

NOTICE OF FILING

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File Title: AUSTRALIAN COMPETITION & CONSUMER COMMISSION v
WOOLWORTHS GROUP LIMITED (ACN 000 014 675)
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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Concise Statement in Response

Federal Court of Australia

No. VID 974 of 2024

District Registry: Victoria

Division: General

Australian Competition and Consumer Commission

Applicant

Woolworths Group Limited (ACN 000 014 675)

Respondent

- I. This is the Concise Statement in Response (**Concise Response**) of Woolworths to the Concise Statement filed by the ACCC on 23 September 2024 (**Concise Statement** or **CS**).
- II. The proceedings concern a period of considerable inflation with significant cost pressures on suppliers. Contrary to the implication in the Concise Statement, Woolworths typically did not initiate retail price increases. Rather, Woolworths was typically responding to cost price increases from its suppliers, with cost price increase requests being made at four to five times the rate received pre-COVID. Following those cost price increases, Woolworths sold products at particular retail prices for a period of time. The prices were genuine prices and many units were sold at those prices.
- III. Subsequently, Woolworths reduced the retail prices of the products the subject of these proceedings. These reduced prices were discounts from the previous higher prices. Those discounts were not “illusory”. The labels for the products accurately identified that the prices had been “dropped”, accurately identified the previous higher price,¹ and identified the date at which the product had been sold at that previous higher price. The statements on the labels were precise and accurate. They were in no way false or

¹ Save for any situations where the “dropped” price had been in place for more than 12 months, in which case the labels accurately identified the date of the previous higher price, in the form of “Since [date].”

Filed on behalf of the Respondent

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misleading, and Woolworths denies the allegation that it has made false or misleading representations in breach of ss 18 and 29(1) of the Australian Consumer Law (**ACL**).

- IV. Unless otherwise indicated, this Concise Response adopts terms as defined within the Concise Statement. This approach has been adopted for convenience only and should not be taken as an admission by Woolworths of any fact or matter, particularly where such defined terms seek to characterise conduct.
- V. Paragraph 1 of the Concise Statement refers to “at least 266 different products” which it defines as “Affected Products”. The ACCC’s Affected Products Schedule identifies 266 products only, and identifies 276 instances in respect of those 266 products. Woolworths does not plead to any allegation in the Concise Statement in respect of any products or any instances other than the 266 products and 276 instances in the ACCC’s Affected Products Schedule. Likewise, references to “**Affected Products**” in this Concise Response are limited to the 266 products identified in the ACCC’s Affected Products Schedule.

A. INTRODUCTION

- 1 In response to paragraph 1, Woolworths notes that the responses below are provided only in respect of the 276 instances and:
- (a) says that in the years prior to the Relevant Period, there was low inflation and prices (both retail prices and cost prices for most grocery products in Australia) were relatively stable. Requests by suppliers to Woolworths Supermarkets (being a business within Woolworths Group Limited) for cost price increases (**CPI Requests**) were infrequent;
 - (b) says that during the Relevant Period inflation increased and there was a significant increase in the number and size of CPI Requests received by Woolworths Supermarkets;
 - (c) admits that during the Relevant Period, in respect of the 266 products (**Affected Products**) and the 276 instances identified in the ACCC’s Affected Products Schedule dated 23 September 2024, there were retail price increases;
 - (d) says that the relevant retail price increases were, in most cases, a response to increases in the cost prices of the Affected Products charged by suppliers to Woolworths Supermarkets as a result of cost inflation experienced by those suppliers;
 - (e) denies that the relevant retail price increases were “a temporary price spike”, and says that this ignores the long term effect of inflation;

