

<b>COMPLAINT NUMBER</b>	18/225
<b>AWAP</b>	18/003
<b>COMPLAINANT</b>	Foodstuffs North Island
<b>ADVERTISER</b>	Woolworths New Zealand
<b>ADVERTISEMENT</b>	Countdown Mailer
<b>DATE OF MEETING</b>	3 September 2018
<b>OUTCOME</b>	Settled in part and Not Upheld in part

### **SUMMARY**

The 32 page Countdown supermarket printed mailer advertisement was distributed to letterboxes and promoted “1/2 price week on selected promotions”. The mailer included specials on about 270 items with about 47 items promoted as half price. It said prices were valid instore and online from Monday 28 May to Sunday 3 June 2018. Fine print on the back page of the mailer listed qualifying statements including “All saves are based on non-promotional prices”.

The Complainant, Foodstuffs North Island, said the mailer advertisement was misleading because the implied usual price is in many instances not genuine, as it is too old or rarely used, the main “½ Price” message of the mailer is significantly diminished by the fine print, the fine print is too inconspicuous and too small to be informative for customers, and the claim that the saving is for ‘one week’ is misleading because some products do not return to their usual prices at the end of the promotion week but remain at the discounted price.

The Advertiser, Woolworths New Zealand, said the Mailer (with the exception of the Cadbury Novelty Bar referred to below) was not in breach of the Code, including the fine print. The Mailer was not misleading or deceptive, as it genuinely offered at least 50% off the non-promotional price of the extensive list of products featured in the Mailer for the week from 28 May to 3 June 2018. Taking into account pricing information for the Cadbury Novelty Bar, the Advertiser accepted that product should not have been included in the Half Price Promotion.

The Panel ruled by majority the use of non-promotional pricing as a basis for the savings claims did not make the advertisement misleading. This aspect of the complaint was not upheld.

The Panel ruled by majority the Advertiser had substantiated the prices in the mailer were genuine and not misleading. This aspect of the complaint was not upheld.

In relation to the specific examples referred to by the Complainant, the complaint was settled in part, as the Advertiser had acknowledged the inclusion of the Cadbury Novelty Bars in the half price promotion was misleading.

The Panel ruled by majority that the main “½ Price” message of the mailer was not significantly diminished by the fine print. This aspect of the complaint was not upheld.

The Panel ruled unanimously that the fine print was not too inconspicuous and too small to be informative for customers.

The Panel ruled unanimously that the claim the savings were for 'one week' was not misleading when two products specifically identified by the Complainant did not return to their usual price immediately after that week, as they were part of another promotion.

Therefore, the Panel ruled the complaint was Settled in part and Not Upheld in part.

Please note this headnote does not form part of the Decision.

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## **PROCEDURE**

The Chair ruled to deal with the matter by "adjudication with attendance of the parties" pursuant to Rule 3 of the Complaints Procedures of the Advertising Standards Complaints Board. This system is designed to resolve disputes between competitors, and a Panel was appointed.

## **THE PANEL**

Chair – R. Anderson, Chair of the Advertising Standards Complaints Board.

Co-panelists – S. Taylor (Public Member of the Advertising Standards Complaints Appeal Board) and N. Keats (Industry Member of the Advertising Standards Complaints Appeal Board).

## **THE PARTIES**

**The Complainant, Foodstuffs North Island:** Iain Thain, DLA Piper and Mike Brooker, General Counsel, Foodstuffs North Island.

**The Advertiser, Woolworths New Zealand (formerly Progressive Enterprises Limited):** Joe Edwards, Russell McVeagh, James Radcliffe, General Counsel, Woolworths New Zealand, and Kiri Hannifin, General Manager, Corporate Affairs, Woolworths New Zealand.

## **PANEL DECISION**

### **Code of Ethics**

The Chair directed the Panel to consider the advertisement with reference to Basic Principle 3 and Rule 2 of the Code of Ethics.

Basic Principle 3 of the Code of Ethics requires that no advertisement is misleading or deceptive or likely to mislead or deceive the consumer.

Rule 2 of the Code of Ethics required the Panel to consider whether the advertisement contained any statement or visual presentation or created an overall impression which directly or by implication, omission, ambiguity or exaggerated claim was misleading or deceptive, was likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading.)

For the purposes of this adjudication, the Code of Ethics is the relevant Code. The Panel acknowledged that parties referred to the Advertising Standards Code, released by the Advertising Standards Authority in July 2018. The Chair of the Panel noted this Code comes into effect in November for new advertising and February 2019 for all advertising.

## **The Advertisement**

The 32 page Countdown printed mailer advertisement was distributed to letterboxes and promoted “1/2 price week on selected promotions”. The mailer included specials on about 270 items with about 47 promoted as half price. It said prices were valid instore and online from Monday, 28 May to Sunday, 3 June 2018. Fine print on the back page of the mailer listed qualifying statements including “All saves are based on non-promotional prices”.

## **Possible Precedent Decisions and other relevant information**

The Panel noted four possible precedent decisions.

Decision 13/516 AWAP 13/009 was an adjudication in which The Mad Butcher complained about a comparative newspaper advertisement from Countdown supermarket. The complaint was upheld in part, as the advertisement did not accurately reflect a like-for-like comparison; the fine print was borderline illegible and the comparison between the sale and everyday price was not explicit enough in the advertisement.

Decision 17/425 was a consumer complaint about a Christmas tree promotion by The Warehouse. The complaint was not upheld. The Complainant said the white sticker price and the sale price were the same. The Advertiser said the ‘price drop’ promotion was not a sale price but a new ‘everyday’ price.

Decision 18/084 was a consumer complaint about pricing for Lindauer sparkling wine. The complaint was not upheld. The Complainant said the Lockdown Price promotion was misleading as there was no mention of an end date for it. The Advertiser Countdown explained the Lockdown Price programme aimed to offer low prices for longer than ordinary special offers and that Lockdown Prices could cease if the supplier price increased and this was unable to be predicted with any certainty. The Complaints Board noted the Price Lockdown programme offered a lower price for products over an extended period and the advertisement did not state that the reduced price was permanent.

