FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v H.J. Heinz Company Australia Limited [2018] FCA 360

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| File number: | SAD 181 of 2016 |
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| Judge: | **WHITE J** |
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| Date of judgment: | 19 March 2018 |
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| Catchwords: | **CONSUMER LAW** – H.J. Heinz Company Australia Ltd (Heinz) manufactures and supplies food products – Heinz supplied three “Shredz” products as appropriate for 1-3 year old children – whether the packaging of the products conveyed representations that they were of an equivalent nutritional value to the natural fruit and vegetables depicted on their packaging (the Nutritional Value Representations) – whether the packaging of the products conveyed representations that they were a nutritious food and beneficial to the health of children aged 1‑3 years (the Healthy Food Representation) and, if so, whether the representations were misleading or deceptive, or likely to mislead or deceive – whether the packaging conveyed representations that the products would encourage the development of healthy eating habits for children aged 1‑3 years (the Healthy Habits Representation) – whether Heinz knew or ought to have known that the representations were made and that they were misleading or deceptive.**Held:** 1. Neither the Nutritional Value Representations nor the Healthy Habits Representations were conveyed by the packaging.
2. The Healthy Food Representations were conveyed and were misleading or deceptive insofar as they represented that the products are beneficial to the health of children aged 1‑3 years;
3. Heinz ought to have been aware that the Healthy Food Representations had been conveyed and that they were misleading or deceptive; and
4. Contraventions of s 18(1) and s 29(1)(g) of the Australian Consumer Law are established.
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| Legislation: | Australian Consumer Law s 18, 29, 33, 224*Competition and Consumer Act 2010* (Cth) s 155*Evidence Act 1995* (Cth) s 140(2)*Trade Practices Act 1974* (Cth) s 53 |
|  |  |
| Cases cited: | *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; (2015) 317 ALR 73*Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682*Australian Competition and Consumer Commission v TPG Internet Pty Ltd*  [2014] HCA 54, (2013) 250 CLR 640*Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592*Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12, (2000) 202 CLR 45*Clipsal Australia Pty Ltd v Clipso Electrical Pty Ltd (No 3)* [2017] FCA 60, (2017) 122 IPR 395*CPA Australia Ltd v Dunn* [2007] FCA 1966; (2007) 74 IPR 495*Gardam v George Wills & Co Ltd (No 1)* (1988) 82 ALR 415*Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; (2013) 249 CLR 435*Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCAFC 181, (2008) 171 FCR 579*New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski* [2011] FCAFC 106, (2011) 195 FCR 234*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191*Peter Bodum A/S v DKSH Australia Pty Ltd* [2011] FCAFC 98, (2011) 280 ALR 639*Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1*Trade Practices Commission v J&R Enterprises Pty Ltd* (1991) 99 ALR 325  |
|  |  |
| Date of hearing: | 24‑28 July 2017 |
|  |  |
| Date of last submissions: | 3 August 2017 |
|  |  |
| Registry: | South Australia |
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| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 318 |
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| Solicitor for the Respondent: | Minter Ellison |

ORDERS

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|  | SAD 181 of 2016 |
|   |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | H.J. HEINZ COMPANY AUSTRALIA LIMITED ACN 004 200 319Respondent |

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| JUDGE: | WHITE J |
| DATE OF ORDER: | 19 march 2018 |

THE COURT ORDERS THAT:

1. The matter is adjourned for further submissions to a date to be fixed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WHITE J:

|  |  |
| --- | --- |
| Introduction | [1] |
| The products | [4] |
| The packaging | [7] |
| The pleaded representations | [23] |
| The statutory provisions and principles | [30] |
| The relevant class of purchasers | [48] |
| The witnesses in the trial | [52] |
| The Berries Product Nutritional Value Representation | [55] |
| The Berries Product Healthy Food Representation | [72] |
| Some general observations concerning the pleaded representation | [73] |
| Was the Healthy Foods Representation conveyed? | [79] |
| Was the Berries Product Healthy Food Representation false or misleading? | [105] |
| The ACCC pleaded case | [105] |
| Nutrition and health benefits: The expert witnesses | [116] |
| The process of manufacture | [132] |
| Is the Berries Product nutritious? | [140] |
| Is the Berries Product beneficial to the health of children aged 1-3 years? | [148] |
| The high level of sugar | [150] |
| Consumption of fresh fruit and vegetables and healthy eating habits | [178] |
| The low moisture content and high energy density | [184] |
| Low satiety values | [191] |
| The effect on dental health | [196] |
| Conclusion on whether the Berries Product is beneficial to the health of toddlers | [232] |
| The Shredz Berries Healthy Habits Representation | [247] |
| The Peach Product | [260] |
| The Fruit and Chia Product | [263] |
| Sections 29(1)(a), 29(1)(g) and 33 of the ACL | [271] |
| Heinz’s knowledge | [279] |
| Summary | [314] |

## Introduction

1. The respondent, H.J. Heinz Company Australia Limited (Heinz), is a well‑known manufacturer and supplier of food products. This judgment concern three products in the Heinz “Little Kids” range with the name Shredz which Heinz supplied as appropriate for children in the 1‑3 year age group.
2. The Australian Competition and Consumer Commission (the ACCC) alleges that the packaging of each product contravened ss 18, 29(1)(a), 29(1)(g) and 33 of the Australian Consumer Law (the ACL) (Sch 2 to the *Competition and Consumer Act 2010* (Cth) (the CC Act)). It seeks declarations, injunctions, the imposition of civil penalties, publicity orders and compliance program orders in respect of the alleged contraventions.
3. Heinz denies each of the allegations. On the agreement of the parties, the Court ordered that the issues of liability be heard and determined before the issues concerning the relief (other than the declarations) claimed by the ACCC.