- (f) says that each of the Affected Products was priced and offered for sale by Woolworths Supermarkets at an undiscounted retail price (the **Undiscounted Price**) for a period of time, and that numerous sales of each of the Affected Products were made to customers at that Undiscounted Price;
- (g) says that each of the Affected Products was in each of the 276 instances subsequently the subject of Woolworths Supermarkets' "Prices Dropped" Program, whereby retail prices are reduced, supported in most instances by funding provided by suppliers, such that the price is reduced or "dropped" from the Undiscounted Price while the "Prices Dropped" program continues (the **Dropped Price**);
- (h) says that, as a result of (f) and (g), each of the Affected Products had its retail price dropped, and the "Prices Dropped" statement was accurate for each of the Affected Products;
- (i) says that it is a mischaracterisation for the ACCC to describe superseded pre-inflationary retail prices as "the price at which each product had ordinarily been offered for sale;"
- (j) says that, in respect of the 276 instances in which each of the Affected Products was on the "Prices Dropped" program during the Relevant Period at a Dropped Price, the relevant product was offered for sale by reference to a red shelf ticket (instore) or a red label (online) which stated (the "**Prices Dropped Ticket**"):
 - (i) "Prices Dropped";
 - (ii) the Dropped Price;
 - (iii) other than in limited instances, "was \$XX", where \$XX was the Undiscounted Price prevailing in the period referred to in paragraph (f); and
 - (iv) the date at which the product was last offered for sale at the Undiscounted Price; and
- (k) says that suppliers and Woolworths Supermarkets would discuss CPI Requests and resulting price increases, supplier funding and resulting specials or discounted prices (including Dropped Prices), and many other matters, in a process months in advance, such that the Undiscounted Price and Dropped Price for an Affected Product might be discussed and planned in advance; and
- (l) otherwise denies paragraph 1.

2 In response to paragraph 2, Woolworths:

- (a) repeats paragraph 1 above;
- (b) says that Woolworths Supermarkets, by the Prices Dropped Ticket, represented to consumers that the retail prices of Affected Products on the “Prices Dropped” Program had been reduced;
- (c) says that this statement was accurate, because the prices of Affected Products on “Prices Dropped” had in fact been reduced;
- (d) says that it is inaccurate and misleading for the ACCC to suggest that “the purported discount was illusory” when the Dropped Prices had been reduced from Undiscounted Prices, and says that the ACCC appears to be incorrectly comparing the Dropped Prices to superseded pre-inflationary retail prices; and
- (e) otherwise denies paragraph 2.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

3 In response to paragraph 3, Woolworths:

- (a) says that the Woolworths Supermarkets business is the operator of one of the largest chains of supermarkets in Australia, by which it offers products for sale to its customers in-store through its physical Woolworths Supermarkets and Woolworths Metro Food Stores and also online through Woolworths Online both via www.woolworths.com.au and the Woolworths Online app;
- (b) says that there were approximately 1,037 Woolworths Supermarkets and approximately 97 Woolworths Metro Food Stores during the Relevant Period; and
- (c) otherwise denies paragraph 3.

The Prices Dropped Program

4 Woolworths admits paragraph 4.

5 In response to paragraph 5, Woolworths:

- (a) says that during the Relevant Period it had a range of price reduction programs to promote the value of products to customers, and the “Prices Dropped” Program was one such program;
- (b) says that under the “Prices Dropped” Program, the price of a product was reduced from the Undiscounted Price to a Dropped Price;

- (c) says that in most cases the funding of the Dropped Price included an investment from the supplier;
- (d) says that in most cases the investment by the supplier to support the Dropped Price was:
 - (i) in the form of a negotiated discount to the cost price per unit of the product charged by the supplier to Woolworths Supermarkets, and paid to Woolworths Supermarkets after the sale to Woolworths Supermarkets of each unit (known as a “**Deferred Deal**”); and
 - (ii) negotiated between Woolworths Supermarkets and the supplier, including in relation to the amount of Deferred Deal funding provided by the supplier and the duration of Deferred Deal funding;
- (e) says that a “Deferred Deal” usually has terms that include:
 - (i) a commitment by the supplier to contribute a dollar amount per unit once sold by Woolworths Supermarkets (hence “deferred”), for a period terminable at the supplier’s option at any time; and
 - (ii) a commitment by Woolworths Supermarkets to apply a red ticket with the Dropped Price to the product in store and on-line; and
 - (iii) that the Deferred Deal is terminated if the supplier makes a successful CPI Request, with any replacement Deferred Deal to be negotiated and agreed;
- (f) says that suppliers and Woolworths Supermarkets usually negotiated as to whether products should be placed on the “Prices Dropped” Program, and the extent of price reductions that would be offered;
- (g) says that Deferred Deal funding was terminable by the supplier at any point while a product was on the “Prices Dropped” Program (even if the duration of the Deferred Deal funding agreed to between Woolworths Supermarkets and the supplier had not been observed) and, if this occurred, the product would generally be removed from the “Prices Dropped” Program and the retail price would revert to the Undiscounted Price;
- (h) says that in return for Deferred Deal funding for the “Prices Dropped” Program, a supplier would expect to have the benefit of Woolworths Supermarkets communicating to customers that the price of the product had been reduced through the application of a Prices Dropped Ticket; and
- (i) otherwise denies paragraph 5.