Decision 18/128 AWAP 18/002 was an adjudication in which Progressive Enterprises Limited complained about misleading shopper price comparison advertisements from PAK’n’SAVE. The complaint was settled in part and not upheld in part. An error was made in one of the advertisements relating to the date the shop took place and this part of the complaint was settled. The Complainant said the fine print in the advertisements was too small and contained significant qualifications. The Complainant also considered the testimonial in the advertisement was exceptional and likely to mislead. The Panel accepted that the shopper was representative of a real shopper and this was not misleading. The Panel agreed the fine print was clear and provided a further explanation of the methodology, which did not diminish the consumer take-out of the advertisements.

Parties referred to *Godfrey Hirst NZ Limited v Cavalier Bremworth Limited* [2014] NZCA 418 (27 August 2014). The Court of Appeal discussed “who is the consumer.” They said “*The question is whether the representation was misleading to any significant group of people within the wide class of those entitled to the protection of the section.*” ...

*Once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations.*”

Reference was made to The Fair Trading Act Pricing Fact Sheet published by the Commerce Commission. Under the heading Discounts, it states in part: “A common

*technique is to compare the discounted price with the non-sale price of the good or service (often referred to as the 'usual', 'was', 'normal', or 'everyday price') to highlight the bargain. The 'usual', 'was', 'normal' or 'everyday' price all mean the same thing – they are a reference to the price at which a good or service is usually sold, or the price at which the good or service was offered before it was marked down."*

It also states

*"A business that makes these types of claims might mislead consumers if:*

*...*

*The claimed usual price is one of many prices at which the business commonly sells the goods or service.*

*A usual price will become out of date if it has not been charged for a reasonable period of time. There is no one-size-fits-all rule for when a usual price will become out of date – this will depend on a number of things such as what the good or service is and the market in which it is being sold. It is therefore important that businesses, particularly those who frequently discount their goods and services, take real care when claiming discounts off a usual price."*

### **Complainant's Submission**

The Complainant, Foodstuffs North Island, said the mailer advertisement was misleading because the implied usual price is in many instances not genuine, as it is too old or rarely used, the main "½ Price" message of the mailer is significantly diminished by the fine print, the fine print is too inconspicuous and too small to be informative for customers, and the claim that the saving is for 'one week' is misleading because some products do not return to their usual prices at the end of the promotion week but remain at the discounted price.

### **Advertiser's Submission**

The Advertiser, Woolworths New Zealand, said the Mailer (with the exception of the Cadbury Novelty Bar referred to below), including the fine print, was not in breach of the Code. The Mailer was not misleading or deceptive, as it genuinely offered at least 50% off the non-promotional price of the extensive list of products featured in the Mailer for the week from 28 May to 3 June 2018.

Taking into account pricing information for the Cadbury Novelty Bar, the Advertiser accepted it should not have been included in the half price promotion.

### **Panel Discussion**

The Panel read all the relevant correspondence regarding the complaint, viewed copies of the advertisement and noted the Complainant's concerns that it considered the Advertiser made misleading and unsubstantiated claims in its advertising.

The Panel noted the robust, volatile advertising environment both companies operated in. Price is an important part of this environment and of significant interest to the consumer. In addition, the Panel confirmed that it would focus on the likely consumer take-out of the advertising.

The Panel confirmed its role was to consider the advertisement, and the claims made from the perspective of their likely audience. It then had to consider whether the information provided to it, when taken at face value, went far enough to substantiate the claims made in the advertisement. It also noted that the onus fell on the Advertiser to substantiate the claims in the advertisement.

The Panel considered the Complainant raised four main issues with the advertisement.

1. It is misleading because the implied usual price is in many instances not genuine, as it is too old or rarely used;
2. The main “½ Price” message of the mailer is significantly diminished by the fine print;
3. The fine print is too inconspicuous and too small to be informative for customers; and
4. The claim that the saving is for ‘one week’ is misleading because some products do not return to their usual prices at the end of the promotion week but remain at the discounted price.

**Does the use of non-promotional pricing as a basis for the savings make the advertisement misleading and are the prices genuine?**

The Complainant said that “in order to meet customers’ expectations created by the advertisement, the quantum of the savings need to be genuine. This requires the starting price from which a saving is calculated to also be genuine (i.e. a price actually used and not too long ago).” The Complainant went on to state that “due to the overall presentation of the advertisement, the majority of customers would reasonably believe or infer (when they receive the Mailer) that the savings are off the usual price. It is also reasonable to infer that the saving will be off the most recently used price (i.e. last week). Only those savvy shoppers who follow prices closely will know that the prices implied may not be the usual price or most recently used price.”

The Complainant provided its own data highlighting products advertised in the mailer and pricing information it had collected over a number of, but not all, recent weeks, and challenged the accuracy of some of the savings claimed.

In its response, the Advertiser said “as the name suggests, the Half Price Promotion features a number of products offered at 50% off Countdown’s non-promotional price. Countdown’s non-promotional price is the standard shelf price for the relevant product. In a Countdown store, it is the price shown on the white shelf ticket, which is visible to customers who purchase the product. This is also sometimes referred to as the “everyday price”, “typical price” or “usual price”. In the context of the Mailer, the non-promotional price refers to the full price of the relevant product, excluding any Onecard Club Prices, multibuy offers or other promotions.”

The Advertiser said that many factors needed to be considered when assessing the accuracy of save statements and the context for them. In the Advertiser’s view this could include the nature of product and the frequency of purchase, the time of year, the pricing history including frequency and multibuy and One Card promotions, regional price variation if any, types of product promotion, and whether it is a product that is frequently on promotion including at competitor supermarkets.

The Panel took into account submissions from parties on the Fair Trading Act Pricing Fact Sheet and the different views from the Complainant and Advertiser on how to identify a “usual price” when making a save statement in advertising.

The Panel’s view is that the consumer take-out of the term “non-promotional price” was the price goods were when they were not on sale, which was the white sticker shelf price. Most consumers would also understand this to be the usual price of the goods.

