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COLES SUPERMARKETS AUSTRALIA PTY LTD (ACN 004 189 708)
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Sia Lagos

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Federal Court of Australia
District Registry: Victoria
Division: General

No VID 973 of 2024

Australian Competition and Consumer Commission

Applicant

Coles Supermarkets Pty Ltd (ACN 004 189 708)

Respondent

RESPONDENT'S OPENING SUBMISSIONS

A. INTRODUCTION

1. Down Down is a promotional program by which Coles sells products at a discount to their non-promotional (or “white ticket”) price for a period of at least 12 weeks (and typically longer).¹ The promotional discount is typically funded by both Coles and the supplier. Products sold on Down Down are accompanied by tickets, which are pieces of paper on the shelf-edge below or near a product (in physical stores) or an image of a product or “tile” (online). Down Down tickets contained, relevantly:
 - (a) the current price of the product (**Down Down price – “Price 3”**);
 - (b) typically, a “was” price, together with a month and year (e.g. “Was \$10 July 2022” – **“Price 2”**); and
 - (c) the words “Down Down”.
2. The ACCC’s pleaded case is that by displaying Down Down tickets, Coles represented to consumers that the relevant product’s Down Down price was a genuine reduction to, or discount from, its “previous regular price”.² In its opening submissions it says, for the first time, what it means by “previous regular price”. It is the price at which “the product was ordinarily offered for sale for a reasonable period prior to the

¹ This proceeding concerns the tickets that accompanied products Coles sold on Down Down promotions in the period February 2022 to May 2023 (**Relevant Period**).

² Applicant's Concise Statement (CS) (CB 2) at [11].

promotion”.³ And it says that what constitutes a “reasonable period” will depend on various factors.⁴ But it relies on only one: it says that Price 2 was offered for a relatively short period compared to the price “ordinarily” charged before Price 2 (“**Price 1**”), and for that reason Price 2 was not offered for a reasonable period.⁵ Price 1 was therefore the “previous regular price.”⁶

3. Some initial difficulties with this approach may be noted at the outset. *First*, the notion of a “previous regular price” is properly characterised as a category of indeterminate reference.⁷ That is, it calls for an evaluation on the basis of an indeterminate concept that admits of “a *chronically wide* area of penumbral doubt”.⁸ As was pointed out in *Taikato v R*,⁹ such a category has “no content until a court makes its decision”, and effectively requires “the courts to prescribe the relevant rule of conduct after the fact of its occurrence”.¹⁰ This is an unlikely construction to arrive at by implication, where the question is what the conduct would convey to an ordinary reasonable consumer, and where the evaluation may have penal consequences.
4. *Secondly*, that awkwardness is not relieved, but rather compounded, by the explanation of “previous regular price” as meaning “ordinarily offered for sale for a reasonable period”,¹¹ which employs two additional categories of indeterminate reference: “ordinarily” and “reasonable”.
5. *Thirdly*, each of these layers of analysis as to what was conveyed depends entirely on implication. None of it is express. Of course, this is not, on its own, a fatal objection. However, it does emphasise the need for close consideration of *all* the relevant

³ Applicant's opening submissions (**AS**) at [9], [67].

⁴ AS at [88].

⁵ AS at [87]–[91].

⁶ AS at [92].

⁷ Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 263–7. See also *Dwyer v Calco Timbers Pty Ltd* [2008] HCA 13; (2008) 234 CLR 124 at [37] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) (*Dwyer*); *Taikato v R* [1996] HCA 28; (1996) 186 CLR 454 at 466 (Brennan CJ, Toohey, McHugh and Gummow JJ) (*Taikato*).

⁸ Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) at 263–5 (emphasis in original); *McMahon v Griffiths* (Supreme Court of NSW, Santow J, 8 July 1994) at 8; *Nair v Health Administration Corporation* (1994) Aust Torts Reports 81-312 at 81-312 (Mahoney JA); *Figliuzzi v Yonan* [2005] NSWCA 290; (2005) 44 MVR 515 at [27]–[28] (Santow JA).

⁹ *Taikato*.

¹⁰ *Taikato* at 466 (Brennan CJ, Toohey, McHugh and Gummow JJ).

¹¹ AS at [9], [67].

circumstances, and of the characteristics of the ordinary reasonable consumer when assessing whether such a concept was conveyed to them.

6. *Fourthly*, the ACCC’s approach sits ill with prior authority. The ACCC relies on the decision in *Australian Competition and Consumer Commission v Kogan Australia Pty Ltd (Kogan)*,¹² but fails to note that there the ACCC did not rely on the notion of the *relative* duration of previous prices; or that in *Kogan* it relied on the notion of a “reasonable period” only to “capture the expectations of reasonable consumers that a reduction in prices or discount be a *genuine* reduction or discount, from the price at which products were or would be available for sale *before* and after the promotion”,¹³ or that the finding of the Court, consistently with the ACCC’s case, was that the “dominant message” was only of “reduction or discount on the prices of the products offered for sale from the prices at which those had *previously* been offered or would be offered for sale in the future”.¹⁴ Further, the ACCC’s submissions make no reference to *Australian Competition and Consumer Commission v Prouds Jewellers Pty Ltd (Prouds)*,¹⁵ where the Full Court held that the “was/now” price tags in that case signified “a change from the prices on offer *immediately before* the catalogue was published”.¹⁶
7. On the approaches in fact taken by this court in *Kogan* and *Prouds*, Coles’ conduct here did not convey the cascade of indeterminate criteria that are bound up in the test of relative duration on which the ACCC now relies.
8. The correct position is more simple. The Down Down tickets conveyed a representation that the Down Down price had been reduced from its previous “white ticket” (non-promotional) price.¹⁷ They may also have conveyed an implied representation that the previous price was a genuine price, that is, a price at which the item had in fact been offered for sale at the time nominated in the ticket¹⁸ (in contrast to *Prouds*), and was not contrived or ephemeral (as in *Kogan*). But they did not convey

¹² AS at [78], citing *Australian Competition and Consumer Commission v Kogan Australia Pty Ltd* [2020] FCA 1004; (2020) 145 ACSR 609 at [71]–[73], [81], [84]–[86] (Davies J) (*Kogan*).

¹³ *Kogan* at [84] (Davies J) (emphasis added).

¹⁴ *Kogan* at [81] (Davies J) (emphasis added).

¹⁵ [2008] FCAFC 199; (2008) 75 IPR 306 (*Prouds*).

¹⁶ *Prouds* at [32] (Black CJ, Ryan and Gordon JJ) (emphasis added).

¹⁷ Respondent's Concise Response (CR) (CB 4) at [13(c)].

¹⁸ Or, if no time were stated, was the immediately preceding offer price.

the notion of a “previous regular price” necessary for the ACCC’s case, namely, that the previous price had a *sufficient duration relative* to some yet earlier price. Nothing in the Down Down tickets, the qualities of an ordinary reasonable consumer, or the relevant context, makes that a necessary or proper implication.

9. *Fifthly*, if, contrary to the above, the conduct did convey the representation for which the ACCC contends, then plainly various factors would be relevant to what constitutes a “reasonable period” (as the ACCC itself acknowledges).¹⁹ However, the ACCC addresses no relevant factors other than the relative duration of earlier prices.²⁰ In effect, the ACCC assumes that the ordinary reasonable consumer would consider no other factors. It reduces the meaning conveyed by the conduct (and the inquiry as to its falsity) to an assertion about the *sufficiency of the relative duration of previous “ordinary” prices*. This has no warrant.
10. *Sixthly*, as regards the factors that would be relevant to an assessment of what was a “reasonable period”, assuming the representation was made, at least the following require consideration:
 - (a) the volume of sales of the product at the previous price;
 - (b) the frequency with which customers might be expected to shop at Coles;
 - (c) the reason for the price changes and their timing (e.g. was it a period of high inflation in which price changes were more frequent on account of supplier cost increases); and
 - (d) the perceptions of ordinary reasonable consumers as to matters of this kind.
11. These matters would be relevant to what representation was made as well as to whether it was misleading. For example, assuming the correctness of the ACCC’s theory that the conduct conveyed that the “was” price was the price ordinarily offered for a reasonable period prior to the promotion,²¹ at least in the case of a product that is sold in very large volumes over even short periods, the conduct should be characterised as a representation that the “was” price was offered for a reasonable

¹⁹ AS at [88].

²⁰ AS at [87]–[92].

²¹ AS at [9], [77], [100].

period having regard to, *inter alia*, the velocity of its sales. However, to say this is to highlight the difficulty of attributing such thought processes to a consumer looking at prices in an aisle in a supermarket.