6 In response to paragraph 6, Woolworths:

- (a) repeats paragraph 5 above;
- (b) says that short term specials generally involved the discounting of prices for one or two weeks;
- (c) says that during the Relevant Period, Woolworths Supermarkets typically applied the "Price Dropped" Program for at least 12 weeks;
- (d) says that many of the Affected Products were on the "Prices Dropped" Program for six months or longer; and
- (e) otherwise denies paragraph 6.

7 Woolworths refers to sub-paragraphs 1(g) and 1(j) and otherwise admits paragraph 7.

8 In response to paragraph 8, Woolworths:

- (a) refers to paragraph 9 below;
- (b) admits that the features described in paragraph 9 below remained the same during the Relevant Period; and
- (c) otherwise denies paragraph 8.

9 In response to paragraph 9, Woolworths:

- (a) in relation to 9(a), says that the electronic labels included a red shroud (i.e. snap on frame as pictured below), and otherwise admits paragraph 9(a);
- (b) refers to sub-paragraphs 1(g) and 1(j) and otherwise admits paragraphs 9(b), (c) and (d);
- (c) says further in relation to 9(d) that throughout the Relevant Period, the Prices Dropped Tickets displayed by Woolworths Supermarkets generally, where a product was on the "Prices Dropped Program for:
 - (i) less than 12 months, had a "Was" price of the product, being the retail price at which the product was previously sold and the date at which the product was last available at that retail price; or
 - (ii) more than 12 months, had a "since [date]" being the date at which the product was last available at the previous higher retail price, but the Prices Dropped Ticket did not display that price; and
- (d) otherwise denies paragraph 9.

Example of the red shroud “snap on frame”



- 10 In response to paragraph 10, Woolworths:
- (a) repeats paragraph 9; and
 - (b) otherwise denies paragraph 10.
- 11 Woolworths admits paragraph 11, but notes that some of the examples in Schedule A are not in the Affected Products and are not one of the 276 instances, and therefore are not the subject of this Concise Response.
- 12 Paragraph 12 is not a proper description of the correct position. Woolworths:
- (a) says that, in relation to the 276 instances, each Prices Dropped Ticket contained a representation to consumers that the retail price of the product had been reduced from a previous higher retail price, which was true in each case;
 - (b) denies that the Price Dropped Tickets made any representation about whether the Undiscounted Price, or any previous retail price, was a “regular price”;
 - (c) says that it is unclear what is meant by “genuine” in paragraph 12, and the Concise Statement is embarrassing in that respect;
 - (d) says that the representation on the Prices Dropped Ticket is a simple representation about a reduction in retail price, rather than any representation about any qualitative aspects of that price reduction; and
 - (e) otherwise denies paragraph 12.
- 13 In response to paragraph 13, Woolworths:
- (a) repeats paragraphs 1 and 2 above;
 - (b) says that each Prices Dropped Ticket contained a simple representation that the retail price of the product had been reduced from a previous higher price, which representation was true and accurate because the retail price of each product had been reduced from a previous higher price;

- (c) says that each Prices Dropped Ticket contained information which was factually accurate, and in no way false or misleading;
 - (d) says that it is not appropriate to compare the retail prices on the Prices Dropped Ticket with superseded pre-inflationary retail prices;
 - (e) denies that any representation was made about a “previous regular price” or that the term “previous regular price” has any sensible meaning in the circumstances of this case;
 - (f) says that it should be possible to reach agreement on objective facts about the prices of products over time, shorn of the ACCC’s adjectives; and
 - (g) otherwise denies paragraph 13.
- 14 In response to paragraph 14, Woolworths:
- (a) admits that for some Affected Products the product was placed on the “Prices Dropped” Program more than once during the Relevant Period;
 - (b) says that the 276 instances include some where a product was placed on the “Prices Dropped” Program for a second time, which is why the 276 instances is greater in number than the 266 Affected Products;
 - (c) repeats paragraph 13(f) above; and
 - (d) otherwise denies paragraph 14.
- 15 In response to paragraph 15, Woolworths:
- (a) repeats paragraph 1 above, including sub-paragraph 1(k); and
 - (b) otherwise denies paragraph 15.
- 16 In response to paragraph 16, Woolworths:
- (a) repeats paragraph 13 above, including paragraph 13(f);
 - (b) says that the period of time at which the 266 Affected Products the subject of the 276 instances were sold at the Undiscounted Price compared with the period of time at which those Affected Products were sold at a pre-inflationary price cannot provide a basis for establishing that customers did not receive a genuine saving or discount in the Dropped Price;
 - (c) says that the retail price applied to most of the Affected Products prior to the inflationary effects in the Relevant Period was a “dropped” price (i.e. a **Pre-inflationary Dropped Price**), rather than at a pre-inflationary undiscounted price (**Pre-inflationary Undiscounted Price**);