The Panel agreed it was not its role to adjudicate on the pricing policies used by retailers. The Panel said its role was to consider whether the advertisement before it was misleading to consumers in relation to the savings claimed.

The Panel considered there were two aspects to adjudicate on in this part of the complaint.

#### *Non-promotional pricing*

It first considered the approach by the Advertiser in promoting the half price sale, based on non-promotional pricing. The Panel discussed the data received from the Complainant, Foodstuffs North Island, on recent pricing for products in the mailer, and the response from the Advertiser, Woolworths New Zealand, providing details about the specific pricing queries in the complaint.

The majority of the Panel said this part of the complaint was not upheld.

The majority of the Panel said it did not expect the Advertiser to provide a detailed pricing history for the products discounted in the mailer. The majority took into account the products that were promoted as half price included the “now price” and the amount saved – signalling the total non-promotional price to the consumer. In the majority view, this provided sufficient information for the consumer to assess whether they wished to purchase those products at the sale price. The majority noted the Complainant challenged the legitimacy of the basis for making the savings claim but said that in making its ruling it took into account the range of factors that influence price and, in particular, that most items in the catalogue were products that consumers would purchase on a regular basis.

A minority of the Panel disagreed. They highlighted the importance of clear and accurate pricing information taking into account the range of consumers who were likely to see the advertisement including those who were not regular Countdown shoppers. It is important for businesses, particularly those who frequently discount their products, to take real care when claiming discounts off a usual price. The minority accepted that a product’s non-promotional price and the usual price may differ in some circumstances, for example if the product is on frequent special and consumers may be misled as to the level of savings. In the minority view, the onus was on the Advertiser to provide clear evidence to show the non-promotional prices in the mailer were genuine and recent, that is the usual price, and that therefore the savings claims were accurate. The minority said the Advertiser’s response did not include this level of evidence and in its absence, the savings claims were not substantiated, and this part of the complaint should be upheld.

However, in accordance with the majority this part of the complaint was not upheld. The Panel said this part of the complaint was not in breach of Rule 2 and Basic Principle 3 of the Code of Ethics.

#### *Claims in relation to specific products challenged*

The Panel then considered the pricing issue with regard to specific products challenged by Foodstuffs.

The Complainant challenged the legitimacy of the half price claims and listed three examples:

- Just Juice 1ltr: the implied usual price of \$3 was last used 4 weeks before the start of the promotion.
- Maggie Recipe Mix: the implied usual price of \$1.69 was last used 5 weeks before the start of the promotion.

- Cadbury Novelty Bar: the implied usual price of 0.80c was never used at all in the 5 weeks prior to the promotion.

The Advertiser responded to these examples with information about recent pricing as follows:

“Just Juice 1 litre was at the non-promotional price for weeks 1 and 5 before, as well as the week after, the Half Price Promotion. We note that, in the week before and the week after the Half Price Promotion, the product could also be purchased at a Onecard Club Price. The product was the subject of a package size and product change in late 2017. As is the case with many products in this circumstance, the product was the subject of a number of promotions to encourage consumers to try it. Having regard to all of the circumstances, we do not consider that this save statement was misleading.”

“Maggi Recipe Mix was at the non-promotional price weeks 4, 5 and 6 before, as well as the week after, the Half Price Promotion. We note that, in the week after the promotion, there was also a multibuy offer applicable when a customer could purchase 3 units of the product for \$4 (the purchase price for a single unit remained \$1.69). In the three weeks before the Half Price Promotion, Maggi Recipe Mix was the subject of another promotion where the price was \$1.20. However, in the three weeks prior to that, the product was sold at the non-promotional price. Having regard to all the circumstances, we do not consider that this save statement was misleading.”

“Cadbury Novelty Bar was at the non-promotional price for weeks 4 and 6 before, as well as the week after, the Half Price Promotion. During the Half Price Promotion the Cadbury Novelty Bar was advertised for \$0.80. In the three weeks before the Half Price Promotion, the Cadbury Novelty Bar was part of a separate promotion where the price ranged from \$0.90 to \$1.00. In the week following the Half Price Promotion, the Cadbury Novelty Bar returned to the non-promotional price of \$1.69. In relation to the Cadbury Novelty Bar, having regard to all of the circumstances, we accept that the product should not have been included in the Half Price Promotion.”

The Panel considered the information before it about these three products. The majority of the Panel accepted the information provided by the Advertiser supporting the half price savings claims for the Just Juice and Maggi Recipe Mix products. The majority of the Panel agreed the claims for these products were therefore not misleading.

The minority said that the only evidence available to the Panel was the mailer and the evidence provided by the Complainant. The onus is on the Advertiser to substantiate the non-promotional price is the usual price, over a reasonable period of time for each particular product and they had not done so for the Just Juice or Maggi Recipe Mix products complained about.

The Panel then discussed the Advertiser’s submission about the Cadbury Novelty Bar. The Panel noted the Advertiser provided pricing context for the savings claim for this product and as part of that explanation accepted it should not have been included in the half price promotion.

The Panel agreed that the inclusion of the Cadbury Novelty Bar in the half price promotion was likely to mislead consumers and this part of the complaint was in breach of the Code of Ethics. However, as the Advertiser had accepted this error, the Panel agreed to settle this part of the complaint.

In summary, in accordance with the majority, the complaint was not upheld with regard to the use of non-promotional pricing as a basis for the save claims for Just Juice and Maggi

Recipe Mix. The Panel said this part of the complaint was not in breach of Rule 2 and Basic Principle 3 of the Code of Ethics.

The complaint about the half price claim for the Cadbury Novelty Bar was Settled.

**Is the main “½ Price” message of the mailer significantly diminished by the fine print?**

The Complainant said “fine print must not be used to change the main message of an advertisement or conceal important information. The clear implied message of the main headline “½ Price Week” is that customers will get 50% off the usual price of goods for a limited period. But, the fine print at the back of the Mailer states that the “saves” are off a price point that is often not used.”

