$6.50	07/02/23 - 05/03/23 (27 days)	-15%	\$5.50	06/03/23 - 04/05/23 (60 days)	60 days	+22%	237

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- i **Karicare Follow On Formula: 900g (Row 1):** The relevant Price 1 Period ended on 5 March 2023. As Price 1 was a Down Down Price, the May 2022 ‘*Down Down and Every Day Factsheet*’ (**May 2022 Factsheet**) required the product to be removed from Down Down and sold for 4 weeks (28 days) on a standard shelf edge ticket with no simple promotions before being returned to Down Down: COL.500.0001.0007 at .0008. The Price Spike Period for the product was only 23 days — being 5 days short of the mandated period.
- ii **Arnotts Shapes Multi-pack Variety 15 Pack: 375g (Row 4):** The relevant Price 1 Period ended on 17 May 2022. As Price 1 was a Down Down Price, the May 2022 Fact Sheet required the product to be removed from Down Down and sold for 4 weeks (28 days) on a standard shelf edge ticket with no simple promotions before being returned to Down Down: COL.500.0001.0007 at .0008. While the Price Spike Period for this product lasted the full 4 weeks, this period included a non-compliant short-term Special on 7 out of the mandated 28 days.
- iii **Bragg Seasoning Nutritional Yeast Premium Quality: 127g (Row 5):** The relevant Price 1 Period ended on 28 September 2022. The May 2022 Factsheet required the price of a product not already on Down Down to be established for 4 consecutive weeks prior to launch, or for “4 out of the last 6 weeks clear of simple promotions prior to launch, including 2 of the last 2 weeks”: COL.500.0001.007 at .0007. The Price Spike Period for the Sample Product was only 27 days — being 1 day short of the mandated period.
- iv **Nature’s Gift Adult All Breeds Wet Dog Food – Chicken, Rice & Vegetables: 1.2kg (Row 11B):** The relevant Price 1 Period ended on 7 February 2023. As Price 1 was a Down Down Price, the May 2022 Factsheet required the product to be removed from Down Down and sold for 4 weeks (28 days) on a standard shelf edge ticket with no simple promotions before being returned to Down Down: COL.500.0001.0007 at .0008. The Price Spike Period for the product was only 7 days — being 25% of the mandated period.
- v **Viva Paper Towel: 3 Pack (Row 12A):** The relevant Price 1 Period ended on 3 May 2022. As Price 1 was a Down Down Price, the May 2022 Factsheet required the product to be removed from Down Down and sold for 4 weeks (28 days) on a standard shelf edge ticket with no simple promotions before being returned to Down Down: COL.500.0001.0007 at .0008. The Price Spike Period for the product was only 26 days — being 2 days short of the mandated period.
- vi **Viva Paper Towel: 3 Pack (Row 12A):** The relevant Price 1 Period ended on 6 February 2023. As Price 1 was a Down Down Price, the May 2022 Factsheet required the product to be removed from Down Down and sold for 4 weeks (28 days) on a standard shelf edge ticket with no simple promotions before being returned to Down Down: COL.500.0001.0007 at .0008. The Price Spike Period for the product was only 27 days — being 1 day short of the mandated period.

ANNEXURE B: COLES' MARGINS ON SAMPLE PRODUCTS

Explanatory Notes

1. Appendix B of the Edwards Report (**Edwards Data**) is an Excel spreadsheet containing the data on which Dr Edwards' analysis in the Edwards Report is based: Edwards Report, [3(c)]. Section 3.3 of the Edwards Report sets out the steps that were taken to prepare the data for analysis, and describes a number of the labels in the Edwards Data, including as follows:
 - a) "Retail Price (\$)" – the daily retail price per unit for each of the Sample Products during the period 1 January 2021 to 4 May 2023 (inclusive): Edwards Report, [38]; and
 - b) "Cost Price less Total Supplier Funding (\$)" – the daily cost price less total supplier funding per unit which was computed by deducting the total supplier funding per unit from the cost price per unit for all line items: Edwards Report, [39(e)].
2. The table below sets out Coles' median daily margin in respect of each of the 14 Particularised Promotions for the Sample Products based on the data in Annexure 1 to the First SOAF (being the details extracted at Columns A, B, C, E, F and G of the table below) and the Edwards Data (for Columns D and H of the table) using the following equation to calculate a daily margin in percentage terms (and then taking the median daily margin for each of the Price 1 and Price 3 Periods):
$$\frac{\text{"Retail Price ($)"} - \text{"Cost Price less Total Supplier Funding ($)"}{\text{"Retail Price ($)"}} \times 100$$
3. Column I of the table sets out the difference between the values in Columns D and H.
4. The final column notes the applicable row of Annexure 1 to the First SOAF for reference purposes.