## The products

1. The three products were “Heinz Little Kids fruit & veg SHREDZ berries apple & veg” (the Berries Product), “Heinz Little Kids fruit & veg SHREDZ peach apple & veg” (the Peach Product) and “Heinz Little Kids fruit & chia SHREDZ strawberry & apple with chia seeds” (the Fruit and Chia Product) (collectively, the Products). They were manufactured in New Zealand by a contractor to Heinz, Taura Natural Ingredients Ltd (Taura). Each Product was a homogenous blend of ingredients derived from fruit and vegetables (save that the Fruit and Chia Product included a small amount (3%) of chia seeds).
2. Heinz had commenced selling the Berries Product and the Peach Product in July 2013 but these proceedings are concerned with the packaging it used in the period between August 2013 and 18 May 2016. Heinz sold the Fruit and Chia Product between January 2016 and 18 May 2016. Heinz informed its customers on 19 May 2016 that there would no further sales of any of the Products and it seemed to be common ground that sales of them had then ceased.
3. Each of the Products was sold in a light cardboard box 145 mm high, 110 mm wide and 30 mm deep. Each box contained five individually wrapped 18 g packets, and each packet contained several sticks of the product (38 mm x 3 mm x 3 mm), which were said by one witness to be similar in texture and taste to confectionery jubes. Several of the witnesses spoke of the Products having a stickiness similar to that of dried fruit.

## The packaging

1. The packaging for each Product was of a generally similar kind. It is convenient to describe first the box for the Berries Product. It had a large stylised picture of a tree on the front. Two stylised images of a smiling boy climbing a rope ladder were on the front and back and, in one case, the ladder was attached to one of the tree’s branches. The picture of the tree continued around the right hand side of the box and continued on the reverse side. At the base of the tree (and on its left) on the front of the box was a coloured photograph of an apple, a strawberry, a raspberry, two blackcurrants, some sweetcorn kernels, and two slices of pumpkin alongside four of the sticks of the Berries Product. The sticks of the Berries Product are at the rear of the photograph with the effect that the depicted fruit and vegetables are more prominent. To the upper left of this picture were the words “Heinz Little Kids™” and underneath that:

fruit & veg

SHREDZ™

berries apple & veg

1. The front of the box contained the words “99% fruit and veg” and above that the words “No preservatives” and “No artificial colours or flavours”. Finally, the front of the box stated prominently “1-3 years”, indicated the product’s weight (90 g net), and indicated that it was made up of five packs each of 18 g.
2. The reverse side of the box contained the following (in smaller fonts than used on the front):

Heinz

Little Kids™

5 packs inside

Made with 99% fruit and vegetable

juice and purees, these tasty treats

are a fun and convenient snack for

toddlers on the go.

Our range of snacks and meals

encourages your toddler to

independently discover the delicious

taste of nutritious food. With our

dedicated nutritionists who are

also mums, we aim to inspire a love

of nutritious food that lasts a life time.

Right portion size for little tummies

Right size and shape for little hands

Right texture to encourage chewing

1. The reverse side of the box also listed the ingredients of the Berries Product and provided some information in a panel under the heading “Nutrition Information”, to which I will return shortly. The lists of ingredients and of nutrients are required under the Food Standards Code. One side of the box included the following:

Heinz

Little Kids™

tasty food discoveries

Our wide range of snacks

and meals is packed with

the tasty goodness of vegetables, fruits, grains,

meat and pasta to

provide nutritious

options of your toddler.

Range includes

* Wholegrain Cereal Bars
* Yoghurt Muesli Fingers
* Mini Corn Cakes
* Pasta Meals
* Casseroles
1. An unfolded copy of the packaging for the Berries Product is attached as Appendix A to these reasons.
2. The box for the Peach Product was essentially the same, save only that the fruit and vegetables pictured at the foot of the stylised tree on this box were an apple, a slice of peach, some sweetcorn kernels and two slices of pumpkin alongside the four sticks of the Peach Product. To the upper left of this fruit were the words:

fruit & veg

SHREDZ™

peach apple & veg

1. The packaging for the Fruit and Chia Product was in the same style but with some differences. On this box, the items pictured at the foot of the tree were an apple, two strawberries, some chia seeds and four sticks of the Fruit and Chia Product. Immediately to the left of these items was a panel with the heading “Just the Good Stuff …”. At the left hand side of the panel was a stylised icon with the words “No Nasties”, “Naturally Sweet” and “Fruit”. Next to the icon, were three entries:
* No artificial colours, flavours or preservatives
* 99% from fruit ingredients and chia seeds
* Naturally sweetened with fruit ingredients
1. The reverse side of the Fruit and Chia Product box also contained a stylised panel with the heading “Just the Good Stuff …”. This panel contained four icons opposite which were the following entries:
* No artificial colours, flavours or preservatives
* 99% from fruit ingredients and chia seeds
* Naturally sweetened with fruit ingredients
* Finger food for fine motor skill development
1. Unlike the boxes for the Berries Product and the Peach Product, the Fruit and Chia Product box did not contain on its front in free standing form the words “No preservatives” and “No artificial colours or flavours” but, as noted, the words “No artificial flavours or preservatives” comprised the first entry in the panel on the front of the box.
2. The reverse side of the Fruit and Chia Product box did not contain the two descriptive paragraphs under the subheading “5 packs inside” which are included on the boxes for the Berries Product and the Peach Product (see above at [9]).
3. There were some differences in the colours used in the three product boxes. I think it fair to describe the colours on each of the boxes as bright and attractive.
4. The ingredients of the Products listed on the reverse side of the boxes can be summarised as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Ingredients** | **Berries Product****%** | **Peach Product****%** | **Fruit & Chia Product****%** |
| Apple paste | 36 | 36 | 51 |
| Apple juice concentrate | 31 | 34 | 35 |
| Berry purees | 12 | - | - |
| Sweetcorn puree | 10 | 10 | - |
| Pumpkin puree | 10 | 10 | - |
| Citrus fibre | % not stated | % not stated | % not stated |
| Gelling agent (fruit pectin) | % not stated | % not stated | % not stated |
| Natural flavour(s) | % not stated | % not stated | % not stated |
| Peach paste | - | 9 | - |
| Strawberry puree | - | - | 7 |
| Lemon juice concentrate | - | - | % not stated |
| Chia seeds | - | - | 3 |
| Natural colour extracts (carrot, blackcurrant) | - | - | % not stated |
| **Total** | **99** | **99** | **97** |