12. Finally, even if Down Down tickets did convey the alleged representation, they were not false or misleading. This trial concerns 12 products and 14 promotions. In each case, the price at which the product was sold immediately before it was placed on Down Down was the non-promotional price at which Coles had actually sold the product. Each of the considerations mentioned in [10] above suggest that the periods in question in this case were reasonable. Each product was sold at that price for a significant period (typically about a month) and in significant volumes. The “was” price was typically the same as the supplier’s recommended retail price (**RRP**) for the product. It was a genuine non-promotional price. The difference between the “was” and “now” (Down Down) price was a genuine discount. Coles’ decision to sell the product at the “was” price was prompted by the supplier seeking to increase the price it charged to Coles for the product on account of cost increases, or (in one case) changing the funding it provided to support a promotion. All this occurred in a period of increasing inflation and an increasing rate of cost-driven price changes. And in the case of at least some products, prior pricing was so frequently affected by Specials or other promotions that characterising any earlier price as “ordinary” or “regular” is inappropriate (see e.g. [33] below).
13. The ordinary reasonable consumer would be taken to have a reasonable appreciation of at least some of these matters. They would appreciate that Coles had numerous promotional mechanisms; that some were of short duration and others longer; that Down Down was a long term discount promotion (something which would effectively be explicit after a passage of time from the date identified for Price 2); that most customers were regular customers; that over periods as short as a week Coles would likely sell thousands of each item; that inflation was rising; that this would likely lead to price increases at the request of suppliers. And if asked, they would likely say that they preferred price establishment periods after a necessary price increase and before a new promotion to be shorter rather than longer.

14. These submissions are structured as follows. First, we address the applicable principles (**Section B**) and relevant facts (**Section C**). We then address the alleged representation (**Section D**) and the relevant class of consumers for the purposes of assessing the alleged representation (**Section E**). We then address why the representation was not conveyed by Down Down tickets (**Section F**) and why, in any event, it was not false or misleading (**Section G**).

B. PRINCIPLES

15. For the inquiry under s 18 of the Australian Consumer Law (*ACL*),²² it is necessary to identify the impugned conduct and then to consider whether that conduct, considered as a whole and in context, is misleading or deceptive or likely to mislead or deceive.²³
16. The required inquiry was described by the High Court in *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd*²⁴ as involving the following four steps:²⁵
- “*first*, identifying with precision the ‘conduct’ said to contravene s 18; *second*, considering whether the identified conduct was conduct ‘in trade or commerce’; *third*, considering what meaning that conduct conveyed; and *fourth*, determining whether that conduct in light of that meaning was ‘misleading or deceptive or ... likely to mislead or deceive’.”
17. As to the third and fourth steps, where the conduct complained of is directed at the public or a section of the public (cf. a specific individual) it is necessary to identify the class of persons likely to be affected by the conduct and assess whether a

²² *Competition and Consumer Act 2010* (Cth) sch 2.

²³ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2014] FCA 634; (2014) 317 ALR 73 at [38] (Allsop CJ) (*Coles*), citing *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; (2013) 249 CLR 435 at [89], [102], [118] (Hayne J) (*Google*) and *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45 at [100]–[101] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ) (*Campomar*).

²⁴ [2023] HCA 8; (2023) 277 CLR 186 at [80]–[82] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ) (*Self Care*).

²⁵ *Self Care* at [80] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

hypothetical representative, the ordinary or reasonable member of that class, would be misled or deceived.²⁶ Reactions that are extreme or fanciful are excluded.²⁷

18. In conducting that assessment, it is necessary to objectively attribute characteristics and knowledge to the hypothetical member of the class.²⁸ Such a person takes reasonable care of their own interests.²⁹
19. It is necessary to view the conduct as a whole and in its proper context.³⁰ Immediate context includes the words in a document and the manner in which they are conveyed.³¹ Broader context includes surrounding facts and circumstances, including the types of goods and services being supplied and the manner in which they are supplied.³²
20. To be misleading or deceptive, conduct must lead or be likely to lead into error.³³ There must be a sufficient nexus between the conduct and an error or misconception on the part of another person.³⁴ Conduct that causes confusion or questioning is insufficient.³⁵
21. There is no material difference between the words “misleading or deceptive” and “mislead or deceive” in s 18, and “false or misleading” in s 29.³⁶ Since the inquiry

²⁶ *Self Care* at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ); *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; (1982) 149 CLR 191 at 199 (Gibbs CJ) (**Puxu**); *Campomar* at [103], [106] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Google* at [7] (French CJ, Crennan and Kiefel JJ), [118] (Hayne J).

²⁷ *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 at [50] (French CJ, Gummow, Hayne and Kiefel JJ) (**Forrest**); *Campomar* at [105] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

²⁸ *Self Care* at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

²⁹ *Blu Logistics SA Pty Ltd v Flogineering Pty Ltd* [2023] FCAFC 103; (2023) 412 ALR 347 at [28] (Rares, Collier and Logan JJ). See also *Campomar* at [102] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 at [39] (French CJ, Crennan, Bell and Keane JJ) (**TPG**).

³⁰ *Self Care* at [82] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

³¹ *Self Care* at [82] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

³² *Self Care* at [82] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ); *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 308 at [110] (O’Byrne J). *TPG* at [39] (French CJ, Crennan, Bell and Keane JJ); *Puxu* at 198 (Gibbs CJ); *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at [25] (French CJ) (**Campbell**).

³³ *TPG* at [39] (French CJ, Crennan, Bell and Keane JJ).

³⁴ *Puxu* at 198 (Gibbs CJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; (2020) 278 FCR 450 at [22(d)] (Wigney, O’Byrne and Jackson JJ) (**TPG 2020**); *Coles* at [39] (Allsop CJ).

³⁵ *Self Care* at [84] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ). See also *TPG 2020* at [20]–[21] (Wigney, O’Byrne and Jackson JJ).

into how an ordinary or reasonable member of the intended audience would receive a message is of its nature hypothetical, it is apt to answer both whether conduct *is* misleading or deceptive and whether it is *likely* to mislead or deceive.³⁷

22. The applicable standard of proof is the balance of probabilities, but the Court must take into account: (a) the nature of the cause of action; (b) the nature of the subject matter of the proceeding; and (c) the gravity of the matters alleged.³⁸ Since the alleged contravention of s 29 of the ACL may expose Coles to a civil penalty, a high level of satisfaction should be reached before finding the contraventions proved.³⁹

C. FACTS

C.1 Coles

23. Coles operates one of Australia’s two largest supermarket businesses.⁴⁰ Throughout the Relevant Period it supplied fresh food, groceries and general merchandise to customers across Australia from over 840 physical stores and online, through its website and app.⁴¹ The products it supplied included “proprietary” products, whose brands were owned by the supplier, and Coles’ “own brand” products, whose brands were owned by Coles.⁴²
24. Coles’ business was organised by reference to “product categories”, “business categories” and “business units”.⁴³ Product categories sat within business categories and business categories sat within business units:⁴⁴
- (a) Coles had six business units during the Relevant Period: Grocery; Produce; Bakery; Dairy, Frozen & Convenience; Meat Deli & Seafood; and Health & Home. Each business unit was led by a General Manager;⁴⁵

³⁷ *Forrest* at [59] (French CJ, Gummow, Hayne and Kiefel JJ).

³⁸ *Evidence Act 1995* (Cth) s 140; *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362–3 (Dixon J).

³⁹ *Kogan* at [17] (Davies J).

⁴⁰ Statement of Agreed Facts filed 13 June 2025 (**First SOAF**) (CB 8) at [9].

⁴¹ First SOAF (CB 8) at [9]–[10].

⁴² Affidavit of Debra Maree Galle dated 21 November 2025, COL.900.001.0001 (**Galle**) (CB 18) at [9].

⁴³ *Galle* (CB 18) at [10].

⁴⁴ *Galle* (CB 18) at [10].

⁴⁵ *Galle* (CB 18) at [10(a)].

- (b) each business unit was divided into a number of business categories.⁴⁶ For example, the Health & Home business unit comprised four business categories: Health, Beauty and Baby; Homecare; General Needs; and Telco, Tobacco and Entertainment.⁴⁷ Each business category was led by a Business Category Manager;⁴⁸
- (c) business categories in turn comprised multiple product categories.⁴⁹ For example, the Health, Beauty and Baby business category comprised various product categories such as Soaps and Body Wash.⁵⁰ Product categories often comprised sub-categories (e.g. Handwash).⁵¹ Each product category was typically led by a Category Manager.⁵²
25. Category Managers had primary responsibility for determining the products that Coles offered for sale in their categories, the retail prices Coles charged for those products and negotiating and agreeing with suppliers on matters such as the suppliers' "list" prices (the prices they charged to Coles before any discounts, rebates, offsets or other adjustments) and promotional plans (discussed below).⁵³ Business Category Managers to whom they reported provided guidance on, and became involved in, those matters from time to time.⁵⁴

C.2 Coles' retail prices

26. As noted above, products that Coles offered for sale, both in-store and online, were accompanied by "tickets" that included details of the product including its name, price and other information.⁵⁵ In physical stores, tickets were pieces of paper placed on the shelf-edge below or near the relevant product.⁵⁶ On the Coles website or app, tickets

⁴⁶ Galle (CB 18) at [10(b)].

⁴⁷ Affidavit of Matthew Peter Hankin dated 21 November 2025, COL.900.007.0001 (**Hankin**) (CB 16) at [6].

⁴⁸ Galle (CB 18) at [10(b)].

⁴⁹ Galle (CB 18) at [10(c)].

⁵⁰ Galle (CB 18) at [10(c)].

⁵¹ Galle (CB 18) at [10(c)].