The Advertiser responded that “the fine print is consistent with the main message of the Mailer in relation to the Half Price Promotion. It explained the basis on which the save statements are made (which is what reasonable consumers would understand was the position - i.e., a discount from the non-promotional price, being the price shown on the white shelf ticket) and it explains what conditions and exclusions applied.” The Advertiser confirmed that the terms “usual price” and “non-promotional price” are used interchangeably “and the non-promotional price is the correct point of comparison.”

In this part of the deliberation, the Panel discussed whether information about the claimed basis for the save statements was sufficiently clear to the consumer, given the prominence of the half price week promotion statement throughout the mailer.

The majority of the Panel said the complaint was not upheld in relation to this part of the complaint.

The majority said that the fine print did not significantly diminish the offer. Consumers would expect that the savings were off the non-promotional or usual price of the goods.

The majority said that the terms and conditions on the back page of the mailer clearly signalled the basis for the savings claims and the placement of this information was common in this type of advertising, and readable. The majority said consumers were likely to check the fine print for information that qualified the offers and this part of the complaint should not be upheld.

The minority said that the basis for the discount – that “all saves are based on non-promotional prices” was important information and should have been displayed more prominently in relation to the savings claims. The minority said that the absence of this information in proximity to the headline claim meant that consumers were likely to be misled.

However, in accordance with the majority, the half price savings claim was not significantly diminished by the fine print and this part of the complaint was not upheld. The Panel said this part of the complaint was not in breach of Rule 2 and Basic Principle 3 of the Code of Ethics.

**Is the fine print too inconspicuous and too small to be informative for customers?**

The Complainant was concerned that the “fine print is located at the very back of a 32 page mailer amongst other detail. There is no indication, either on the front page or anywhere else in the Mailer, that the headline message is “subject” to any fine print. It is only when a customer reaches the back of the Mailer that there is any suggestion that the main message is qualified by fine print.”

The Advertiser said that unlike “other forms of advertisements, consumers have the ability to take their time and peruse mailers. This includes reading the fine print. Given this, it is



common for mailers to include more detailed fine print than is permissible for television advertisements and for the fine print to be located in one place in the mailer. The Mailer has multiple pages and is in a standard format that allows customers to sit down and read the entire booklet. In our experience, regardless of the advertiser's industry, such fine print is often found at the end of the mailer or catalogue, and this is well understood by reasonable consumers.”

The Panel noted the fine print on the last page of the mailer contained statements qualifying the offers including that they were subject to availability, that not all stores sell alcohol, quantities may be limited and matters related to the One Card loyalty programme, along with the dates the mailer and pricing applied to.

The Panel said that the fine print size and location of the general terms and conditions that applied to the promotion were not in breach of the Code of Ethics. The Panel agreed that a mailer advertisement could be distinguished from other advertising with regard to the availability of terms and conditions and it was the type of advertising consumers would read through, identifying the offers of interest to them, including on the back page. The Panel agreed that this was a common place for Advertisers to place terms and conditions that applied to such promotions.

The Panel said this part of the complaint was not in breach of Rule 2 and Basic Principle 3 of the Code of Ethics.

**Is the claim the savings are for ‘one week’ misleading as some prices did not return to their usual price?**

The Complainant said “the Mailer implies that the sale will be for one week ending on Sunday 3rd June 2018. The result of this is that customers are incentivised to shop during that week to receive the special deal because the implication is that the deal will not exist the next week. However, we can see instances where the products stay on promotion the following week.” The instances they identified were the Oral B toothbrush and the Sistema container.

In response the Advertiser said: “In relation to the Sistema container and the Oral B toothbrush, there is no law or obligation that the price must return to the non-promotional price immediately after the Half Price Promotion. Some suppliers request specific timeframes for the promotion of their products and one week may not be sufficient. It is unrealistic to expect that all of the products in the Half Price Promotion would only be on sale for that specific week.”

“In relation to the Mailer, there was no statement that every single product would then revert back to the non-promotional price in the week following the Half Price Promotion. Woolworths' records show that the majority of products advertised did in fact revert back to the non-promotional price during the week following the Half Price Promotion. However, for a small number of products, the Half Price Promotion was part of a wider promotional campaign that spanned more than one week.”

The Panel discussed whether some products being available at the sale price for longer than the dates given in the mailer was misleading. The Panel ruled that this part of the complaint was not upheld.

The Panel agreed the dates notified in the mailer and the reference to “½ price week” did signal to consumers there was a limited timeframe to obtain the items on special under that promotion and based on the evidence before it, this was the case for the vast majority of items in the mailer.

The Panel said, in its view, in this particular case, including the two products specifically identified by the Advertiser in the half price week promotion, did not preclude them being part of a separate promotion with similar price savings that may continue beyond the week of the sale promoted in the mailer. The Panel noted that it is possible that if a sale continued for more products beyond the time period indicated that might create a misleading sense of urgency in customers.

The Panel said this part of the complaint was not in breach of Rule 2 and Basic Principle 3 of the Code of Ethics.

### **Summary**

The Panel ruled by majority that the use of non-promotional pricing as a basis for the savings did not make the advertisement misleading. This aspect of the complaint was not upheld.

The Panel ruled by majority that the Advertiser had substantiated that the prices in the mailer were genuine and not misleading. This aspect of the complaint was not upheld. In relation to the specific examples referred to by the Complainant, the complaint was settled in part as the Advertiser had acknowledged the inclusion of the Cadbury Novelty Bars in the half price promotion was misleading.

The Panel ruled by majority that the main “½ Price” message of the mailer was not significantly diminished by the fine print. This aspect of the complaint was not upheld.

The Panel ruled unanimously that the fine print was not too inconspicuous and too small to be informative for customers taking into account the medium and was therefore not misleading.

The Panel ruled unanimously that the claim the savings were for ‘one week’ was not misleading when two products of 47 did not return to their usual price immediately after that week, as they were part of another promotion.

