

NOTICE OF FILING

Details 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

Federal Court of Australia

No. VID of 2024

District Registry: Victoria

Division: General

Commercial and Corporations National Practice Area (Regulator and Consumer Protection)

Australian Competition and Consumer Commission

Applicant

Woolworths Group Limited (ACN 000 014 675)

Respondent

A. INTRODUCTION

1. The Applicant (the **ACCC**) alleges that, between September 2021 and May 2023 (the **Relevant Period**), Woolworths Group Limited (**Woolworths**) temporarily increased the prices of at least 266 different products (**Affected Products**) before placing them on 'Prices Dropped' promotions at prices which were higher than, or the same as, the price at which each product had ordinarily been offered for sale prior to the temporary price spike. In many cases, before the price spike, Woolworths had planned to later place the Affected Product on a 'Prices Dropped' promotion, and effected the temporary price spike to 'establish' a higher 'was' price.
2. As a result, Woolworths represented to consumers that the prices of Affected Products promoted on 'Prices Dropped' were discounted when, in fact, the purported discount was illusory. By this conduct, Woolworths made false or misleading representations in breach of ss 18 and 29(1)(i) of the Australian Consumer Law (the **ACL**).

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

3. Woolworths is the operator of the largest supermarket chain in Australia. There were approximately 1,140 Woolworths supermarket stores which traded at any time during the Relevant Period.

Filed on behalf of the Applicant, the ACCC
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B.1 The 'Prices Dropped' Program

4. At all material times, Woolworths operated a national pricing model, with the result that prices for its products were typically the same across all locations, whether purchased in-store or online. This was subject only to limited exceptions, such as in the case of ad-hoc, store-specific clearance sales; stores which required remote freight; and adjustments relating to container deposit schemes.
5. The **'Prices Dropped' Program** is promoted by Woolworths as a shelf price reduction program designed to offer Woolworths' customers consistently low prices over a prolonged period. The objective of the 'Prices Dropped' Program was to lower the standard shelf price of a product from its previous standard (or regular) shelf price. It was a key aspect of Woolworths' marketing throughout at least the Relevant Period.
6. In contrast to short-term specials, which involve temporarily discounting the prices of products for a few days or weeks, the promotional focus of the 'Prices Dropped' Program was on lowering the standard shelf price of a product on a longer-term basis. During the Relevant Period, Woolworths typically promoted products on the 'Prices Dropped' Program for at least 12 weeks. Many of the Affected Products were placed on 'Prices Dropped' for six months or longer.
7. Products on a 'Prices Dropped' promotion were identified by Woolworths in-store and online using different tickets (**'Prices Dropped' Tickets**) to distinguish them from products on special or on other forms of promotion. At least throughout the Relevant Period, the 'Prices Dropped' Ticket for a product was displayed, during the period that the product remained on promotion:
 - (a) in-store (whether in the form of paper tickets or electronic shelf labels), on the shelf immediately below the relevant product, or otherwise physically near the relevant product; and
 - (b) online, when consumers shopped on Woolworths' website or on a mobile or tablet via the Woolworths mobile application, near the picture of the relevant product.
8. The precise design of 'Prices Dropped' Tickets varied somewhat throughout the Relevant Period and depending on whether it was a physical ticket displayed in-store or a digital one displayed online. Nonetheless, the features relevant to this proceeding (set out in paragraph 9 below) remained the same.