⁵² Galle (CB 18) at [10(c)].

⁵³ First SOAF (CB 8) at [15], [17]; affidavit of Eleftheria (Via) Lavdas dated 18 November 2025, COL.900.011.0001 (**Lavdas**) (CB 12) at [33]–[34], [36]; affidavit of Rebecca Thompson dated 24 November 2025, COL.900.009.0001 (**Thompson**) (CB 19) at [18]; Galle (CB 18) at [52].

⁵⁴ First SOAF (CB 8) at [16], [17]; Hankin (CB 16) at [10]; Lavdas (CB 12) at [25].

⁵⁵ Galle (CB 18) at [28].

⁵⁶ First SOAF (CB 8) at [21]; affidavit of Katherine Ann Bailey dated 21 November 2025, COL.900.005.0001 (**Bailey**) (CB 17) at [34]; Galle (CB 18) at [28].

were images (or “tiles”) that displayed a photograph of the product along with other product information.⁵⁷

27. Coles offered products for sale using different pricing types.⁵⁸ The ticket that accompanied a product varied depending on the type of pricing that was used for the product.⁵⁹
28. The most commonly used type of pricing was “white ticket”. White ticket prices were undiscounted (i.e. non-promotional) prices and were usually set at or around suppliers’ RRP’s.⁶⁰ They were first set when a supplier’s product was first included in Coles’ range and usually only changed when the supplier changed the list price for the product, or one of Coles’ competitors changed the price it charged for the product.⁶¹ Most of the products that Coles ranged at any point in time were offered for sale at a white ticket price.⁶²
29. The name “white ticket” was used because products sold at white ticket prices were accompanied by tickets that were white with black text.⁶³ White tickets were smaller than the other tickets that Coles used. They sat entirely within the edge of supermarket shelves (i.e. there was no “overhang”).⁶⁴ They contained no colours or promotional markings.⁶⁵ Images of them are contained in the Affidavit of Katherine Ann Bailey dated 21 November 2025 (CB 17) at [36].
30. The other types of prices that Coles used were often referred to as pricing “mechanics”.⁶⁶ The mechanics that Coles used most often were:⁶⁷

⁵⁷ First SOAF (CB 8) at [21]; Bailey (CB 17) at [35]; Galle (CB 18) at [28].

⁵⁸ Galle (CB 18) at [29]–[32].

⁵⁹ Galle (CB 18) at [29], [33].

⁶⁰ Galle (CB 18) at [29].

⁶¹ Lavdas (CB 12) at [16].

⁶² Galle (CB 18) at [30].

⁶³ Galle (CB 18) at [29]; Lavdas (CB 12) at [16].

⁶⁴ Bailey (CB 17) at [36]–[37]; Galle (CB 18) at [33].

⁶⁵ See Lavdas (CB 12) at [16]; Galle (CB 18) at [29]; Bailey (CB 17) at [36].

⁶⁶ Galle (CB 18) at [31].

⁶⁷ Galle (CB 18) at [31].

- (a) Specials: which involved offering products at discounts for short periods, typically a week.⁶⁸ The discounts were expressed in dollar terms (e.g. \$2), a percentage (e.g. 40% off) or a fraction (e.g. 1/2 price).⁶⁹
 - (b) Down Down: which involved selling products at a discount for a period of at least 12 weeks (and typically longer).⁷⁰
 - (c) Multi-buy: promotions whereby customers received savings when they bought more than one item.
 - (d) Mix ‘N’ Save: promotions whereby customers received savings when they purchased multiple items in the same range. For example, Mix ‘N’ Save promotions might include “buy 1 get 1 free”, “buy 2 get the third free” and “any 2 for \$4.50”.
 - (e) Dropped & Locked: a promotion that involved discounting a product from its white ticket price and “locking in” the reduced price until a date that was specified on the ticket. During the Relevant Period, products on Dropped & Locked were required to remain on the program for at least 12 weeks.⁷¹
 - (f) Every Day Value (**EDV**), which involved selling products at a consistent price for a period of at least six months.⁷²
31. Other than EDV, each of these mechanics involved offering products for sale at a discount or saving compared to the price at which Coles offered the product for sale immediately before the start of the promotion.⁷³ For mechanics other than Specials, that was the product’s white ticket price. For Specials, it was either the product’s white ticket price or a Down Down price.⁷⁴

⁶⁸ Bailey (CB 17) at [37(a)].

⁶⁹ Galle (CB 18) at [31(a)].

⁷⁰ Galle (CB 18) at [31(b)].

⁷¹ Galle (CB 18) at [31(e)].

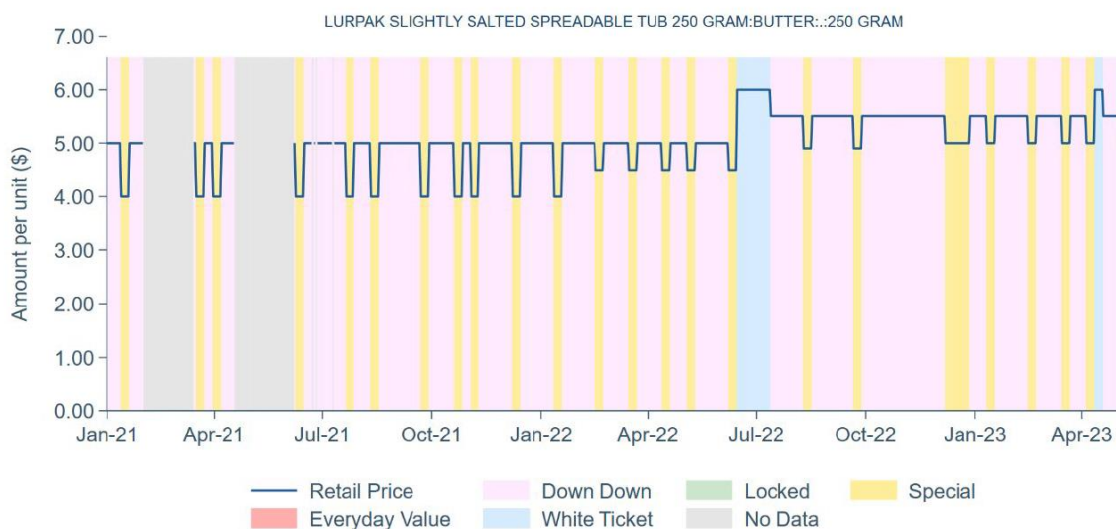
⁷² Galle (CB 18) at [31(f)].

⁷³ Galle (CB 18) at [31]; Bailey (CB 17) at [37].

⁷⁴ Galle (CB 18) at [31].

C.3 “Hi-Lo” pricing

32. Specials were the most common pricing mechanic that Coles used. When a product was sold using the Special mechanic, it was usually sold on Special at regular intervals, often around one out of every four weeks or sometimes every alternate week.⁷⁵ Coles and its suppliers often referred to this as a “Hi-Lo” pricing strategy.⁷⁶
33. Hi-Lo pricing occurred frequently. Seven out of the 12 sample products were sold repeatedly on Special, including during the Price 1 Period.⁷⁷ In these cases, the ACCC alleges that the previous price at which products were “ordinarily” offered for sale, in the mind of the ordinary and reasonable consumer, excluded not only the price at which the product was sold prior to the promotion (Price 2), but also the repeated Special prices in earlier periods. For example, the Lurpak product was sold on Special at least 16 times during its Price 1 Period (as well as many times during its Price 3 Period), as depicted in the following graph.⁷⁸



⁷⁵ Galle (CB 18) at [34]; affidavit of James Andrew Cubbon dated 20 November 2025, COL.900.004.0001 (**Cubbon**) (CB 14) at [14(a)].

⁷⁶ Galle (CB 18) at [34].

⁷⁷ Statement of Agreed Facts filed 21 August 2025 (**Second SOAF**) (CB 9) Annexure 1 at 4, 7–29; Report of Dr Geoff Edwards dated 4 December 2025, COL.901.001.0001 (**Edwards**) (CB 23) at .0039–.0043, .0046–.0047.

⁷⁸ Edwards (CB 23) at .0040.

C.4 Promotions

34. The expression “promotions” was typically used by Coles and its suppliers to describe a pricing mechanic by which Coles offered a price discount on a product (i.e. each of the mechanics referred to above other than EDV).⁷⁹
35. When products were sold on promotion Coles used different tickets, to draw attention to and identify the nature of the promotion.⁸⁰ The tickets were larger than white tickets (they overhung the shelf-edge) and generally incorporated yellow and/or red colours.⁸¹ They included information about the nature of the discount that customers received if they purchased the product (e.g. in the case of Specials, “40% off” or “1/2 price”; in the case of Multi-buy, “\$6.50 ea” and “2 for \$12”).⁸² Often, they included the name of the promotion (e.g. “Special”, “Mix ‘N’ Save”, “Dropped & Locked”).⁸³ Down Down tickets are addressed in more detail in Section C.9 below.
36. When products were sold on promotion, sales typically increased.⁸⁴ Products sold on promotion were also often included in Coles’ catalogues and other advertising material (including television and radio), which helped to advertise not only the discounted price of the product but also the product and the supplier’s brand.⁸⁵ Promotions thus delivered significant benefits both to Coles and its suppliers.⁸⁶
37. In that context, promotions were usually jointly “funded” by Coles and its suppliers.⁸⁷ The expression “funding” describes bearing the cost of a promotional discount – i.e. the difference between the product’s undiscounted price and its promotional price.⁸⁸ Suppliers provided funding by paying to Coles an amount for each unit of the product that Coles sold (which was known as a “scan deal”).⁸⁹ Coles provided funding by

⁷⁹ At times, however, the word “promotion” was used by some within Coles more broadly to describe any pricing or promotional mechanic other than white ticket pricing: Galle (CB 18) at [39].