**Decision:** Complaint Settled in part and Not Upheld in part.

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## **DESCRIPTION OF ADVERTISEMENT**

The 32 page Countdown printed mailer advertisement was distributed to letterboxes and promoted “1/2 price week on selected promotions”. The mailer included specials on 270 items with 47 promoted as ½ price. It said prices were valid instore and online from Monday 28 May to Sunday 3 June 2018. Fine print on the back page of the mailer listed qualifying statements including “All saves are based on non-promotional prices”.

### **Complaint – From Foodstuffs North Island re. Countdown ½ Price Week Mailer**

1. We are writing with regard to Countdown’s “½ Price Week” (Mailer) attached to this letter. We believe that this advertisement is misleading and in breach of the Advertising Code of Ethics – Basic Principle 3 and Rule 2 (Code).
2. When a customer receives the Mailer, they are presented with a bold headline message that Countdown is having a ½ Price Week (on selected products). There are various “saves” indicating prices and the amount that a customer will save.

3. Due to the overall presentation of the Mailer, it is reasonable for customers to believe or infer that this would be a discount off the usual price of the products and that they will receive a genuine and significant saving if they take up the offer. Customers may also reasonably believe that those “saves” are off the most recently used price (i.e. the week prior to the sale).
4. The advertisement appears to be unqualified. However, if customers were then to read down 32 pages at the end of the Mailer, in very small fine print amongst other text, they would see a sentence that then changes this impression significantly – they are told that the saving is actually off the “non-promotional price”.
5. Having monitored the prices of the products in the Mailer for five weeks pre-promotion and for one week post-promotion (see attached schedule for price movements), we believe that the advertisement is misleading for the following reasons:
  - The advertisement is misleading because the implied usual price is in many instances not genuine, as it is too old or rarely used.
  - The main “½ Price” message of the Mailer is significantly diminished by the fine print (if that fine print was actually read by customers).
  - The fine print is too inconspicuous and too small to be informative for customers.
  - The claim that the saving is for ‘one week’ is misleading because some products do not return to their usual prices at the end of the promotion week but remain at the discounted price.

### **Implied price is not genuine**

6. In order to meet customers’ expectations created by the advertisement, the quantum of the savings need to be genuine. This requires the starting price from which a saving is calculated to also be genuine (i.e. a price actually used and not too long ago).
7. Due to the overall presentation of the advertisement, the majority of customers would reasonably believe or infer (when they receive the Mailer) that the savings are off the usual price. It is also reasonable to infer that the saving will be off the most recently used price (i.e. last week). Only those savvy shoppers who follow prices closely will know that the prices implied may not be the usual price or most recently used price.
8. In some cases, Countdown is offering some genuine savings off the usual price, which accords with the overall impression of the advertisement. For example, Watties Frozen Spinach is a genuine ½ price saving off the usual price. It is offered at a usual price of \$4.45 every week in the 5 weeks leading up to the promotion. It is then discounted to \$2.00 for the promotional week. This is a genuine saving and in line with what customers expect when they view the Mailer.
9. However, there are many instances in the Mailer where the implied usual price is not genuine, for example:
  - Just Juice 1ltr: the implied usual price of \$3 was last used 4 weeks before the start of the promotion.
  - Maggie Recipe Mix: the implied usual price of \$1.69 was last used 5 weeks before the start of the promotion.

- Cadbury Novelty Bar: the implied usual price of 0.80c was never used at all in the 5 weeks prior to the promotion.
10. Leading customers to believe they will be achieving a saving off a price that is not genuine, is misleading. In addition, it exploits the lack of knowledge that consumers have about pricing because they cannot know the non-promotional price.
  11. Accordingly, the advertisement is in breach of Advertising Code of Ethics – Basic Principle 3 and Rule 2.

### **Main message is significantly diminished by the fine print**

12. Generally, we believe that the fine print is too small and inconspicuous to be read by the great majority of customers. However, even if it was enlarged and read by customers, the advertisement would still be misleading because the fine print significantly diminishes the main message.
13. Fine print must not be used to change the main message of an advertisement or conceal important information. As discussed above, the clear implied message of the main headline “½ Price Week” is that customers will get 50% off the usual price of goods for a limited period. But, the fine print at the back of the Mailer states that the “saves” are off a price point that is often not used.
14. If the overall impression given by an advertisement is misleading, it cannot be ‘saved’ by fine print. This fine print significantly diminishes the headline message and therefore the advertisement is misleading, or is likely to be misleading, to customers and exploit their lack of knowledge, thereby breaching the Advertising Code of Ethics – Basic Principle 3 and Rule 2.

### **Fine print is too inconspicuous and small**

15. While we believe the above points outlined in our letter make the advertisement misleading as a whole, we also believe that the fine print itself is too inconspicuous in the overall context of the advertisement. The fine print is located at the very back of a 32 page mailer amongst other detail. There is no indication, either on the front page or anywhere else in the Mailer, that the headline message is “subject” to any fine print. It is only when a customer reaches the back of the Mailer that there is any suggestion that the main message is qualified by fine print.
16. The fact that the “saves” are off a “non-promotional” price is critical information that should not be hidden at the back of Mailer, in very small print. Its position and lack of prominence means that it is unlikely to be seen (or read) by customers and therefore creates a misleading advertisement which is in breach of the Advertising Code of Ethics – Basic Principle 3 and Rule 2.

### **Products do not return to usual price after one week sale**

17. Finally, the Mailer implies that the sale will be for one week ending on Sunday 3rd June 2018. The result of this is that customers are incentivised to shop during that week to receive the special deal because the implication is that the deal will not exist the next week. However, we can see instances where the products stay on promotion the following week. For example, as highlighted in the schedule:

- a. Oral B toothbrushes are advertised as part of the ½ Price Week at \$24.90. We would expect them to then come off promotion but they remain at \$24.90 for the following week.
  - b. Sistema containers are advertised as part of the ½ Price Week promotion at \$2.50. We would expect them to come off promotion but they remain at \$2.50 for the following week.
18. It is misleading to advertise a “week” sale, which is designed to create a sense of urgency and quick buying by customers, to then remain on promotion for another week. Failure to follow through with the main message of the advertisement breaches the Advertising Code of Ethics – Basic Principle 3 and Rule 2.