1. As noted earlier, the boxes for each Product also contained a panel headed “Nutrition Information”. Each indicated that there were five “servings” per package and that the serving size was 18 g. The “nutrition information” in the panel for each Product can be summarised as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Berries Product**  | **Peach Product** | **Fruit & Chia Product** |
|  | **Avg. Quantity per serving** | **Avg. Quantity per 100g** | **Avg. Quantity per serving** | **Avg. Quantity per 100g** | **Avg. Quantity per serving** | **Avg. Quantity per 100g** |
| Energy | 260kJ | 1,450kJ | 260kJ | 1440kJ | 260kJ | 1430kJ |
| Protein | 0.4g | 2.0g | 0.4g | 2.1g | 0.4g | 2.0g |
| Fat - Total | 0.1g | 0.8g | 0.1g | 0.8g | 0.4g | 2.1g |
| Fat- saturated | 0g | 0.2g | 0g | 0.1g | 0g | 0.3g |
| Carbohydrate- sugars | 14.1g12.4g | 78.4g68.7g | 14.1g12.4g | 78.1g69.1g | 13.3g12.2g | 74.1g67.6g |
| Dietary Fibre | 1.1g | 6.2g | 1.2g | 6.4g | 1.4g | 7.8g |
| Sodium | 7mg | 35mg | 7mg | 35mg | 6mg | 30mg |

1. The evidence from the expert nutritionists, to whom I will refer later, indicates that the required nutrients in food include proteins, fats, carbohydrates, dietary fibre, vitamin A, vitamin C, potassium and magnesium.
2. As can be seen, the nutrition panels indicated that approximately two‑thirds of each Product was sugar. However, an analysis carried out in March 2016 at the request of the ACCC solicitors indicated that the Products comprised, respectively, 62‑63%, 66% and 62% sugar.
3. The ingredients information and the nutrition information on the boxes were in a relatively small font and, in particular, in a font which was smaller than all the other printing on the front and rear of the boxes.

## The pleaded representations

1. The ACCC pleads that the statements and images on the box of each Product conveyed representations to the effect that the Product:

(a) is of an equivalent nutritional value to the natural fruit and vegetables depicted on the packaging (the Nutritional Value Representation);

(b) is a nutritious food and is beneficial to the health of children aged 1‑3 years (the Healthy Food Representation); and/or

(c) encourages the development of healthy eating habits for children aged 1‑3 years (the Healthy Habits Representation).

There is one qualification to this summary of the alleged representations. That is that the pleaded Nutritional Value Representation in respect of the Fruit and Chia Product refers only to the natural fruit depicted on the packaging. It was not suggested that this slight difference in form was material to the determination of the issues in the trial.

1. The parties commonly used the term “toddlers” for children aged 1‑3 years, and in these reasons I will do likewise.
2. Each of the pleaded representations is alleged to contravene ss 18, 29(1)(a), 29(1)(g) and 33 of the ACL.
3. Intention is not an element of contraventions of ss 18, 29(1) and 33. It is not necessary for the ACCC to prove that a respondent intended to make false or misleading statements. However, the ACCC alleges that Heinz knew, or ought to have known, that each of the Products was not a nutritious food, nor equivalent to the nutritional value of the fruit and vegetables depicted on the boxes, and that each Product discouraged the development of healthy eating habits in toddlers. The ACCC also alleges that Heinz knew, or ought to have known, that the packaging conveyed the pleaded representations and that those representations were false or misleading. These are serious allegations, attracting in an obvious way, the application of s 140(2) of the *Evidence Act 1995* (Cth). It was the subject of considerable evidence at the trial.
4. I will defer consideration of the ACCC submissions concerning the knowledge of Heinz until after I have made findings concerning the allegations that the pleaded representations were made and that they were false or misleading. In the view I take of the matter, it will not be necessary to make findings concerning some of the evidence bearing on this aspect of the matter.
5. It is pertinent to keep in mind that the issue for the Court’s determination is whether (a) the specific representations alleged by the ACCC were made and, if so, (b) whether they were misleading or deceptive or, in the case of s 33, liable to mislead in the manner pleaded. The Court is not required to determine some of the other issues canvassed in some of the submissions including whether the Products had an inappropriate amount of sugar *per se*, whether they should be purchased as part of a sensible purchasing decision, whether it would be sensible for a parent or carer to give the Products to their children as an alternative to fruit and vegetables, and whether Heinz could have done more to reduce the sugar content of the Products. Nor is the Court required to consider whether the packaging was misleading or deceptive in other ways which, at times, the ACCC evidence and submissions seemed to suggest, for example, that it was misleading or deceptive for Heinz to describe Products as “fruit and veg” and “99% fruit and veg” rather than “sugarised fruit and vegetables” or “sugary fruit and vegetables” or in some other way to indicate that the Products comprised fruit and vegetables with concentrated sweetness.
6. Further still, the issues in the trial concerning the alleged misleading or deceptive nature of the pleaded representations are not to be resolved by reference to the Healthy Star Rating system being implemented in Australia and New Zealand nor by reference to the Nutrition Profiling Scoring Criterion established under the Australia New Zealand Food Standards Code.

## The statutory provisions and principles

1. Section 18 of the ACL provides (relevantly):

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

1. Section 29(1) of the ACL provides (relevantly):

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

…

(g) make a false or misleading representation that goods or services has sponsorship, approval, performance characteristics, accessories, uses or benefits …