- (d) says that paragraph 16(a) of the Concise Statement mixes up multiple different things. First, the price referred to as the “previous regular price” is, in most cases, a Pre-inflationary Dropped Price, not an Undiscounted Price, and paragraph 16(a) is improperly comparing a price of a product on the “Prices Dropped” Program with an Undiscounted Price, and therefore is not comparing like with like. Secondly, the price referred to as the “previous regular price” is the price prior to any CPI Request or the acceptance of such a request, and therefore is in most cases a Pre-inflationary Dropped Price or a Pre-inflationary Undiscounted Price (and therefore a superseded price), rather than a price that is relevant to consumers. Paragraph 16(a) is therefore confusing and misleading; and
- (e) otherwise denies paragraph 16.

17 In response to paragraph 17, Woolworths:

- (a) says that Oreo Family Pack Original 370g was:
 - (i) on the “Prices Dropped” Program from the start of the Relevant Period until 28 November 2022 at a Pre-inflationary Dropped Price of \$3.50 (at which price the product was sold to consumers), with a Pre-inflationary Undiscounted Price of \$4.50 and a statement, “Was \$4.50” on the ticket;
 - (ii) the subject of a CPI Request from the supplier which was agreed to by Woolworths Supermarkets and implemented in November 2022;
 - (iii) removed from the Prices Dropped Program on 28 November 2022, at which time the retail price was increased to \$5 (i.e. the Undiscounted Price) and the product was sold to consumers from that time at a retail price of \$5; and
 - (iv) subsequently placed on the “Prices Dropped” Program on 20 December 2022 at a Dropped Price of \$4.50, with a Prices Dropped Ticket stating “Was \$5 19/12/22” (being the last day on which the product was sold for \$5);
- (b) says that the placement of the product on the “Prices Dropped” Program on 20 December 2022 was as a result of negotiations between Woolworths Supermarkets and the supplier whereby the supplier agreed to make an investment to support the placement of the product on the “Prices Dropped” Program, after the implementation of the Cost Price Increase agreed between Woolworths Supermarkets and the supplier;

- (c) says that it involves a mischaracterisation to describe the Pre-inflationary Dropped Price of \$3.50 as “the product’s previous regular price”;
- (d) says that if (which is denied) it is sensible or meaningful to describe the product as having a “previous regular price”, then the previous regular price was \$5, not \$3.50; and
- (e) otherwise denies paragraph 17.

18 In response to paragraph 18, Woolworths:

- (a) says that as part of the negotiations concerning the CPI Request, Woolworths Supermarkets discussed with the supplier what the new Undiscounted Price would be, and also what the Dropped Price would be if the supplier chose to support the product being placed on that program, in the same way that Woolworths Supermarkets would usually discuss with a supplier any proposed retail price, including both undiscounted and discounted retail prices, whether promotional or otherwise;
- (b) says that discussions with the supplier of the sort described in (a) are a standard feature of the Australian supermarket retail industry; and
- (c) otherwise denies paragraph 18.

C. RELIEF SOUGHT

19 Woolworths denies that the ACCC is entitled to the relief sought in the Originating Application as alleged in paragraph 19 of the Concise response.

D. ALLEGED CONTRAVENTIONS OF SECTION 18 AND 29 OF THE AUSTRALIAN CONSUMER LAW

20 Woolworths denies paragraph 20.

21 Woolworths denies paragraph 21.

22 Woolworths denies paragraph 22.

23 Woolworths denies paragraph 23.

Date: 29 November 2024

A handwritten signature in black ink, appearing to read "Peta Stevenson", followed by a colon and a dotted line.

Peta Stevenson
Lawyer for the Respondent
King & Wood Mallesons

This Concise Response was settled by Cameron Moore SC, Peter Strickland, and Jacqueline Ibrahim of counsel.

Certificate of lawyer

I, Peta Stevenson, certify to the Court that, in relation to the Concise Response filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for each allegation, denial and non-admission in the pleading.

Date: 29 November 2024

A handwritten signature in black ink, appearing to read 'Peta Stevenson', followed by a horizontal dotted line.

Peta Stevenson
Lawyer for the Respondent
King & Wood Malletson