## Relevant Codes of Practice

### Code of Ethics

**Basic Principle 3:** No advertisement should be misleading or deceptive or likely to mislead or deceive the consumer.

**Rule 2 Truthful Presentation:** Advertisements should not contain any statement or visual presentation or create an overall impression which directly, or by implication, omission ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience of knowledge (Obvious hyperbole, identifiable as such, is not considered to be misleading).

### Response from Advertiser, Woolworths New Zealand

1. Thank you for letter dated 12 July 2018 and for providing us with a copy of the complaint filed by Foodstuffs North Island ("**Complaint**").
2. Woolworths New Zealand Limited (previously Progressive Enterprises Limited) ("**Woolworths**") takes its responsibilities regarding the accuracy of its advertising material seriously and welcomes the opportunity to respond to the Complaint.

#### The Mailer

3. The mailer that is the subject of the Complaint sets out the prices for various products sold by Countdown between 28 May and 3 June 2018 ("**Mailer**"), including as part of:
  - (a) the "Price Lockdown" programme;
  - (b) various promotions for specific products (e.g., the Kettle Luxury Lodge promotion);
  - (c) introductory offers for specific products; and
  - (d) the "half price on selected products" promotion ("**Half Price Promotion**").
4. There were approximately 270 products advertised in the Mailer. Foodstuffs has included, with the Complaint, a spreadsheet providing pricing information about 47

products. It has highlighted 12 products in the spreadsheet and has specifically referred to five of those 12 in the Complaint.

5. On the assumption that Foodstuffs does not have any objections to any of the products not highlighted in the spreadsheet, we have reviewed the 12 highlighted products, focussing particularly on the five specifically referred to in the Complaint.

### **Save statements in advertising**

6. As the name suggests, the Half Price Promotion features a number of products offered at 50% off Countdown's non-promotional price. Countdown's non-promotional price is the standard shelf price for the relevant product. In a Countdown store, it is the price shown on the white shelf ticket, which is visible to customers who purchase the product. This is also sometimes referred to as the "everyday price", "typical price" or "usual price". In the context of the Mailer, the non-promotional price refers to the full price of the relevant product, excluding any Onecard Club Prices, multibuy offers or other promotions.
7. Percentage discount claims are commonly known as "save statements". Aside from the "save" being made against the non-promotional price, there are no other "hard and fast" rules as to when save statements can be made. The courts and regulators (in New Zealand and overseas) have been reluctant to impose strict rules for when save statements can be made because:
  - (a) establishing the non-promotional price is different for different products in different industries (e.g., non-promotional prices for jewellery need to be set for eight weeks before a save statement can be made, whereas supermarket prices fluctuate much more regularly due to a wide range of factors);
  - (b) businesses' pricing models can be highly sophisticated and, in order to remain competitive:
    - (i) promotions may need to be extended; or
    - (ii) prices reduced (even within a promotional period) in order to respond to a competitor's offering;and
  - (c) there is no uniform or accepted approach in relation to the use of save statements.
8. As a result, each save statement in the Mailer needs to be assessed on a case by case basis, and having regard to all of the relevant factors, to determine whether the claim is correct. These factors include:
  - (a) the nature of the product and how frequently customers usually purchase it;
  - (b) the time of year, as some products are promoted more frequently during summer or winter (due to seasonal availability or seasonal demand) and some products are promoted more frequently before particular events or holidays (e.g., Guy Fawkes, Halloween, Easter and Christmas);
  - (c) the pricing history of the product (e.g., whether the price changes frequently or rarely, when the product was last on promotion and for how long, whether there been a multibuy offer or Onecard Club Price applicable to the product);

- (d) whether the pricing of the product has been consistent across the country or whether it has varied from region to region or in a particular store (e.g., to match local competition);
  - (e) how and where the product has been advertised (e.g., in a mailer, television commercial, billboard or only in store); and
  - (f) how familiar customers generally are with the price of the product and what competitors' pricing practices are in relation to the product (e.g., is it frequently on promotion at other supermarkets).
9. These factors need to potentially be considered over a number of different time periods. For some products a six week period might be appropriate, but for others 13, 26 or even 52 weeks might be the appropriate period.

#### **Woolworths' systems and training**

10. Woolworths has a system of vetting the mailers it publishes. As part of that system, it is the responsibility of each relevant Category Manager to ensure that all claims (including save statements) relating to the products the particular Category Manager is responsible for, are accurate. Category Managers will often build a promotional programme looking out into the future (potentially up to 52 weeks in advance). That programme will take into account the need to substantiate all save statements. However, the supermarket industry is highly competitive and fast moving. For that reason, the promotional programme may need to change, sometimes at short notice (e.g., to stimulate demand; to match a competitor's pricing; to accommodate supplier feedback, or to facilitate a supplier run market wide promotion). The flow on impact of these changes can be complex, particularly where Category Managers need to consider all of the factors referred to in paragraph 8 above, and can lead to errors occurring.
11. We have, since the Half Price Promotion and prior to receipt of the Complaint, carried out specific workshop based training sessions for all Category Managers in relation to consumer law issues, including the substantiation of save statements and other representations made in connection with the products we sell. This was unrelated to the Half Price Promotion, but rather was part of our structured legal compliance training programme.