1. Section 33 of the ACL provides:

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

1. The ACCC alleges that each of the pleaded representations was misleading or deceptive or liable to mislead or deceive in contravention of s 18(1) by reason of five features to which I will refer shortly.
2. The ACCC alleges that Heinz contravened s 29(1)(a) by making statements on the Products’ packaging which contained false or misleading representations that the Products were of a “particular … quality, value or composition”, and that it contravened subs 1(g) by making false or misleading representations that the Products had “uses and/or benefits”.
3. The ACCC alleges that Heinz contravened s 33 by making statements on the packages which were liable to mislead the public as to the “nature and/or “characteristics” of the Products and as to “the suitability for their purpose”.
4. By reason of s 224 of the ACL, contraventions of ss 29 and 33 attract a liability to pecuniary penalties.
5. The principles which the Court applies when considering alleged contraventions of s 29(1) and s 33 of the ACL are settled. Section 29 of the ACL is the counterpart to s 53 of the *Trade Practices Act 1974* (Cth). It was common ground that the case law developed in relation to s 53 may be applied in relation to s 29. It was also common ground that, despite the slight differences in language between the terms “misleading or deceptive” and “mislead or deceive” used in s 18 of the ACL and the term “false or misleading” used in s 29(1), the terms have the same meaning: *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14], cited with approval by Allsop CJ in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; (2015) 317 ALR 73 at [40]. It has, however, been held that conduct which is “liable to mislead” (being the term used in s 33) applies to a narrower range of conduct than does conduct which is “likely to mislead or deceive” (being the term used in s 18): *Coles Supermarkets* at [44] and the cases cited therein. Under s 33, what is required is that there be an actual probability that the public would be misled: *Trade Practices Commission v J&R Enterprises Pty Ltd* (1991) 99 ALR 325 at 339.
6. Provisions such as ss 18, 29 and 33 of the ACL are remedial in character and so should be construed so as to give the fullest relief which the fair meaning of their language would allow: *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 503; *New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski* [2011] FCAFC 106, (2011) 195 FCR 234 at [105].
7. A representation will be false if it is contrary to the relevant fact and misleading if it has a tendency to lead into error. The causing of confusion or questioning is insufficient; it is necessary to establish that the ordinary or reasonable consumer is likely to be led into error: *Coles Supermarkets* at [39].
8. The question of whether conduct, including conduct by way of representations, contravenes ss 29 or 33 of the ACL is one of fact to be determined by an objective consideration in the light of all the relevant surrounding circumstances: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198‑9; *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 at [109].
9. The application of ss 29 and 33 requires the Court to identify the conduct said to be false or misleading or liable to mislead and then to consider separately whether the conduct was false or misleading or liable to mislead: *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1; (2013) 249 CLR 435 at [89].
10. Consideration of the conduct as a whole in its proper context may require consideration of the type of market, the manner in which the goods or services are sold, the habits and characteristics of purchasers in that market as well as of any relevant disclaimers or explanations: *Coles Supermarkets* at [41]. It also includes any relevant disclaimers, qualifications or explanations: *Butcher v Lachlan Elder Realty* at [49]. When the impugned conduct involves representations to the public at large or to a section of the public, such as prospective retail purchasers of a product or service, regard must be had to the effect of the representations on “ordinary” or “reasonable” members of the class of prospective purchasers. The range of persons in such a class may be quite broad and may include the intelligent as well as the less intelligent, and those who are well educated as well as those who are less literate.
11. In many cases, the words and images used in advertising or promotional material are capable of conveying different meanings. In such cases, the question is whether the meaning said to be false or misleading is reasonably open and may be drawn by a significant number of persons to whom the representation was addressed. Thus, in *CPA Australia Ltd v Dunn* [2007] FCA 1966; (2007) 74 IPR 495 at [28], Weinberg J said:

Statements that are capable of more than one meaning may be misleading or deceptive provided that the meaning for which the applicant contends is one that would be reasonably open, and might be drawn by a significant number of those to whom the representation is made. In the same way, a statement may contain a representation that is implied, rather than express. That is why a statement that is literally true can be misleading or deceptive.

(Citation omitted)

1. In *Coles Supermarkets* at [46], Allsop CJ quoted with approval the following statement by Hill J in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 50:

Where, as in the present case, the advertisement is capable of more than one meaning, the question of whether the conduct of placing the advertisement in a newspaper is misleading or deceptive conduct must be tested against each meaning which is reasonably open. This is perhaps but another way of saying that the advertisement will be misleading or likely to mislead or deceive if any reasonable interpretation of it would lead a member of the class, who can be expected to read it, into error …

Allsop CJ went on to say at [47], that “if any one or more of the reasonably available different meanings is misleading, the conduct may well be misleading or deceptive, or false and misleading”.

1. Generally speaking, however, the class will not include those who fail to take reasonable care for their own interests: *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12, (2000) 202 CLR 45 at [101]‑[103]; *Coles Supermarkets* at [43].
2. In cases in which the conduct and representations are to the public generally and concern simple advertising, the absence of individuals saying that they were misled will usually be of little significance. In such circumstances, the Court can carry out an objective assessment of the advertising and promotional material itself without evidence from individual witnesses: *Coles Supermarkets* at [45].
3. In assessing advertising material, the “dominant message” of the material will be of crucial importance: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*  [2014] HCA 54, (2013) 250 CLR 640 at [45]; *Coles Supermarkets* at [47].

## The relevant class of purchasers

1. In the present case, Heinz acknowledged that the relevant class of retail purchasers comprised the parents and carers of children aged 1‑3 years. It submitted, however, that the class should be confined to those parents and carers shopping for snack foods, as opposed to meals, for children aged 1‑3 years. In support of this submission, Heinz referred to the evidence indicating that many of its direct customers were the major retailers and to the evidence that these retailers displayed the Products in the sections of their stores containing children’s food. Ms Rigas (Heinz’s Scientific and Regulatory Affairs Specialist) said that these Heinz products were located in the supermarkets next to “other snacking options”.
2. Heinz submitted that understanding the class in this confined way meant that the “target audience” would understand the Products to be a processed snack product, as distinct from fresh fruit and vegetables. Its submissions did not elaborate the significance of that particular distinction. In my opinion, the “target audience” would have readily understood that the Products were not fresh fruit and vegetables, and instead a processed product.
3. I do not consider that it is realistic to confine the class of purchasers in the way for which Heinz contended. The ordinary reasonable purchaser in a supermarket does not usually undertake a shopping expedition for the purpose only of purchasing snacks. Such purchases are much more commonly made in the course of a more general shopping trip involving the purchase of a range of products and, in particular, foods of different kinds. There may be some stores in which the products are so different that it can be said that representations are made to purchasers of one kind of product only. An example may be a whitegoods store which sells both televisions and refrigerators. It may be natural to understand the “target audience” to which promotional material concerning these products is directed as being the prospective purchasers of each individual product. Such a distinction does not seem apt, however, in the context of a food product presented for sale in a supermarket. Accordingly, I accept the ACCC submission that the relevant class of persons comprises the parents or carers of toddlers who are shopping in a supermarket as part of their weekly or other periodic food shopping.
4. It is not necessary for the ACCC to establish that *all* persons in this class would have been misled or deceived. The relevant enquiry is whether a significant number or, as it is sometimes put, a “not insignificant number” may have been misled or deceived: *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCAFC 181, (2008) 171 FCR 579 at [46] (Tamberlin J); *Peter Bodum A/S v DKSH Australia Pty Ltd* [2011] FCAFC 98, (2011) 280 ALR 639 at [209] (Greenwood J, with whom Tracey J agreed).