⁸⁰ Bailey (CB 17) at [32], [37]; Lavdas (CB 12) at [18].

⁸¹ Bailey (CB 17) at [37]; Galle (CB 18) at [33]; Lavdas (CB 12) at [18].

⁸² Bailey (CB 17) at [37]; Lavdas (CB 12) at [18].

⁸³ Bailey (CB 17) at [37].

⁸⁴ Lavdas (CB 12) at [19]; Galle (CB 18) at [35], [41].

⁸⁵ Galle (CB 18) at [41]; Lavdas (CB 12) at [19].

⁸⁶ Galle (CB 18) at [41]; Lavdas (CB 12) at [19].

⁸⁷ Galle (CB 18) at [42]. See also affidavit of Jack Eugene Jorgensen dated 20 November 2025, COL.900.003.0001 (**Jorgensen**) (CB 13) at [16].

⁸⁸ Galle (CB 18) at [42]; Jorgensen (CB 13) at [16]; Thompson (CB 19) at [16].

⁸⁹ Galle (CB 18) at [44]; Lavdas (CB 12) at [20]; Thompson (CB 19) at [16].

accepting a lower margin on the product (compared to the margin Coles received when the product was sold at its undiscounted price).⁹⁰

38. Promotions were usually proposed by suppliers in “promotional plans” (or “trade plans”). Promotional plans usually identified: the products that suppliers proposed that Coles sell on promotion; the promotional mechanic they proposed that Coles use; the funding they proposed to provide; proposed promotional prices; forecast sales volumes; and the margin Coles would earn if the plan were implemented.⁹¹ They typically also identified suppliers’ RRP for the products⁹² and covered a three to six-month period.⁹³
39. Suppliers usually proposed promotional plans at least six months before the start of that period, to allow time for the plan to be negotiated and agreed and then implementation of the plan to occur.⁹⁴ Implementation involved various steps including forecasting and planning for changes in demand for the product, preparing and publishing any advertising, manufacture / import and transport of the relevant product, and making any adjustments to the in-store layout – e.g. placing products on promotion on displays at the end of supermarket aisles (known as “gondolas”).⁹⁵ From time to time, promotional plans could change, including due to supplier production shortages which resulted in insufficient volumes of the product being available.⁹⁶
40. Coles’ Category Managers had primary responsibility for negotiating and agreeing promotional plans with suppliers.⁹⁷ In considering the appropriate promotional mechanic for a product, Coles had regard to matters such as the amount of any funding the supplier was willing to provide; whether the product was sold on promotion by Coles’ competitors (and, if so, the mechanic(s) they used); and the nature of the product.⁹⁸ For example:

⁹⁰ Galle (CB 18) at [44]; Lavdas (CB 12) at [20]; Thompson (CB 19) at [16].

⁹¹ Galle (CB 18) at [48]; Lavdas (CB 12) at [22(a)], [24]; Thompson (CB 19) at [23].

⁹² Lavdas (CB 12) at [24].

⁹³ Galle (CB 18) at [51].

⁹⁴ Galle (CB 18) at [51]; Lavdas (CB 12) at [21]; Thompson (CB 19) at [15].

⁹⁵ Galle (CB 18) at [36], [51]; Lavdas (CB 12) at [22]–[23].

⁹⁶ Lavdas (CB 12) at [32]; Cubbon (CB 14) at [14(c)].

⁹⁷ Galle (CB 18) at [52]; Lavdas (CB 12) at [25]; Thompson (CB 19) at [15].

⁹⁸ Galle (CB 18) at [52].

- (a) premium products were often promoted using the Special mechanic, because that mechanic involved using short-term, steeper discounts and provided an incentive to customers to try to “trade up” to the premium product;
- (b) products that consumers tended to purchase impulsively upon seeing them in Coles’ stores (rather than planning to buy them in advance of visiting a store), such as chocolates and snacks, also tended to be better suited to Specials; and
- (c) the “Mix ‘N’ Save” mechanic was suited to products that had variations or different flavours that customers often purchased (e.g. pet food or yoghurt).⁹⁹

C.5 Weekly price changes and advertisements

41. Specials typically commenced on Wednesdays during the Relevant Period.¹⁰⁰ Each week, before trade started on Wednesdays, Coles took down in-store tickets for products that had been on promotion the previous week and put up new tickets for products to be offered on a new or different promotion the coming week. This involved changing tickets for around 5,500 products per store each week during the Relevant Period. The typical Coles store ranged approximately 18,000 to 24,000 products in any given week.¹⁰¹
42. Each week Coles published a catalogue, which featured various products that were on promotion the following week.¹⁰² This weekly catalogue, like other advertising, was intended to reflect customer shopping habits as understood by Coles. Coles operated on the basis that customers typically shopped at major supermarkets (such as Coles or Woolworths) at least once per week.¹⁰³

C.6 Suppliers’ list prices

43. Coles had trading terms with each of its suppliers that specified (among other things) a “list price” for the supplier’s products, which was the price the supplier charged to Coles before any discounts, rebates, offsets or other adjustments.¹⁰⁴

⁹⁹ Galle (CB 18) at [53].

¹⁰⁰ Galle (CB 18) at [35].

¹⁰¹ Galle (CB 18) at [36].

¹⁰² Galle (CB 18) at [37]; Bailey (CB 17) at [44(b)], [46(e)].

¹⁰³ Galle (CB 18) at [37], [38]; Bailey (CB 17) at [44(b)].

¹⁰⁴ Lavdas (CB 12) at [33]; Thompson (CB 19) at [18].

44. When suppliers' costs increased, they could seek to increase their list prices by completing and submitting to Coles a "cost price alteration" (**CPA**) request.¹⁰⁵ During the Relevant Period, there was a dramatic increase in the volume of CPA requests that Coles received, due to the increase in inflation around that time.¹⁰⁶ Some suppliers were requesting increases to their list prices multiple times in the one year.¹⁰⁷
45. Coles had a Vendor Management Office (**VMO**) that assisted with the assessment of CPA requests. The VMO assessed whether the supplier's input costs had increased by the amount the supplier claimed using publicly available information (such as commodity price movements), information available to Coles as part of its business (including because it paid for the same inputs – e.g. milk as an input to other dairy products; delivery costs for all products) and any information the supplier provided. This was referred to within Coles as "validating" a CPA request.¹⁰⁸
46. When suppliers submitted CPA requests, they usually also proposed amended promotional plans.¹⁰⁹ That is because list prices were an input into promotional plans.¹¹⁰ List prices also informed matters such as suppliers' RRP's and proposed promotional prices and Coles' margins.¹¹¹ So, when list prices changed, any promotional plans that were in place for the products concerned also had to change.¹¹²
47. Coles' Category Managers had primary responsibility for negotiating and reaching agreement with suppliers in respect of CPA requests and revised promotional plans.¹¹³ CPA requests that were "validated"¹¹⁴ in full were usually agreed. Where they were not validated in full, Coles typically entered into discussions with the supplier as to whether the gap could be addressed in the revised promotional plans.¹¹⁵ Details of

¹⁰⁵ Also known as a "cost price increase" request: Lavdas (CB 12) at [34]; Thompson (CB 19) at [19]; affidavit of Massimo Palmisciano dated 24 November 2025, COL.900.006.0001 (**Palmisciano**) (CB 20) at [17]–[18].

¹⁰⁶ Galle (CB 18) at [59]; affidavit of Paul Francis Carroll dated 18 November 2025, COL.900.008.0001 (**Carroll**) (CB 11) at [17]; Palmisciano (CB 20) at [24].

¹⁰⁷ Carroll (CB 11) at [17]; Palmisciano (CB 20) at [24].

¹⁰⁸ Lavdas (CB 12) at [38]; Thompson (CB 19) at [21].

¹⁰⁹ Lavdas (CB 12) at [39]; Galle (CB 18) at [49]; Thompson (CB 19) at [23]; Jorgensen (CB 13) at [15].

¹¹⁰ Lavdas (CB 12) at [39]; Galle (CB 18) at [49]; Thompson (CB 19) at [23]; Carroll (CB 11) at [20].

¹¹¹ Lavdas (CB 12) at [39]; Galle (CB 18) at [49]; Thompson (CB 19) at [23].

¹¹² Lavdas (CB 12) at [39]; Galle (CB 18) at [49]; Thompson (CB 19) at [23].

¹¹³ Lavdas (CB 12) at [36].

¹¹⁴ See Lavdas (CB 12) at [38].