## **Issues with Foodstuffs' data**

12. There are a number of issues with the data provided by Foodstuffs. We are unsure of the source of the data, so we are unable to comment on the reason for those issues. The issues are:
- (a) The spreadsheet does not appear to include data for the week commencing 30 April 2018. We are unsure why this would be the case. We assume it is an oversight. However, we note that for two out of the three products Foodstuffs specifically refers to in paragraph 9 of the Complaint, the relevant product was sold at the non-promotional price during that week. The impact of this is that Foodstuffs' statements in relation to Maggie Recipe Mix and Cadbury Novelty Bar in paragraph 9 of the Complaint, are factually incorrect. This was not apparent on the face of the Complaint and it has taken some considerable additional time and effort to identify this, which would not have been required if Foodstuffs had checked the Complaint more carefully for accuracy.
  - (b) In the part of paragraph 9 of the Complaint relating to the Cadbury Novelty Bar, Foodstuffs states that the "implied usual price" was \$0.80. This was the price during the Half Price Promotion, so we assume Foodstuffs intended this to read "\$1.60". Once again, this is not a major issue, but has resulted in unnecessary wasted time in identifying the error and responding to the Complaint.
  - (c) The data does not differentiate between specials, multibuy offers, Onecard Club Prices or other price reductions. This pricing history is relevant to the context within which a customer would read the Mailer. In addition, we believe that these limitations are highly relevant to any proper consideration of the Complaint. For that reason, we believe Foodstuffs should have provided details about how and where the information was obtained, and the limitations should have been brought to the Complaints Board's attention. For example:
    - (i) For a product in respect of which a multibuy offer is available (i.e., a separate price where a customer buys more than one unit), the data appears to show the total multibuy offer price divided by the number of units that a customer needs to purchase to take advantage of the multibuy offer. It does not show the price that the customer would pay if they purchased a single unit of the product.
    - (ii) For a product in respect of which an Onecard Club Price is available, the data appears to show only the price the customer would pay if they choose to "swipe" their Onecard to take advantage of the Onecard Club Price.
  - (d) The data appears to show the lowest price (subject to the qualifications above) for the relevant product during the relevant week. For example, if the product was the subject of a "late week special" (i.e., a special available for only one or two days during the week), or if the price was reduced during the week, the data seems to show the lowest price. Once again, we believe that these limitations are highly relevant to any proper consideration of the Complaint.

## **The products**

### *Spreadsheet data*

13. For the seven products included in the Foodstuffs spreadsheet but not specifically referred to in the Complaint, we note:



- (a) Hellers Short Cut Bacon was at the non-promotional price for weeks 2 and 4 before, as well as the week after, the Half Price Promotion.
  - (b) Watties Tomatoes 400g was at the non-promotional price for weeks 2, 3 and 5 before, as well as the week after, the Half Price Promotion.
  - (c) Watties Tortellini was at the non-promotional price 4 weeks before, as well as the week after, the Half Price Promotion.
  - (d) Watties Meal Sensations was at the non-promotional price for weeks 2 and 5 before, as well as the week after, the Half Price Promotion. (We note the week after the Half Price Promotion the product could also be purchased at a Onecard Club Price, which appears to be the price included in the Foodstuffs data.)
  - (e) Watties Big Eat was at the non-promotional price for weeks 3 and 6 before, as well as the week after, the Half Price Promotion.
  - (f) Mini Mixed Banana Bread was at the non-promotional price for weeks 3, 5 and 7 before, as well as weeks 2, 3 and 4 after, the Half Price Promotion. (We note that in weeks 3 and 7 before the promotion, there was also a multibuy offer applicable when a customer purchased multiple units of the product, which appears to be the price included in the Foodstuffs data.)
  - (g) Inghams Butterfly Chicken 1.1kg was at the non-promotional price for weeks 2, 5 and 6 before, as well as the week after, the Half Price Promotion. (Immediately after the Half Price Promotion the non-promotional price of the product was reduced to \$13.)
14. Given these products were simply highlighted in the spreadsheet that was included with the Complaint, but not specifically referred to by Foodstuffs in the Complaint itself, this information is provided by way of correction to the Foodstuffs data. We do not consider it necessary to comment any further on these products.

*Cadbury Novelty Bar*

15. Cadbury Novelty Bar was at the non-promotional price for weeks 4 and 6 before, as well as the week after, the Half Price Promotion. During the Half Price Promotion the Cadbury Novelty Bar was advertised for \$0.80. In the three weeks before the Half Price Promotion, the Cadbury Novelty Bar was part of a separate promotion where the price ranged from \$0.90 to \$1.00. In the week following the Half Price Promotion, the Cadbury Novelty Bar returned to the non-promotional price of \$1.69. In relation to the Cadbury Novelty Bar, having regard to all of the circumstances, we accept that the product should not have been included in the Half Price Promotion.

*Just Juice*

16. Just Juice 1 litre was at the non-promotional price for weeks 1 and 5 before, as well as the week after, the Half Price Promotion. We note that, in the week before and the week after the Half Price Promotion, the product could also be purchased at a Onecard Club Price. The product was the subject of a package size and product change in late 2017. As is the case with many products in this circumstance, the product was the subject of a number of promotions to encourage consumers to try it. Having regard to all of the circumstances, we do not consider that this save statement was misleading.

*Maggie Recipe Mix*

17. Maggie Recipe Mix was at the non-promotional price weeks 4, 5 and 6 before, as well as the week after, the Half Price Promotion. We note that, in the week after the promotion, there was also a multibuy offer applicable when a customer could purchase 3 units of the product for \$4 (the purchase price for a single unit remained \$1.69). In the three weeks before the Half Price Promotion, Maggie Recipe Mix was the subject of another promotion where the price was \$1.20. However, in the three weeks prior to that, the product was sold at the non-promotional price. Having regard to all the circumstances, we do not consider that this save statement was misleading.