## The witnesses in the trial

1. The ACCC led expert evidence from two witnesses, Dr Stanton and Professor Manton. Heinz led expert evidence from three witnesses, Dr Barclay, Associate Professor Lucas and Mr Shrapnel. I will defer assessment of them as witnesses until later in these reasons.
2. Heinz led evidence from five of its employees who were involved to a greater or lesser extent in the development of the Products and the packaging, or at least in matters bearing upon the guidelines concerning the development of both. These were Ms Weaver, Ms Hodson, Ms Russell, Ms Tatt and Ms Rigas. All have qualifications in nutrition and/or dietetics.
3. As will be seen, in the view I take of the matter, issues of the credibility of these witnesses do not loom large in my decision. However, in case it becomes necessary, I indicate now that I considered Ms Tatt and Ms Rigas, and for the most part, Ms Russell, to be honest and reliable witnesses who had gone about their tasks within Heinz in a conscientious manner. I agree with the ACCC that the evidence of Ms Hodson and Ms Weaver was to an extent marked by defensiveness, and an unwillingness to make concessions which they perceived to be contrary to the interest of Heinz. While it is understandable that those who perceive their own performance to be in question in a trial will, to an extent, respond in such a way, I would, had it been necessary to do so, been cautious about accepting as reliable some aspects of their evidence.

## The Berries Product Nutritional Value Representation

1. Although the evidence bearing on the ACCC representations in respect of the Products had much in common, it is convenient to consider first the Nutritional Value Representation with respect to the Berries Product.
2. The first issue is whether an ordinary and reasonable reader of the words and images on the packaging would have understood it to convey the nutritional value representation alleged by the ACCC, namely, that the Berries Product “is of an equivalent nutritional value to the natural fruit and vegetables depicted on the packaging”. At the heart of this pleaded representation is the term “equivalent nutritional value”.
3. As already noted, the ACCC does not (and could not) allege that the representation concerning nutritional value was conveyed expressly. It alleges that the representation was conveyed by implication. The ACCC said that the implication arose from the prominent photograph of the fruit and vegetables, the location of the depicted fruit and vegetables next to the picture of the Berries Product, and from the proximity of both to the words “99% fruit and veg”. The ACCC emphasised these words submitting that “if something is 99% of something else, it’s the same as – as good as”.
4. It is established, as noted above, that a representation may be conveyed by words and images. For this reason, the submission by Heinz that the term “nutritional value” does not appear on the box, let alone any term like “equivalent nutritional value”, while obviously correct, does not preclude the alleged representation having been conveyed.
5. Heinz also submitted that the ordinary and reasonable consumer may not even understand the concepts of nutritional value and equivalent nutritional value. Its submission was that an understanding of these concepts required a degree of technical knowledge which could not be expected of the ordinary consumer. This requires a finding as to the sense in which the ordinary and reasonable parents or carers of 1‑3 year olds would understand the term “nutrition” and its cognates.
6. It may readily be accepted that the majority of ordinary and reasonable purchasers of toddler foods do not have the same detailed knowledge of matters bearing on the nutrition of a food as do qualified dieticians and nutritionists who have undertaken tertiary study. They may not be able to list the nutrients which are necessary in a healthy diet to which reference was made earlier. However, the ordinary and reasonable consumer does not require the level of knowledge of a qualified nutritionist in order to have an understanding of the concepts of “nutrition”, “nutritional value” and equivalents. In my view, the consumers would understand the terms in a non‑technical way, that is, that “nutrition” and “nutritional value” refer to the extent to which a food is nourishing in the sense of being a source of the nutrients which sustain life. Such consumers will understand that some foods are more nutritious than others and many will have a general understanding of the constituents which make food nutritious. Many will be accustomed to making comparisons of different foods.
7. I consider that this submission of Heinz involved an underestimation by it of the capacity of the ordinary and reasonable consumers or potential consumers of its products. I reject its submission to the effect that, because the ordinary and reasonable consumer does not have an understanding of those concepts, the Berries Product packaging cannot be understood as conveying a representation about “nutritional value” or “comparative nutritional value”.
8. Heinz also emphasised that the packaging depicted different fruit and vegetables and, further, fruit and vegetables in different sizes. There were four fruits (apple, strawberry, raspberry and blackcurrant) and two vegetables (pumpkin and sweetcorn). The fruits were whole fruits but the pumpkin consisted of slices and the sweetcorn of some kernels. It pointed out that the depicted sweetcorn could be cooked or uncooked. Heinz submitted that this variety of fruit and vegetables, the differing sizes and the possible difference in the cooked state of the sweetcorn militated against the ordinary consumer having an understanding that it was representing that the Berries Product was of equivalent nutritional value to the depicted fruit and vegetables. The submission (which was seemingly inconsistent with Heinz’s first submission) was that the ordinary and reasonable consumer would understand that the varieties of fruit and vegetables and the difference in their quantities and qualities would, or may well have, differing nutritional values, making it unlikely that the consumer would understand that any representation regarding equivalence was being made in respect of the combination.
9. In part, this submission of Heinz may have been responsive to an ACCC submission that “feeding a packet of Shredz Products to a toddler is a nutritious option which provides the toddler with the equivalent nutritional benefit *as portions of the fresh fruit and vegetables depicted on the packaging*” (emphasis added).
10. However, I do not regard this Heinz submission as persuasive. It seemed to involve an overly literal view of the ACCC allegation and, in particular, seemed to assume that the ACCC is alleging a representation of exact equivalence. While that is one possible interpretation of the ACCC allegation, I do not regard it as the appropriate understanding. It is more natural to understand the ACCC to be alleging that a representation of generalised equivalence was made. The diversity of the fruit and vegetables and their quantities does not mean that consumers could not have understood Heinz to be making a representation about overall equivalence in a generalised way.
11. Nevertheless, I accept Heinz’s overall submission concerning the Berries Product Nutritional Value Representation. In my opinion, ordinary and reasonable purchasers, or potential purchasers, would not have understood the aspects of the packaging to which the ACCC referred to be conveying a statement about the nutritional value of the Berries Product compared with the nutritional value of the depicted fruit in its raw state, let alone that these values were equivalent. The consumers would, in my opinion, have readily understood that the Berries Product was a processed product and would have understood that a representation was being made that it was derived, at least principally, from the depicted ingredients. They would not have understood the Product to be in the form of fresh fruit and vegetables. The pictures of the sticks of the Berries Product would have confirmed that impression.
12. Contrary to the ACCC submission, the reference to “99% fruit and veg” is not a representation as to the product being a percentage of something else. In its ordinary meaning, it is a representation about the ingredients of the Product. Consumers well understand that the processing of multiple ingredients will change the ingredients. They would not expect that, despite the processing, nutritional equivalence would be preserved. Consumers would not expect Heinz to be making a representation to that effect.
13. Consumers are accustomed to seeing manufactured products promoted with images of wholesome ingredients, without this giving rise to an expectation that the products are *equivalent* in nutritional value to the depicted ingredients.
14. In these circumstances in particular, I consider it more likely that the ordinary and reasonable consumer would have understood the aspect of the packaging on which the ACCC relies to be conveying a representation that the Berries Product was a composite Product derived from the depicted fruit and vegetables, ie, that it was fruit based as distinct from having some other derivation, and that this gave it a “goodness” like that of the depicted fruit and vegetables. The words “99% fruit and veg” would have added to that understanding of the effect of the packaging. The ordinary and reasonable consumer may well have understood the package to convey a representation that the Product was nutritious in a way which was similar to the way in which fresh fruit and vegetables are nutritious and therefore good for toddlers. However, in my view, such a consumer would not have understood Heinz to be making a representation concerning the comparative nutritional value of the Berries Product, let alone a representation that its nutritional value was “equivalent” to that of the depicted fruit and vegetables.
15. I reach the same conclusion with respect to the packaging of the Peach Product which was, in the respects which are material for present purposes, identical to the packaging of the Berries Product. Although there are some differences in the packaging of the Fruit and Chia Product, the ACCC did not contend that these are material, and so the same conclusion applies in respect of that Product also.
16. As I am not satisfied that the Nutritional Value Representations were made, it is not necessary to consider whether they were false or misleading or liable to mislead. I indicate, however, that had I regarded the Nutritional Value Representations as having been made, I would not have found that the ACCC had established that they were misleading or deceptive.
17. Accordingly, I conclude that the ACCC’s allegations concerning the Nutritional Value Representation fail with respect to all three Products.