¹¹⁵ See, eg, Hankin (CB 16) at [18], [26]; Thompson (CB 19) at [34]; Carroll (CB 11) at [71]–[72].

discussions and negotiations concerning the sample products are addressed in the evidence of the witnesses that Coles will call and documents it will tender.

C.7 Guardrails

48. Coles had rules (known as “guardrails”) that applied to the sale of products on promotion and the EDV mechanic. Category Managers were responsible for ensuring the guardrails were complied with.¹¹⁶ They are contextually relevant to the ACCC’s case, in that they help explain the price changes of the products which occurred.
49. The guardrails for the Down Down program changed over time.¹¹⁷ However, the versions that applied to the impugned price changes in this proceeding were largely the same. Each included rules concerning, relevantly: (1) pricing prior to a product’s launch on Down Down; (2) promotional activity permitted while a product was on Down Down; (3) price increases while products were sold on Down Down; and (4) the period products could remain on Down Down. Each version stated that the purpose of the rules was to ensure that Coles’ advertising was not misleading or deceptive.¹¹⁸
50. ***Pricing prior to launch:*** before a product could be placed on Down Down for the first time, the white ticket price of the product had to be “established”. This meant that before it was first launched on the Down Down program, the product had to be sold at that price:
- (a) for four weeks immediately prior to launch of the product on Down Down without any “simple” promotions (i.e. Specials); or

¹¹⁶ Galle (CB 18) at [54].

¹¹⁷ The different versions of the guardrails that applied during the Relevant Period are: COL.500.001.0010, Exhibit DG-1 – Tab 1 (**September 2019 Guardrails**) (CB 18.1); COL.500.001.0001, Exhibit DG-1 – Tab 2 (**January 2022 Guardrails**) (CB 18.2); COL.500.001.0004, Exhibit DG-1 – Tab 3 (**March 2022 Guardrails**) (CB 18.3); COL.500.001.0007 (**May 2022 Guardrails**) (CB 948); COL.500.001.0396 (**July 2022 Guardrails**) (CB 959); COL.500.001.0389 (**August 2022 Guardrails**) (CB 963); COL.500.001.0409 (**13 September 2022 Guardrails**) (CB 964); COL.500.001.0416 (**28 September 2022 Guardrails**) (CB 965); COL.500.001.0402 (**October 2022 Guardrails**) (CB 966).

¹¹⁸ September 2019 Guardrails (CB 18.1) at .0010; January 2022 Guardrails (CB 18.2) at .0001; March 2022 Guardrails (CB 18.3) at .0004; May 2022 Guardrails (CB 948) at .0007; July 2022 Guardrails (CB 959) at .0399; August 2022 Guardrails (CB 963) at .0392; 13 September 2022 Guardrails (CB 964) at .0412; 28 September 2022 Guardrails (CB 965) at .0419; October 2022 Guardrails (CB 966) at .0405.

- (b) for four out of the six weeks immediately prior to the launch of the product without any simple promotion, including two out of the last two weeks.¹¹⁹
51. **Promotional activity permitted while on Down Down:** during the Relevant Period the Down Down guardrails permitted Specials to be run as promotions from the Down Down price provided that, *inter alia*, each promotion was for one week and occurred no more than one out of every four weeks.¹²⁰
52. **Price increases:** the rules noted that there may be a need for Coles to increase the price of products on Down Down if the relevant supplier increased its list prices.¹²¹ When that occurred, it was necessary to remove the product from Down Down, increase the white ticket price of the product and offer it for sale at that price for a specified period before it could be offered on promotion again. In September 2019, there was also a rule that products could not be returned to Down Down for at least nine months.¹²² In January 2022, for products where a supplier requested a CPA, the period for which those products could not be returned to Down Down was changed to 12 weeks¹²³ and in March 2022, it was changed to four weeks.¹²⁴
53. **Period on Down Down:** the period over which products could remain on the Down Down program changed over time. At all times they were required to remain on Down

¹¹⁹ September 2019 Guardrails (CB 18.1) at .0010; January 2022 Guardrails (CB 18.2) at .0001; March 2022 Guardrails (CB 18.3) at .0004; May 2022 Guardrails (CB 948) at .0007; July 2022 Guardrails (CB 959) at .0399; August 2022 Guardrails (CB 963) at .0392; 13 September 2022 Guardrails (CB 964) at .0412; 28 September 2022 Guardrails (CB 965) at .0419; October 2022 Guardrails (CB 966) at .0405.

¹²⁰ September 2019 Guardrails (CB 18.1) at .0010; January 2022 Guardrails (CB 18.2) at .0001; March 2022 Guardrails (CB 18.3) at .0004; May 2022 Guardrails (CB 948) at .0007; July 2022 Guardrails (CB 959) at .0399; August 2022 Guardrails (CB 963) at .0392; 13 September 2022 Guardrails (CB 964) at .0412; 28 September 2022 Guardrails (CB 965) at .0419; October 2022 Guardrails (CB 966) at .0405; Galle (CB 18) at [31(a)], [39].

¹²¹ September 2019 Guardrails (CB 18.1) at .0011; January 2022 Guardrails (CB 18.2) at .0002; March 2022 Guardrails (CB 18.3) at .0005; May 2022 Guardrails (CB 948) at .0008; July 2022 Guardrails (CB 959) at .0400; August 2022 Guardrails (CB 963) at .0393; 13 September 2022 Guardrails (CB 964) at .0413; 28 September 2022 Guardrails (CB 965) at .0420; October 2022 Guardrails (CB 966) at .0406.

¹²² September 2019 Guardrails (CB 18.1) at .0011.

¹²³ January 2022 Guardrails (CB 18.2) at .0002.

¹²⁴ March 2022 Guardrails (CB 18.3) at .0005.

Down for at least 12 weeks. The maximum time they could remain on the program varied from 18 months to three years.¹²⁵

C.8 Coles' advertising of the Down Down promotion

54. The Down Down promotional program has been in place since 2010.¹²⁶ It has been advertised to customers since that time through various media, including television, radio and catalogues.¹²⁷
55. Features of Coles' marketing of the Down Down program have included:
- (a) the “Big Red Hand”, which is an image of a red hand with the index finger pointing down;
 - (b) a jingle based on a song called “Down Down” by Status Quo, which has been used in some video and radio advertisements; and
 - (c) the slogan, “Down Down, prices are down”, which was sometimes used together with other slogans including: “prices are down and staying down”; “Down Down and staying down”; “not on Special, they're on Down Down”; and “100s of prices down”.¹²⁸
56. Since 2011, Coles has not used the expression “regular price” in any of its advertising of the Down Down promotion when referring to the “was” price of products or Down Down prices (or at all).¹²⁹

¹²⁵ September 2019 Guardrails (CB 18.1) at .0010; January 2022 Guardrails (CB 18.2) at .0001; March 2022 Guardrails (CB 18.3) at .0004; May 2022 Guardrails (CB 948) at .0007; July 2022 Guardrails (CB 959) at .0399; August 2022 Guardrails (CB 963) at .0393; 13 September 2022 Guardrails (CB 964) at .0413; 28 September 2022 Guardrails (CB 965) at .0420; October 2022 Guardrails (CB 966) at .0406.

¹²⁶ Bailey (CB 17) at [7].

¹²⁷ Bailey (CB 17) at [14].

¹²⁸ Bailey (CB 17) at [16].

¹²⁹ Bailey (CB 17) at [21].

C.9 Down Down tickets

57. As noted above, Down Down tickets contained information about the product including its name; the words Down Down; the Down Down price; and, typically, a “was” price, together with a month and year.¹³⁰
58. The form of the tickets varied depending on whether it was in Coles’ physical stores or on the Coles website or app.¹³¹ During the Relevant Period, Coles’ website was “re-platformed” and the appearance of the online ticket changed.¹³² The following are examples of Down Down tickets as they appeared in Coles’ stores, on its website (before and after the re-platform) and on the Coles app.¹³³

¹³⁰ First SOAF (CB 8) at [25].

¹³¹ First SOAF (CB 8) at [25].

¹³² Bailey (CB 17) at [40(b)].

¹³³ Statement of Agreed Facts filed 17 November 2025 (**Third SOAF**) (CB 10) 3, 6–8; Bailey (CB 17) at [37(b)].