B.2 The 'Prices Dropped' Representation

9. Throughout the Relevant Period, 'Prices Dropped' Tickets displayed by Woolworths in its stores and online included the following features:
 - (a) a red and white colour scheme (or black and white for electronic shelf labels), coupled with the words "Prices Dropped" in large, bold, font;¹
 - (b) the name of the relevant product (for example, "Macro Organic Chick Peas 425g");
 - (c) the price at which the product was available for sale during the 'Prices Dropped' promotion (the '**Prices Dropped** price'), displayed in prominent font; and
 - (d) in all but a small number of cases, a '**was**' price for the product or products in the same range, displayed in smaller font, together with the date of the 'was' price (for example, "Was \$21 17/10/2017").
10. The small number of exceptions referred to in subparagraph 9(d) were where the product had been on a 'Prices Dropped' promotion for 12 months — at which point Woolworths changed the labels to say "Since [the date on which the 'Prices Dropped' promotion commenced]" without reference to a 'was' price.
11. Examples of 'Prices Dropped' Tickets used by Woolworths throughout the Relevant Period can be found at **Schedule A** to this Concise Statement.
12. The information displayed on each 'Prices Dropped' Ticket represented to consumers that the relevant product's 'Prices Dropped' price was a genuine reduction to, or discount from, the product's previous regular price (the '**Prices Dropped** Representation').

¹ In some cases, the words 'Prices Dropped' were accompanied by additional words relating to it being for a particular time (e.g. 'PRICES DROPPED *for Winter*'), which were referred to by Woolworths as seasonal Prices Dropped programs and ordinarily ran for approximately 13 weeks. Woolworths also ran a thematic Prices Dropped campaign during the Relevant Period, 'PRICES DROPPED on healthier products'.

B.3 Misleading representations in relation to the Affected Products

13. Throughout the Relevant Period, the 'Prices Dropped' Representations made by Woolworths on 'Prices Dropped' Tickets displayed in-store and online in respect of the 266 Affected Products were false or misleading because:
- (a) Woolworths had increased the price of each Affected Product for only a relatively short period of time (the **Price Spike Period**) prior to placing the product on the 'Prices Dropped' promotion — and, in most cases, advertising that higher price as the relevant 'was' price on the product's 'Prices Dropped' Ticket;² and
 - (b) the price at which Woolworths offered each Affected Product for sale during the 'Prices Dropped' promotion (as displayed on the product's 'Prices Dropped' Ticket) was:
 - (i) in 265 instances, higher than; and
 - (ii) in 11 instances, the same as,the Affected Product's previous regular price (i.e. the price at which Woolworths had previously offered the product for sale prior to the Price Spike Period, excluding any short-term specials or promotions).
14. For some Affected Products, there was more than one occasion during the Relevant Period on which the product was placed on a 'Prices Dropped' promotion following a Price Spike Period. For this reason, the total number of separate instances collectively referred to in subparagraph 13(b) above is 276, which is greater than the total number of Affected Products, being 266.
15. In many cases, Woolworths had already planned to later place the Affected Product on a 'Prices Dropped' promotion prior to the commencement of the Price Spike Period, and effected the temporary price increase for the purpose of 'establishing' a higher 'was' price. As a general principle, Woolworths also sought to at least maintain its margin with respect to the Affected Products throughout the process outlined in paragraph 13 above.

² For a limited number of Affected Products, the Price Spike Period did not immediately precede the relevant 'Prices Dropped' promotion. For those products, Woolworths reduced the price of the product to what would become the 'Prices Dropped' price, shortly before applying the 'Prices Dropped' promotion. The 'Prices Dropped' promotion was subsequently applied with a 'was' price in all cases referring to the price at which Woolworths offered the product for sale during the Price Spike Period.

16. In the case of the Affected Products the subject of this proceeding:
- (a) there was a Price Spike Period of 45 days or less prior to the product being placed on the 'Prices Dropped' promotion during which the price of the product (excluding any temporary price fluctuations due to short-term specials for a few days or weeks) was at least 15% higher than its previous regular price; and
 - (b) the 'Prices Dropped' price at which the product was offered for sale after the Price Spike Period was either higher than, or the same as, the price at which that product had previously been offered for sale for a period of 180 days or more (excluding any temporary price fluctuations due to short term specials for a few days or weeks, or other temporary price fluctuations of seven days or less) prior to the Price Spike Period.
17. For example, from at least 1 January 2021 until 27 November 2022, Woolworths offered the Oreo Family Pack Original 370g product for sale (on a pre-existing 'Prices Dropped' promotion) at a regular price of \$3.50 — being a period of at least 696 days. On 28 November 2022, the price of the product was increased to \$5.00 for a period of 22 days (the Price Spike Period). On 20 December 2022, the product was then placed back on a 'Prices Dropped' promotion with the tickets showing a 'Prices Dropped' price of \$4.50 and a 'was' price of \$5.00. The 'Prices Dropped' price of \$4.50 was 29% higher than the product's previous regular price of \$3.50. A graphical representation of this example is set out at **Schedule B** to this Concise Statement.
18. In the case of the above example, Woolworths had planned the temporary price spike to establish a new higher 'was' price for the subsequent 'promotion'. Woolworths had decided (following a request from the supplier for a price increase) on or around 18 November 2022 to take the product off 'Prices Dropped', increase the price, and then put the product back on to 'Prices Dropped' three weeks later.