## The Berries Product Healthy Food Representation

1. The ACCC alleges that the packaging of the Berries Product conveyed a representation that it is a nutritious food and beneficial to the health of children aged 1‑3 years. Its case was that the representation was conveyed by the packaging as a whole and, in particular, by the repeated use of the word “nutritious” or its cognates.

### Some general observations concerning the pleaded representation

1. As counsel for Heinz noted, the subject matter of this alleged representation is the intrinsic quality of the Berries Product, rather than its quality relative to other foods.
2. The Healthy Food Representation is a form of composite representation involving two distinct concepts: “nutritious food” and “beneficial to the health of children”. Heinz submitted that this meant that the ACCC had to establish that the packaging conveyed both of the pleaded limbs and that, if it failed to establish that either limb was conveyed, the allegation based on the Healthy Food Representation would fail altogether. I accept that submission and reject the ACCC submission that the ordinary reasonable consumer would have understood the two limbs of the pleaded representation as being conveyed disjunctively.
3. Initially, the ACCC submitted that there was very little difference between the concepts of “nutritious food” and “beneficial to the health of children”. There is an obvious overlap between the two concepts as it will commonly (but not always) be the case that a food which is nutritious will also be beneficial to the healthy growth and development in children. However, the ACCC also submitted that, if “nutritious food” is understood as limited to food containing nutrients, the term “beneficial to the health of children” would have a wider meaning.
4. Ultimately, the ACCC submission was that the representation conveyed was that the Berries Product was both nutritious and beneficial to the health of children and that, if the Court accepted that that was so, it would establish falsity by showing that one or other or both limbs was false. Heinz accepted that, if the Court was satisfied that the composite representation was conveyed, the ACCC case would succeed even if it could establish the falsity of only one of the two limbs.
5. Both limbs of the Healthy Food Representation are positive in nature. In particular, the representation that the Berries Product is “beneficial to the health of children aged 1 to 3 years” is not to be regarded as synonymous with “not detrimental to the health of children aged 1 to 3 years”. To make out falsity of the second limb, the ACCC need establish only that the Berries Product is not beneficial to the health of these children. It does not have to establish that it is in fact detrimental to their health.
6. A food may be beneficial to the health of those who consume it even if it has some disadvantages. The presence of some undesirable features may not, of itself, mean that the food is not beneficial to consumers’ health.

### Was the Healthy Foods Representation conveyed?

1. Apart from the heading to the panel containing the nutrition information, the box of the Berries Product uses the word “nutritious” or a cognate four times. None of these usages is on the front of the packaging. The reverse side includes the following:

Our range of snacks and meals encourage your toddler to independently discover the delicious taste of **nutritious**food. With our dedicated **nutritionists** who are also mums, we aim to inspire a love of **nutritious** food that lasts a life time.

(Emphasis added)

One of the side panels states:

Our wide range of snacks and meals is packed with the tasty goodness of vegetables, fruits, grains, meat and pasta to provide **nutritious** options for your toddler.