\$6.70
WAS \$7.80
OCT 2022

DOWN DOWN

Danone Yopro Yoghurt
 Vanilla
 700gram 1533

\$0.96 per 100g

324 6914 0 0 0

DOWN DOWN

Arnott's Shapes Variety | Crackers 15 Pack

\$5.50 Was \$6.50 Jun 2022

375g | \$1.47 per 100G

Add 1 for \$5.50



Bragg Seasoning
 | Nutritional Yeast | 127g

\$16.50
 \$12.99 per 100g | Was \$19.00 on
 Oct 2022
 ★★★★★ 0.0 (0)

Add

DOWN DOWN

Located in aisle
 Coca-Cola Classic
 | Soft Drink Bottle | 2 Litre

\$3.50 ea
 \$1.75 per 1L | Was \$4.40
 on Mar 2022

Add to list

D. ALLEGED REPRESENTATION

59. In its pleading, the ACCC alleges that by displaying Down Down tickets, Coles represented that the relevant product’s Down Down price was a genuine reduction to, or discount from, its “previous regular price”.¹³⁴ This of course is not explicit in Coles'

¹³⁴ CS (CB 2) at [11].

conduct. It is an implication. In its submissions, the ACCC redefines the implication: “previous regular price” means “the price at which that product was ordinarily offered for sale for a reasonable period prior to the promotion”.¹³⁵

60. The notion of a “previous regular price” is what Julius Stone would have called a category of indeterminate reference: it calls for an evaluation on the basis of an indeterminate concept.¹³⁶ Notably, it does so on the basis that this is how the ordinary reasonable consumer would understand the effect of the conduct.¹³⁷ As redefined by the ACCC, the indeterminacy is compounded: “previous regular price” is defined to mean “ordinarily offered for sale for a reasonable period”,¹³⁸ which employs two additional categories of indeterminate reference: “ordinarily” and “reasonable”. This is then refined into further indeterminacies, namely, a question about the *sufficiency* of the relative duration of previous *ordinary* prices.
61. Of course, categories of indeterminate reference can properly be the subject of judicial determination. As Gummow J said in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*,¹³⁹ “there may be a number of categories of indeterminate reference which already exist in the case law in Australia”.¹⁴⁰ His Honour went on to say: “However, that is no reason to add to them.”¹⁴¹ For present purposes the difficulty is that the ACCC’s construction involves attributing to the ordinary reasonable consumer a state of mind: (1) that is said to be derived entirely by implication from a simple statement; (2) which involves cascading categories of indeterminacy; but (3) which ignores the full matrix of relevant circumstances. It combines complexity, indefiniteness and incompleteness in a manner that is not plausibly attributable to the ordinary reasonable consumer seeing a price tag on a supermarket shelf (or in an online or paper catalogue).

¹³⁵ AS at [9], [67].

¹³⁶ Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 263–7. See also *Dwyer* at [37] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *Taikato* at 466 (Brennan CJ, Toohey, McHugh and Gummow JJ).

¹³⁷ AS at [77]–[78].

¹³⁸ AS at [9], [67].

¹³⁹ [1993] FCA 638; (1993) 45 FCR 84 (*Service Station Association*).

¹⁴⁰ *Service Station Association* at 97 (Gummow J).

¹⁴¹ *Service Station Association* at 97 (Gummow J).

62. As to (3) above, if the representation was made then what constitutes a “reasonable period” will depend on various factors (as the ACCC itself acknowledges).¹⁴² It is characteristic of categories of indeterminate reference that they are “predicated on a ‘fact-value’ complex, not mere facts”.¹⁴³ Despite this, the ACCC’s case is based on a single factor. It says that the alleged representations were false or misleading because, for each of the Affected Products:¹⁴⁴
- (a) the period the product was offered for sale immediately prior to the promotion (at Price 2) was “relatively short”, being 45 days or less;
 - (b) in comparison to the period the product was offered for sale in a prior historical period (at Price 1), being at least 180 days – excluding any price fluctuations due to Specials up to a few weeks.
63. Thus, on the ACCC’s case, the Down Down tickets conveyed *that* concept to ordinary, reasonable customers. That is, the representation conveyed by “was \$2.70 March 2022” is this: “\$2.70 was the price in March 2022 and was the price prior to March 2022 for a period that was not short relative to the ordinary price that preceded \$2.70, excluding short term Specials”. We address this topic further in Section F below. But we note here that the ACCC’s case might be thought to involve a large leap from the text being interpreted. It gives a false determinacy to the indeterminate concepts they say were conveyed.

E. THE RELEVANT CLASS OF CONSUMERS

64. As noted above, where the conduct complained of is directed at the public or a section of the public (cf. a specific individual) it is necessary to identify the class of persons to which the conduct is directed, then objectively attribute characteristics and knowledge to the hypothetical member (or members) of the class.¹⁴⁵

¹⁴² AS at [58].

¹⁴³ *Service Station Association* at 97 (Gummow J).

¹⁴⁴ CS (CB 2) at [12], [15].

¹⁴⁵ *Self Care* at [83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).

E.1 Relevant class of consumers

65. Down Down tickets are directed at actual or potential purchasers of the products. Based on the way the ACCC puts its case, the relevant characteristics of the actual or potential buyers of each product for the purposes of the ACCC’s case are likely to be substantially the same. Any differences in the relevant classes of consumers should therefore not affect the assessment of the impugned conduct.

E.2 Characteristics of the ordinary and reasonable Coles customer

66. The hypothetical ordinary and reasonable Coles customer had at least the following characteristics.

67. *First*, they understood that Coles is one of the largest supermarkets in Australia and sells products from its physical stores and online.¹⁴⁶

68. *Secondly*, they shopped frequently at Coles. Coles operated on the basis that consumers typically shopped at a major grocery retailer at least once each week.¹⁴⁷ Customers who shopped less than once per week at Coles are still likely to have shopped at Coles frequently (many times over many years), given that Coles is one of two major supermarkets in Australia.

69. *Thirdly*, they understood that the prices that Coles charged for products frequently changed, including as a result of the product going on and off promotion (e.g. Specials) or Coles changing the “white ticket” prices.¹⁴⁸

70. *Fourthly*, in conducting their shopping (whether in-store or online), they looked at promotional tickets briefly but sufficiently to observe the features of the promotion. In the case of the relevant Down Down tickets, they observed the words “Down Down”, the Down Down price and typically the word “was” together with the price, month and year which appear in prominent text directly next to the Down Down price.¹⁴⁹

¹⁴⁶ First SOAF (CB 8) at [9]–[10].

¹⁴⁷ Galle (CB 18) at [38].

¹⁴⁸ Galle (CB 18) at [36]; Lavdas (CB 12) at [27], [29].

¹⁴⁹ First SOAF (CB 8) at [25].

71. *Fifthly*, they would appreciate that Coles had numerous promotional mechanisms; that some were of short duration and others longer; and that Down Down was a long term discount promotion¹⁵⁰ (something which would effectively be explicit after a passage of time from the date identified for Price 2).
72. *Sixthly*, given the size of Coles as a national retailer,¹⁵¹ they would appreciate that over periods as short as a week Coles would likely sell thousands of each item.
73. *Seventhly*, in the period in question, given its importance and notoriety they would appreciate that inflation was rising and that this would likely lead to price increases at the request of suppliers.

F. THE ALLEGED REPRESENTATION WAS NOT CONVEYED

74. Down Down tickets did not contain any express representation to the effect alleged by the ACCC. The ACCC must therefore show that the alleged representation would have been inferred by the ordinary and reasonable Coles customer reading the tickets.
75. In almost all cases, Down Down tickets included the word “was” together with a price, month and year (e.g. “Was \$10 July 2022”) in prominent text.¹⁵²
76. The word “was” is the simple past tense of “to be”, which means “to exist”, “to take place” or “to occur”.¹⁵³ When it is read together with the price, month and year, the natural and ordinary meaning of the Down Down tickets is that the product was last sold at that “was” price, and that this was in that month. Thus, when the ordinary and reasonable customer saw “Was \$10 July 2022”, for example, they would understand that \$10 was the last price charged by Coles for the relevant product, and this was charged in July 2022.
77. They may have also expected the “was” price to be a real or genuine one (that is, not contrived or ephemeral), such that the discount or saving that Coles was advertising (the “was” price compared to the Down Down price) represented a real or genuine saving.

¹⁵⁰ First SOAF (CB 8) at [19].

¹⁵¹ First SOAF (CB 8) at [9]–[10].

¹⁵² Third SOAF (CB 10).

¹⁵³ *Macquarie Dictionary* (9th ed, 2023) 'to be', 126.

78. But there is no basis to conclude that ordinary and reasonable customers would read the tickets as conveying the sequence of matters necessary for the ACCC’s case, namely: that the Down Down ticket conveyed that the “now” price was a genuine reduction to, or discount from, its “previous regular price”, now defined to mean “the price at which that product was *ordinarily* offered for sale for a *reasonable* period prior to the promotion”,¹⁵⁴ where “reasonable period” is in turn defined to mean, “offered for a *reasonable or sufficient duration relative* to the price *ordinarily* charged before that previous price”. The ACCC does not identify any feature of Down Down tickets, or relevant context, to suggest that ordinary and reasonable consumers would interpret the claim of the discount by that elaborate, indeterminate, and (so far as the last step leaves other relevant circumstances out of account) incomplete process.
79. The ACCC cites *Kogan* in support of its case.¹⁵⁵ Attention to its facts and the reasoning is essential. The respondent was an online retailer. From 27 to 30 June 2018, it ran a promotion whereby it offered the products for sale and said that if customers entered a promotional code (“TAXTIME”) at checkout they would receive a 10% discount that was only available for a limited time.¹⁵⁶ In fact, the day before the promotion (on 26 June 2018), it increased its advertised prices for various products by around 10%.¹⁵⁷ And after the promotion finished (on 2 July 2018), it decreased the price again, in many cases by around 10%.¹⁵⁸ The result was that both before and after the promotion the item was available for purchase at around the same price as the promotional price.¹⁵⁹ Davies J concluded (inevitably) that ordinary and reasonable consumers who saw the advertisements would not have expected the price preceding the discount period to be a price increased by *Kogan* (i.e. on the day before the promotion) so as to offset any genuine 10% discount on the promotion.¹⁶⁰
80. The ACCC did argue in *Kogan* that the ads conveyed that if consumers purchased products during the Tax Time Promotion and used the code “TAXTIME” at checkout, they would receive a 10% discount off the price at which these products were available

¹⁵⁴ AS at [9] (emphasis added).