C. RELIEF SOUGHT

19. The ACCC seeks the relief set out in the accompanying Originating Application, comprising declarations, pecuniary penalties, non-punitive orders, and costs.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

20. For the reasons set out in this Concise Statement, the ACCC alleges that by making the 'Prices Dropped' Representations about the Affected Products during the Relevant Period, Woolworths, in trade or commerce, in connection with the supply or possible supply of goods (or the promotion thereof):
- (a) engaged in misleading or deceptive conduct, in contravention of s 18 of the ACL; and
 - (b) further, or in the alternative, made false or misleading representations with respect to the price of goods, in contravention of s 29(1)(i) of the ACL.
21. It is alleged that a separate contravention of s 18 and/or s 29(1)(i) occurred on each occasion that Woolworths made a 'Prices Dropped' Representation to a consumer about an Affected Product during the Relevant Period in the circumstances set out in paragraph 13 above. The total number of contraventions is therefore equivalent to the number of times a consumer viewed a relevant 'Prices Dropped' Ticket for an Affected Product during the Relevant Period.
22. It may be inferred that this number is at least equal to the total number of consumers who purchased an Affected Product while the product was promoted as being on 'Prices Dropped' in the circumstances set out in paragraph 13 above.

E. ALLEGED HARM

23. As a result of Woolworths' conduct, consumers shopping both in-store and online may have made decisions to purchase products based on false or misleading information. The relevant conduct took place over an extended period of time, and involved the largest player in a critical market for Australians. The false or misleading representations concerned the price of household staples at a time of increasing cost of living pressures, and were made in the context of a program which Woolworths specifically promoted as being designed to help consumers make long-term savings on the cost of their groceries. By its conduct, Woolworths diminished the ability of consumers to make informed choices about their essential purchases.

This concise statement was prepared by James Love of Johnson Winter Slattery and settled by Michael Hodge KC and Sarida McLeod of counsel.

CERTIFICATE OF LAWYER

I, James Love, certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 23 September 2024



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James Love
Partner, Johnson Winter Slattery
Solicitor for the Applicant

SCHEDULE A

Example 1:

Example of in-store 'Prices Dropped' Ticket in use during the Relevant Period.



Example 2:


Example of in-store 'Prices Dropped' Ticket in use from June 2021, in relation to the seasonal 'Prices Dropped for Winter' promotion.



Example 3:

Example of online 'Prices Dropped' Ticket in use on the Woolworths Online website from September 2021 to February 2023.


PRICES DROPPED




Sunrice Super Grains Gluten Free Super Duo Cup 250g

Range was **\$3.80** 24/02/2020


\$3⁰⁰ \$1.20 / 100G

Add to cart 

Save to list 

Example 4:

Example of online 'Prices Dropped' Ticket in use on the Woolworths mobile application from September 2021.



PRICES DROPPED

Woolworths Pasta Spaghetti 500g

\$1⁰⁰

\$0.20 per 100G

Range was **\$1.25** 12/03/2023

Example 5:

Example of electronic shelf label 'Prices Dropped' Ticket in use from June 2022 to September 2022.



Example 6:

Example of electronic shelf label 'Prices Dropped' Ticket template in use from 21 September 2022.



SCHEDULE B

73032-EA Oreo Family Pack Original 370g