(Emphasis added)

1. Heinz noted that each usage of the word “nutritious” or its cognate occurred with reference to the Little Kids range of snacks and meals and not with specific reference to the Berries Product.
2. Heinz submitted that ordinary and reasonable consumers can be expected to read at least the front and reverse sides of the box. I accept that most ordinary reasonable consumers would look at the prominent parts of both sides of the box, but consider it unlikely that this would extend in most cases to the Nutrients and Ingredients panels. That is especially so given that most consumers will be looking at the box in the press of a supermarket aisle. I will refer again to this aspect shortly.
3. Next, Heinz noted that the packaging contains express claims about the Berries Product such as “99% fruit and veg”, “No preservatives”, and “No artificial colours or flavours”. It submitted that ordinary and reasonable consumers would give the greatest weight to these statements, especially as they appear on the front of the packaging and concern the particular Product, in contrast to the statements on the back of the box about the Little Kids range more generally.
4. Thirdly, Heinz submitted that ordinary and reasonable consumers would understand that it intended the Berries Product to be consumed as a snack or as a treat. It relied for this submission on the statement on the front of the box that it contained five packs each of 18 g, the visual depiction of the Product sticks, and the description of the Product on the reverse side as “tasty treats” and “a fun and convenient snack for toddlers on the go”.
5. Fourthly, Heinz submitted that ordinary reasonable consumers would observe and take account of the contents of the Nutrition Information and Ingredients panels. By reading these panels, the ordinary reasonable consumer would understand that a serve of the Berries sticks contained on average 68.7% sugar, that it comprised primarily fruit paste, fruit and vegetable purees, and apple juice concentrate, and that it also contained dietary fibre, protein, fat, sodium and carbohydrates other than sugar.
6. Heinz submitted that, having regard to each of these four matters, the ordinary reasonable consumer would not have understood the word “nutritious” on the back and side of the box as conveying a representation that the Product was “nutritious food and beneficial to the health of children aged 1 to 3 years”. Heinz developed this submission by saying:

At most, to the extent that the ordinary or reasonable consumer understands the packaging as conveying anything about the nutritional attributes of the products, it would be no more than that the products were a *nutritious snack* for children aged 1 to 3, in the sense described on the front of the packaging, namely that:

1. in relation to the Berries and Vegetables Sticks and Peach and Vegetables Sticks, they are made from 99% fruit and vegetable ingredients and do not contain any preservatives or any artificial colours or flavours, as expressly stated on the front of the packaging; and
2. …

(Emphasis in the original)

1. In part, this submission seemed to draw a distinction between a representation that an item is a nutritious “food” and a representation that an item is a nutritious “snack”, and suggested that any representation conveyed by the packaging of the Berries Product was of the latter kind only. To the extent that Heinz did seek to make this distinction, I regard it as artificial in the present context. A snack is just one form by which food is consumed. The ordinary reasonable consumer does not regard a snack as being something other than food. Furthermore, it is common experience that many 1‑3 year olds consume food by “grazing” in a series of snacks rather than in regular meals. In the description of the Berries Product on the reverse side of the packaging of the Berries Product, Heinz itself did not distinguish between food and snacks. It said that its range of “snacks and meals” encourages toddlers to discover the delicious taste of nutritious “food”. It went onto to say that it sought to inspire a love of nutritious “food” which lasts a lifetime. Further, and in any event, the representation alleged by the ACCC can just as easily be understood as a representation that the Berries Product is a nutritious food, in the form of a snack, and beneficial to the health of toddlers.
2. Heinz also sought to show that the Health Food Representation was not conveyed by reference to the matters upon which the ACCC relies for its claim that the representation was false or misleading, namely, that the Berries Product:
3. is high in sugar;
4. has a low moisture content;
5. has a low satiety value;
6. is high in kilojoules per gram; and/or
7. has a sticky texture and is therefore likely to increase the risk of poor dental health in children aged 1‑3 years.

It submitted that, because this was the ACCC case on falsity, the ACCC had to establish that the ordinary reasonable consumer would understand the packaging as conveying a representation that the Berries Product was a nutritious food and beneficial to the health of toddlers in the same sense, that is, as representing that it was high in sugar, had a low moisture content and so on. The Heinz submission was as follows:

[The ACCC] seeks to persuade the Court that the ordinary or reasonable consumer would give the terms “nutritious food” and “beneficial to health” a lay meaning, yet seeks to prove that the products were not “nutritious foods and beneficial to the health of children aged 1 to 3 years” by expert evidence (principally from an expert nutritionist), who does not apply a lay meaning of these terms but instead refers to issues such as the moisture content and satiety value of the products. There is an obvious difficulty for the ACCC in reconciling its asserted meaning of the terms “nutritious food” and “beneficial to the health of children aged 1 to 3 years” in the first stage of its case with the meaning that it assigns those words in the second stage of its case to attempt to demonstrate falsity.

…

The ACCC cannot do so, particularly in circumstances where the amount of sugar and kilojoules per 100 g in the products were listed on the packaging. The packaging said nothing about moisture content, satiety value or stickiness of the products, or about dental health. There is no plausible basis for a finding that the packaging of any of the products conveyed that the products were nutritious and beneficial to the health of children aged 1 to 3 in the sense pleaded by the ACCC.

1. In my opinion, this particular submission is without merit. The manner by which a representation may be proved to be false does not control the content or meaning of the representation. There is no reason in logic or principle why the ACCC cannot prove the falsity of a representation concerning the quality of a product by resort to expert evidence concerning features of the product about which the consumer may be unware or have overlooked. It is commonly the case that the features of a product which make representations about it misleading are revealed only by expert investigation or analysis.
2. In my opinion, Heinz’s present submission with reference to the Nutrition Information and Ingredients panels is similar to that which was rejected by the High Court in *ACCC v TPG*  in respect of the less prominent qualification to the offer featured in TPG’s advertisement. The plurality noted, at [47], that there are circumstances in which prospective customers cannot be expected to pay the same close attention to an advertisement which can be expected of judges obliged to scrutinise them for the purposes of legal proceedings. In particular, there are circumstances in which persons absorb only “the general thrust” of the advertisement and that, while the attention given by the ordinary and reasonable person to an advertisement may be perfunctory, it is not to be equated with a failure on the part of the target audience to take reasonable care of the their own interests. Later, the plurality said:

[51] [T]his is not a case where the tendency of TPG’s advertisements to lead consumers into error arose because the target audience might be disposed, independently of TPG’s conduct, to attend closely to some words of the advertisement and ignore the balance. The tendency of TPG’s advertisements to lead consumers into error arose because the advertisements themselves selected some words for emphasis and relegated the balance to relative obscurity. To acknowledge, as the Full Court did, that “many persons will only absorb the general thrust” is to recognise the effectiveness of the selective presentation of information by TPG. The Full Court erred in failing to appreciate the implication of that finding.