¹⁵⁵ AS at [78].

¹⁵⁶ *Kogan* at [1]–[2] (Davies J).

¹⁵⁷ *Kogan* at [18], [40] (Davies J).

¹⁵⁸ *Kogan* at [18], [86] (Davies J).

¹⁵⁹ See *Kogan* at [85]–[86] (Davies J).

¹⁶⁰ *Kogan* at [85] (Davies J).

for sale for a reasonable period before the Tax Time Promotion.¹⁶¹ However, the ACCC disclaimed any argument that the idea of a “reasonable” period delineated any fixed period of price stability.¹⁶² Rather, it was:

“to capture the expectations of reasonable consumers that a reduction in prices or discount be a genuine reduction or discount, from the price at which products were or would be available for sale before and after the promotion.”¹⁶³

81. Consistently with this, the Court did not find that the ads conveyed a meaning by reference to the notion of a “reasonable period”. Rather, it found that the dominant message conveyed was:

“a reduction or discount on the prices of the products offered for sale from the prices at which those had previously been offered or would be offered for sale in the future.”¹⁶⁴

82. Further, the ACCC did not rely on any assessment of the relative duration of different historical prices. And insofar as the ACCC relied on stable previous and subsequent prices as a point of comparison with the discounted price, it relied on prices over a *two-week* period.¹⁶⁵ That, apparently, was taken to be sufficient for price establishment.
83. Properly understood, the decision in *Kogan* does not support ACCC claims in this case – rather, it undermines them.
84. The other authorities on “was/now” pricing have followed a similar path – focusing on the prices in place *immediately before* the promotion.¹⁶⁶

¹⁶¹ *Kogan* at [3], [95] (Davies J).

¹⁶² *Kogan* at [84] (Davies J).

¹⁶³ *Kogan* at [84] (Davies J).

¹⁶⁴ *Kogan* at [81] (Davies J). See also *Kogan* at [72] (Davies J).

¹⁶⁵ *Kogan* at [20], [96] (Davies J).

¹⁶⁶ See, eg, *Prouds* at [31], [32], [38], [42], [46], [55], [63] (Black CJ, Ryan and Gordon JJ); *Australian Competition and Consumer Commission v Ascot Four Pty Ltd* [2008] FCA 1295; (2008) 250 ALR 467; *Jewellery Group Pty Ltd v Australian Competition and Consumer Commission* [2013] FCAFC 144 at [18], [55]–[57] (Greenwood and Besanko JJ), [74], [90] (Katzmann J).

85. That is not consistent with the ACCC’s approach in this case, but is consistent with what Coles submits is a straightforward approach to characterising the effect of the conduct in this case.

F1. The ACCC’s alleged representation is unacceptably unclear

86. As noted above, the ACCC says that what constitutes a “reasonable period” depends on “various factors”¹⁶⁷ but has not identified or analysed any of them, save for one: the relative duration of the Price 2 Period as compared with an earlier price period not referred to on the tickets. It is unclear on the ACCC’s case what those other factors are, whether they vary from one product to the next (and, if so, how), and how ordinary and reasonable consumers would think about (or weigh) them so as to identify a “reasonable period” in any given case.

87. Further, the only “factor” the ACCC has identified – whether the period the product was sold at Price 2 is “relatively short”¹⁶⁸ – is unclear. It is unclear whether that period will be “relatively short” if it is:

- (a) shorter than the Price 1 Period by *any* amount;
- (b) shorter than the Price 1 Period by some particular amount (e.g. one week, one month or one year) – and, if so, how one identifies the amount (even approximately); or
- (c) some portion of the Price 1 Period (e.g. 10%, 50% or 80%) – and again, if so, how one identifies the portion (even approximately).

88. It is also unclear whether the “reasonable period” is always a relative concept, or whether it may sometimes be assessed in absolute terms. For example, if the Price 2 Period is two months, or four months – or even a year – has it then been sold for a “reasonable period”, regardless of the duration of the Price 1 Period?

89. The ACCC says that the contraventions it alleges would be “unlikely” to have occurred if the Affected Products were sold at Price 2 for nine months.¹⁶⁹ However,

¹⁶⁷ AS at [88].

¹⁶⁸ AS at [88]–[92].

¹⁶⁹ AS at [45]–[47].

that implies that nine months might still be insufficient. The ACCC does not explain how ordinary, reasonable customers would arrive at a judgement either way. For example, it offers no explanation as to why a period of many months might be perceived as implied by the tickets (in the context of Coles' grocery business, where consumers purchase, consume and re-purchase products within quite short periods of time).

90. The concept of a price at which a product was “ordinarily” offered for sale adds further uncertainty. Presumably it is intended to capture the allegation in the ACCC’s pleading that the “previous regular price” excludes “temporary price fluctuations”.¹⁷⁰ But the additional indeterminacy introduced by this notion further diminishes the cogency of the multi-layered implications on which the ACCC relies.
91. Further, there is, with respect, no reason why “temporary price fluctuations”¹⁷¹ should be excluded from consideration. The notion of a previous “regular” price implies stability. Where prices before Price 2 were not relevantly stable, there is not a price able to be characterised as “regular”.

F2. No intention to convey the alleged representation

92. The ACCC contends that Coles *intended* Down Down tickets to convey the alleged representation, which supports an inference that they did so.¹⁷²
93. That contention should be rejected. *First*, whether or not a party intended to convey a particular representation is only relevant if the impugned conduct was “apt” to convey that representation.¹⁷³ Down Down tickets were not apt to convey the alleged Down Down Representation, for the reasons given above.
94. *Secondly*, in any event, none of the matters on which the ACCC relies are concerned with what Coles intended Down Down tickets to convey. They are statements in Coles’ internal documents or communications to the ACCC describing price changes that *in fact* occurred, or that should occur, before products are placed on a Down Down

¹⁷⁰ CS (CB 2) at [12], [15].

¹⁷¹ AS at [53.1], [90].

¹⁷² AS at [82], [85].

¹⁷³ *TPG* at [55] (French CJ, Crennan, Bell and Keane JJ).

promotion.¹⁷⁴ They are not relevant to or probative of the question of whether the alleged representation was conveyed.

95. *Thirdly*, some of the matters on which the ACCC relies are references in Coles' internal documents or communications to the expressions "regular price" and/or "reasonable period".¹⁷⁵ The ACCC wrongly assumes that Coles was using those expressions in the way the ACCC now does for the purposes of this proceeding, *viz.*, to mean a price at which a product was sold for a sufficient period relative to some earlier price. Nothing in the relevant documents suggests that Coles was using those expressions in those particular ways. Examination of the documents will show that it was not.

G. THE ALLEGED REPRESENTATION, IF MADE, WAS NOT FALSE OR MISLEADING

96. Even if the Court finds that the Down Down tickets conveyed the ACCC's alleged representation, they were not false or misleading. The evidence shows that Price 2 for each of the sample products was a genuine non-promotional price at which products were offered for sale, and were sold. The period during which each of the sample products was offered for sale at Price 2 was sufficient to be characterised as reasonable, having regard to the following matters.
97. *First*, ordinary and reasonable customers understood that Coles is one of the largest supermarkets in Australia and the customers used it for their regular shopping. They understood that when Coles offered a product for sale at a particular price, large volumes of sales of the product may occur in a very short period of time. They expected that, even within the space of a week, thousands of units of a given product could be sold across Coles' stores.
98. *Secondly*, ordinary and reasonable customers understood that Coles' prices frequently changed. Every week in every Coles store the price of around 5,500 products (around 23% to 30% of all products) changed, as they were moved on and off promotion.¹⁷⁶ Indeed, the only products whose prices were *not* apt to frequent change were those

¹⁷⁴ AS at [81]–[85].

¹⁷⁵ AS at [81]–[85].

¹⁷⁶ Galle (CB 18) at [36].

sold with Dropped & Locked and EDV tickets¹⁷⁷ – and those mechanics were the exception to the rule. The fact that they existed only highlights the frequency of change of other prices.