	A	B	C	D	E	F	G	H	I	
No.	Sample Product	Price 1		Price 1 Period median daily margin	Price 3			Price 3 Period median daily margin	Difference between Column D to Column H	Ann. 1 Row
		Price	Period		Price	Period	Days on DD			
1.	KARICARE FOLLOW ON FORMULA: 900 GRAM (1023271)	\$18.00	01/01/21 - 05/03/23 (794 days)	█	\$21.00	29/03/23 - 04/05/23 (37 days)	37 days	█	█	81
2.	CCA SOFT DRINK: COLA:::2 LITRE (191736)	\$2.75 [#]	08/06/21 - 01/02/22 (239 days)	█	\$3.50 [#]	16/03/22 - 04/05/23 (415 days)	359 days	█	█	27
3.	PEDIGREE ADULT WET DOG FOOD WITH 5 KINDS OF MEAT LOAF 1.2KG CAN:FIVE KINDS MEAT:::1.2 KG (255409)	\$4.50	09/03/22 - 11/09/22 (187 days)	█	\$4.50 [#]	10/10/22 - 04/05/23 (207 days)	186 days	█	█	151
4.	ARNOTTS SHAPES MULTIPACK VARIETY 15 PACK:375 GRAM (2992180)	\$5.00	08/06/21 - 17/05/22 (344 days)	█	\$5.50	15/06/22 - 04/05/23 (324 days)	205 days	█	█	6
5.	BRAGG SEASONING NUTRITIONAL YEAST PREMIUM QUALITY:127 GRAM (3139426)	\$13.20 [#]	15/11/21 - 28/09/22 (318 days)	█	\$16.50	26/10/22 - 04/05/23 (191 days)	191 days	█	█	16
6.	DANONE YOPRO YOGHURT:VANILLA:::700 GRAM (3246914)	\$6.00 [#]	10/06/21 - 11/09/22 (459 days)	█	\$6.70	10/10/22 - 18/04/23 (191 days)	191 days	█	█	41
7.	COLGATE TOTAL ORIGINAL TOOTHPASTE 200G:200 GRAM (3401074)	\$5.50 [#]	09/06/21 - 08/03/22 (273 days)	█	\$6.00 [#]	06/04/22 - 04/05/23 (394 days)	303 days	█	█	36

	A	B	C	D	E	F	G	H	I	
No.	Sample Product	Price 1		Price 1 Period median daily margin	Price 3			Price 3 Period median daily margin	Difference between Column D to Column H	Ann. 1 Row
		Price	Period		Price	Period	Days on DD			
8.	COLES FINEST QUINCE PASTE 100G:100 GRAM (3609315)	\$3.00	29/09/21 - 03/07/22 (278 days)	██████	\$3.15	01/08/22 - 04/05/23 (277 days)	277 days	██████	██████	32
9.	REXONA ANTI PERSP DEODORANT:250 ML (5079187)	\$5.00	05/03/21 - 17/04/22 (409 days)	██████	\$6.00	18/05/22 - 04/05/23 (352 days)	352 days	██████	██████	175
10.	LURPAK SLIGHTLY SALTED SPREADABLE TUB 250 GRAM:BUTTER: ..250 GRAM (5393910)	\$5.00 [#]	08/06/21 - 14/06/22 (372 days)	██████	\$5.50 [#]	13/07/22 - 02/05/23 (294 days)	224 days	██████	██████	101
11A.	NATURE'S GIFT ADULT ALL BREEDS WET DOG FOOD LOAF CHICKEN- RICE & VEGETABLES 1.2KG: CHICKEN VEGETABLE AND RICE:::1.2 KG (3589976)	\$3.50 [#]	08/06/21 - 08/03/22 (274 days)	██████	\$4.00 [#]	18/04/22 - 17/01/23 (275 days)	268 days	██████	██████	116
11B.		\$4.00 [#]	18/04/22 - 07/02/23 (296 days)	██████	\$4.50	15/02/23 - 04/05/23 (79 days)	79 days	██████	██████	117
12A.	VIVA PAPER TOWEL WHITE SELECT A SIZE 3 PACK:3 PACK (3823600)	\$4.00 [#]	09/06/21 - 03/05/22 (329 days)	██████	\$4.50	30/05/22 - 22/01/23 (238 days)	238 days	██████	██████	236
12B.		\$4.50	30/05/22 - 06/02/23 (253 days)	██████	\$5.50	06/03/23 - 04/05/23 (60 days)	60 days	██████	██████	237