*Oral B and Sistema*

18. For the last two products specifically referred to in the Complaint, we note:
  - (a) Oral B toothbrushes: During the Half Price Promotion, the Oral B toothbrush was offered for sale for \$24.90. For four out of the five weeks prior to the Half Price Promotion, the Oral B toothbrush was offered for sale at \$49.99. The week after the Half Price Promotion, the Oral B toothbrush remained offered for sale at \$24.90. This is because the Oral B toothbrush promotion was set for a two week period, one of these weeks being during the Half Price Promotion. In the weeks beginning 11 June and 18 June 2018 (the second and third week after the Half Price Promotion), the Oral B toothbrush was offered for sale at the non-promotional price of \$49.99. As a result, we do not consider that this save statement was misleading.
  - (b) Sistema 2L container: During the Half Price Promotion, the Sistema 2L container was offered for sale for \$2.50. For the four weeks prior to the Half Price Promotion, the Sistema 2L container was offered for sale at \$5.00. The week after the Half Price Promotion, the Sistema 2L container remained offered for sale at \$2.50. This is because the Sistema 2L container promotion was set for a two week period, one of these weeks being during the Half Price Promotion. As with the Oral B toothbrush promotion, in the weeks beginning 11 June and 18 June 2018 (the second and third week after the Half Price Promotion), we confirm that the Sistema 2L container was offered for sale at the non-promotional price of \$5.00. As a result, we do not consider that this save statement was misleading.
19. In relation to the Sistema container and the Oral B toothbrush, there is no law or obligation that the price must return to the non-promotional price immediately after the Half Price Promotion. Some suppliers request specific timeframes for the promotion of their products and one week may not be sufficient. It is unrealistic to expect that all of the products in the Half Price Promotion would only be on sale for that specific week.
20. In relation to the Mailer, there was no statement that every single product would then revert back to the non-promotional price in the week following the Half Price Promotion. Woolworths' records show that the majority of products advertised did in fact revert back to the non-promotional price during the week following the Half Price Promotion. However, for a small number of products, the Half Price Promotion was part of a wider promotional campaign that spanned more than one week.
21. As noted above, the pricing history of the specific products needs to be taken into account. When this is done, then there is nothing misleading in relation to the save statements for the Sistema container and the Oral B toothbrush.

## Mailer fine print

22. The intention of the Mailer was to make customers aware of the prices available in Countdown stores during the week between 28 May and 3 June 2018. Woolworths makes every effort to ensure that the prices listed in its mailers (and other advertisements) are accurate and understandable to customers.
23. The terms and conditions of the Half Price Promotion are listed on the back page of the Mailer. The full terms and conditions of the Mailer state:

*Prices & selected specials apply in-store & online from 7am Monday 28 May 2018 to midnight Sunday 03 June 2018 at Countdown nationwide (subject to availability). All saves are based on non-promotional prices. Onecard club prices only apply when you use your Onecard. Onecard loyalty programme terms & conditions apply. We reserve the right to limit quantities. Trade not supplied. Product range may vary between stores. Certain products may not be available in all stores. Proprietary brands are not for resale. Some images shown are styled and are serving suggestions only. Props not included. Fresh or Free Guarantee to replace your purchase and give a refund applies to fresh products purchased from produce, meat, deli, bakery & seafood departments. Selected Deli & Bakery items are not available in all stores. Prices shown in Percentage Off & Half Price Discounts already include discount & are based on the non-promotional price that may vary between stores. Savings are not additional to existing reductions. While stocks last. No rainchecks available. For customer support visit [countdown.co.nz](http://countdown.co.nz).*

24. Foodstuffs claims that:
  - (a) the "main message is significantly diminished by the fine print"; and
  - (b) the "fine print is too inconspicuous [sic] and small".
25. Neither of these claims have any merit, and we address them separately.

### *Effect of the fine print on the main message*

26. The fine print is consistent with the main message of the Mailer in relation to the Half Price Promotion. It explains the basis on which the save statements are made (which is what reasonable consumers would understand was the position - i.e., a discount from the non-promotional price, being the price shown on the white shelf ticket) and it explains what conditions and exclusions applied.
27. Foodstuffs' primary objection appears to be that the save statement is made against the non-promotional price, as opposed to the "usual price". However, these terms are used interchangeably and the non-promotional price is the correct point of comparison.
28. Accordingly, the fine print is consistent with the overall impression and it is not required to "save" it.
29. Lastly, the reference to "non-promotional price" in the fine print is consistent with the terminology used by other retailers in their mailers. See the extract enclosed as Attachment A from a recent New World mailer as an example.

*Placement and size of the fine print*

30. The placement and size of the fine print needs to be considered in the context of a mailer.
31. Unlike other forms of advertisements, consumers have the ability to take their time and peruse mailers. This includes reading the fine print. Given this, it is common for mailers to include more detailed fine print than is permissible for television advertisements and for the fine print to be located in one place in the mailer. The Mailer has multiple pages and is in a standard format that allows customers to sit down and read the entire booklet. In our experience, regardless of the advertiser's industry, such fine print is often found at the end of the mailer or catalogue, and this is well understood by reasonable consumers.
32. We note that, with the exception of the front page, the back page of a mailer is the section most visible to customers.
33. In response to the claim that the fine print is too small, it is legible and easily understood by consumers. Further, the text of the fine print is a similar size font to the text for most of the product names, weights and descriptions throughout the Mailer. We also note that Woolworths uses the same fine print for most promotions, so our customers are reasonably familiar with them. We enclose as attachment B a clear copy of the Mailer so that the Complaints Board can easily view this print in the context of the other text in the Mailer.
34. Lastly, the size of the fine print is significantly larger than the fine print regularly used by other retailers in their own mailers. See the enclosed extracts at Attachment A from a recent New World mailer as an example.
35. In summary, the fine print (in relation to content, placement and size) is not misleading and is not in breach of the Advertising Code of Ethics.

**Advertising Code of Ethics**

36. Foodstuffs has specifically referred to the Advertising Code of Ethics (the "Code"), including:
  - (a) *Basic Principle 3*: No advertisement should be misleading or deceptive or likely to mislead or deceive the consumer; and
  - (b) *Rule 2: Truthful Presentation* – Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).
37. Woolworths submits that, subject to the comments made in relation to the Cadbury Novelty Bar above, the Mailer is not in breach of the Code, including the fine print. The Mailer was not misleading or deceptive, as it genuinely offered at least 50% off the non-promotional price of the extensive list of products featured in the Mailer for the week from 28 May to 3 June 2018.

38. Further and as outlined above, the Mailer does not contain any statement or visual presentation or create an overall impression that is false or misleading or that abuses the trust of the consumer or exploits his/her lack of experience or knowledge.

**Summary**

39. In light of the above, we ask that the Complaints Board determines that the Complaint is only partially upheld (in relation to the Cadbury Novelty Bar) and finds that there are no other breaches of the Code.