99. *Thirdly*, each sample product was offered for sale at Price 2 for a significant period.¹⁷⁸ For example, the Karicare product (infant formula) was offered for sale at Price 2 between 6 March 2023 and 28 March 2023.¹⁷⁹ The CCA product (soft drink) was offered for sale at Price 2 between 2 February 2022 and 15 March 2022 (save for two weeks where it was sold on Special).¹⁸⁰ Lurpak spreadable butter was offered for sale at Price 2 between 15 June 2022 and 12 July 2022.¹⁸¹ Even the product that was sold at Price 2 for the shortest period (Nature’s Gift dog food) was still sold at that price for a week, across all of Coles’ stores nationally and online.¹⁸²
100. *Fourthly*, each sample product was sold in substantial volumes during the Price 2 Period.¹⁸³ For example, 8,573 units of the Karicare product were sold during the Price 2 Period; 609,982 units of the CCA product were sold during the Price 2 Period; 85,572 units of the Lurpak product were sold during the Price 2 Period; and 3,038 units of the Nature's Gift product were sold during the shortest Price 2 Period.¹⁸⁴
101. *Fifthly*, in most cases Price 2 was the supplier’s RRP for the product. That was the case for each of the Karicare, CCA, Pedigree, Arnott’s, Bragg, Danone, Lurpak, Viva and Nature’s Gift sample products (subject to rounding for Bragg).¹⁸⁵ Colgate did not supply an RRP for the sample product. Coles Finest Quince Paste was a Coles Own Brand product so did not have a RRP. The only sample product for which Price 2 was

¹⁷⁷ Galle (CB 18) at [31]. Coles also had a promotion named “Locked” under which discounting was not permitted, but that promotion was rarely used: Galle (CB 18) at [32].

¹⁷⁸ Second SOAF (CB 9) Annexure 1 at 3, 5, 9–10, 14–15, 18, 20–1, 24, 28–9.

¹⁷⁹ Second SOAF (CB 9) Annexure 1 at 3.

¹⁸⁰ Second SOAF (CB 9) Annexure 1 at 5; Cubbon (CB 14) at [29], [37].

¹⁸¹ Second SOAF (CB 9) Annexure 1 at 24.

¹⁸² Second SOAF (CB 9) Annexure 1 at 28; Carroll (CB 11) at [52], [59]; Galle (CB 18) at [31].

¹⁸³ Second SOAF (CB 9) Annexure 1 at 3, 5, 9–10, 14–15, 18, 20–1, 24, 28–9.

¹⁸⁴ Second SOAF (CB 9) Annexure 1 at 3, 5, 24, 28.

¹⁸⁵ COL.503.060.3344 (CB 49); COL.500.029.4706 (CB 77); COL.500.029.4709 (CB 78); Cubbon (CB 14) at [29]; Carroll (CB 11) at [34]–[35], [52], [74], [76]; Thompson (CB 19) at [41]–[42]; Jorgensen (CB 13) at [25]; Palmisciano (CB 20) at [39]–[40]; COL.504.004.9486 (CB 519); COL.501.011.7186 (CB 555); COL.500.008.1598 (CB 697); COL.500.029.2998 (CB 739); COL.500.008.1629 (CB 805); COL.503.009.3923 (CB 877).

not the supplier's RRP was the Rexona sample product.¹⁸⁶ Price 2 for the Rexona sample product was \$6.50 whereas the RRP was \$6.¹⁸⁷ But Coles only moved it to \$6.50 after observing that that was the price Woolworths was charging for the product.¹⁸⁸ Coles was simply responding to the competition. It was a genuine price.

102. *Sixthly*, for each of the sample products, the increase from Price 1 to Price 2 was precipitated by an increase in the supplier's list price or a change to the supplier's promotional funding.¹⁸⁹ Further, before accepting the supplier's CPA, Coles typically assessed and tested the veracity of the supplier's claimed cost increases based on the information available to Coles.¹⁹⁰
103. Thus, by way of example, in February 2022, Ms Thompson (then Senior Category Manager of the Biscuits and Cookies category) received a CPA request from Arnott's in respect of 77 of its products including the Shapes Multipack.¹⁹¹ At that time, and since at least January 2021, the Shapes Multipack had been priced at \$5.00 on a Down Down promotion.¹⁹² As a result of the CPA request, Arnott's sought a 10.02% increase in the list price for that product and proposed a new RRP of \$6.50.¹⁹³
104. In its initial assessment, the VMO validated a cost increase of between 7.8% and 10.02%.¹⁹⁴ Before accepting the supplier's CPA request, Ms Thompson engaged in discussions and negotiations with Arnott's regarding promotional funding and a promotional strategy to drive volume, and sought to ensure that Coles' prices were competitive and the product category's financial performance was supported.¹⁹⁵ During the negotiation, Ms Lavdas (then Business Category Manager of the Impulse

¹⁸⁶ Affidavit of Edward Matthew McCutchan dated 20 November 2025, COL.900.002.0001 (**McCutchan**) (CB 15) at [30]; Hankin (CB 16) at [37], [54].

¹⁸⁷ Hankin (CB 16) at [37], [54].

¹⁸⁸ Hankin (CB 16) at [53]–[54].

¹⁸⁹ Edwards (CB 23) at .0037–.0048; Carroll (CB 11) at [23], [43], [60]; Jorgensen (CB 13) at [19]; McCutchan (CB 15) at [23]; Cubbon (CB 14) at [17]; Hankin (CB 16) at [12], [36]; Thompson (CB 19) at [25]; Palmisciano (CB 20) at [27]; COL.503.060.3343 (CB 48); COL.503.060.3344 (CB 49); COL.504.004.9486 (CB 519); COL.500.008.1597 (CB 696); COL.500.008.1598 (CB 697); COL.500.008.1627 (CB 803); COL.500.008.1628 (CB 804); COL.500.008.1629 (CB 805).

¹⁹⁰ Lavdas (CB 12) at [21].

¹⁹¹ Thompson (CB 19) at [6], [25].

¹⁹² Second SOAF (CB 9) Annexure 1 at 9–10.

¹⁹³ Thompson (CB 19) at [25], [27].

¹⁹⁴ Thompson (CB 19) at [29].

¹⁹⁵ Thompson (CB 19) at [33]–[34].

category), to whom Ms Thompson reported,¹⁹⁶ also became involved and challenged the promotional plan proposed by Arnott's to ensure that any increase in prices also resulted in changes to the way in which value was delivered to customers.¹⁹⁷ Ultimately, Coles agreed to the CPA request on 6 May 2022, and Arnott's agreed to a revised promotional plan and increased promotional funding for the product.¹⁹⁸

105. Thereafter on 18 May 2022, the product's revised white ticket price of \$6.50 was introduced, which was also the RRP.¹⁹⁹ On the same day, Woolworths was also offering the product for sale at \$6.50.²⁰⁰ The product was sold at that price until 15 June 2022 (save for a Special promotion during that period), at which time it was then placed on Down Down with a promotional price of \$5.50.²⁰¹
106. A further example is the Danone yoghurt product. In early 8 July 2022, Mr Palmisciano (Senior Category Manager – Chilled Desserts and Chilled Spreads) received a CPA request from Danone for 39 products including the Danone yoghurt.²⁰² Danone requested an increase to the list price of the Danone yoghurt from \$█ to \$█ (approximately 11.5%).²⁰³ At the time, Coles had been selling the product on a Down Down promotion at \$6.00 since at least January 2021.²⁰⁴
107. Coles validated only a portion of the claimed price increase and was not satisfied with a revised trade plan that Danone had proposed, which reduced the amount of funding that Danone proposed to provide.²⁰⁵ It pressed Danone to amend and improve the trade plan, to maintain the depth of promotions without Coles' margins decreasing.²⁰⁶ On 9 September 2022, after securing improvements to the trade plan, Coles accepted the CPA request.²⁰⁷

¹⁹⁶ Thompson (CB 19) at [8].

¹⁹⁷ Lavdas (CB 12) at [47].

¹⁹⁸ Lavdas (CB 12) at [50]; Thompson (CB 19) at [35]–[37].

¹⁹⁹ Second SOAF (CB 9) Annexure 1 at 10; Thompson (CB 19) at [25], [41]–[42].

²⁰⁰ Thompson (CB 19) at [42].

²⁰¹ Second SOAF (CB 9) Annexure 1 at 10; Thompson (CB 19) at [43], [46], [48].

²⁰² Palmisciano (CB 20) at [1], [27].

²⁰³ Palmisciano (CB 20) at [27].

²⁰⁴ Second SOAF (CB 9) Annexure 1 at 14.

²⁰⁵ Palmisciano (CB 20) at [29].

²⁰⁶ Palmisciano (CB 20) at [29], [31], [34], [36].

²⁰⁷ Palmisciano (CB 20) at [37].

108. On 12 September 2022, Coles removed Danone yoghurt from the Down Down promotion and sold it on a white ticket for \$7.80.²⁰⁸ That was Danone's new RRP for the product and Mr Palmisciano considered it appropriate having regard to the product's position in the hierarchy of high-protein yoghurt that Coles offered at the time.²⁰⁹ Coles maintained the product at that price for 28 days, before selling it again on Down Down at \$6.70, in accordance with the trade plan for the product.²¹⁰

H. CONCLUSION

109. For the reasons developed above, the alleged representation was not conveyed. It is an artificial construct, not one based on what Down Down tickets said or how consumers are likely to have read them. The ACCC appears instead to have started with its case on falsity and sought to formulate a representation to fit that case. The approach is misconceived and wrong. In any event, even if the representation was made, it was not false or misleading. The application should be dismissed.

6 February 2026

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²⁰⁸ Palmisciano (CB 20) at [40].

²⁰⁹ Palmisciano (CB 20) at [39].

²¹⁰ Palmisciano (CB 20) at [37], [40].