[52] It was common ground that when a court is concerned to ascertain the mental impression created by a number of representations conveyed by one communication, it is wrong to attempt to analyse the separate effect of each representation. But in this case, the advertisements were presented to accentuate the attractive aspect of TPG’s invitation relative to the conditions which were less attractive to potential customers. That consumers might absorb only the general thrust or dominant message was not a consequence of selective attention or an unexpected want of sceptical vigilance on their part; rather, it was an unremarkable consequence of TPG’s advertising strategy. In these circumstances, the primary judge was correct to attribute significance to the “dominant message” presented by TPG’s advertisements.

1. As noted earlier, the information in the Nutrition Information and Ingredients panels is in a smaller font that that used for the other printing on the packaging. The other features to which I referred earlier are much more prominent and, in my opinion, more likely to create an impression in the consumer’s mind.
2. In any event, it is ordinary experience that information of this kind is not read or absorbed in any detail at the time of purchasing decision of products of this kind. Such decisions commonly have to be made in a supermarket aisle in the course of a larger shopping expedition and sometimes amidst the press of other children for whom the purchaser is responsible or of other customers. Having regard to these circumstances, it would not be realistic to suppose that the ordinary reasonable consumer reads, let alone absorbs, the information in the Nutrition and Ingredients panels with the level of detail which the Heinz submission supposed.
3. Many of the ordinary and reasonable purchasers of the Berries Product are likely to be similar to the ordinary and reasonable member of the class of prospective purchasers of bread in supermarkets to whom Allsop CJ referred in *ACCC v Coles Supermarkets* at [43]:

In a context such as the present, the purchasing of a staple such as bread in a supermarket, the ordinary or reasonable person may be intelligent or not, may be well educated or not, will not likely spend any time undertaking an intellectualised process of analysis, will often be shopping for many other items, and will be likely affected by an intuitive sense of attraction rather than by any process of analytical or logical choice.

1. The conclusion that a particular representation was conveyed may be more readily reached when it is made in terms apt to create the particular mental impression in the representee intended by the representor: *ACCC v TPG* at [55]; *Clipsal Australia Pty Ltd v Clipso Electrical Pty Ltd (No 3)* [2017] FCA 60, (2017) 122 IPR 395 at [240]. The ACCC submitted that this principle was applicable in the present case because it was apparent that Heinz had intended, by its packaging of the Berries Product, to create an impression that it was nutritious and healthy in the minds of its potential customers.
2. In support of this submission, the ACCC referred to a number of Heinz’s internal documents. The first was a presentation made to Heinz by The Nielsen Company on 15 June 2012 entitled “Playschool (Little Kids Snacks)”. The Nielsen Company provided the report at a time when Heinz was considering new initiatives under the Heinz Little Kids brand and was seeking to assess their viability. One of the products was “Fruit Chewies”, as the Shredz sticks were then known. At a later time they were given the name “Fruit Juicies”. The Neilsen Company had carried out market research including a survey of potential purchasers. It reported that there was “an opportunity to dial up on health/nutrition” as this was “an important driver for those interested in the range”. By itself, I regard this evidence as being of only slight evidentiary value as there is no express evidence that Heinz expressly adopted or endorsed the recommendation of The Neilsen Company.
3. Next, the ACCC noted that the packaging of the Products had changed following a project undertaken within Heinz entitled “Project Totes” in late 2012 and early 2013. Ms Weaver described Project Totes as a “brand refresh” which involved “looking at the attributes of products and what they represented”. Ms Weaver did not accept that the packaging had been changed so as to promote a message of nutrition and health, asserting that instead Heinz sought to have “fun and convenient and toddler‑appropriate packaging”. I regarded that evidence of Ms Weaver as unconvincing, and do not accept it. Heinz’s own document entitled “Project TOTES Update” indicated that part of the image it sought to create for the Little Kids range of products was that they were nutritious and healthy. With reference to the depictions used on the Products, the Project Totes Update identified the tree as symbolising “source of food, nature, healthy growth” and that the overall illustration “communicates essence of toddlerhood – Innocence, Energy, Joy”.
4. Thirdly, the ACCC referred to a Heinz document entitled “Heinz Infant FY14 comms briefing” dated 8 January 2013. This appears to be a Heinz internal briefing which, amongst other things, compared the messages conveyed by contemporaneous packages used for Little Kids Products with the proposed new packaging. It supports the conclusion that Heinz’s intention was to present its Little Kids range as both nutritious and healthy. In relation to the packaging then being used, the document reported under the heading “WHAT’S NOT WORKING”:
* Bright colours dialling up **artificiality, sugar and additives**
* Small ingredient visual **failing to reinforce taste and naturalness**
* **Girl character lacking meaning**, not transporting active, playful, independent essence of toddler life stage
* **Product appearance lacking appeal**
* Nutritional claims **too small**

(Emphasis in the original)

1. With respect to the new form of packaging (being of the same style used for the Products) the briefing stated under the heading “WHAT’S WORKING”:
* **Tree** symbolising strong benefits; **natural, health, slow growth, freshness, healthy outdoor lifestyle** (aspiring to mums who are fighting to get their kids outside)
* Earthy colouring dialling up **organic cues** (natural)
* Scene communicating **essence of childhood**: carefree, energetic, healthy, fun
* Drawing style perceived as **sophisticated and warm**(detail communicating love and care)

The new pack is emotionally engaging (telling a story) and strongly delivers on natural product benefits …

(Emphasis in the original)

1. In my view, the latter two documents support an inference that the general intention by Heinz with respect to the packaging of the Little Kids products was to promote them as both nutritious and healthy.
2. However, it is not necessary to rely upon Heinz own internal statements regarding the purpose of its packaging. Even a reasonably cursory examination of the packaging indicates that Heinz was promoting the Berries Product as being healthy and nutritious and that ordinary reasonable consumers would have understood that that was so. This is evident from the imagery and colours used as well as from the wording on the packaging.
3. In my opinion, there is no difficulty in concluding that the combination of imagery and words on the packaging conveyed to ordinary reasonable consumers both limbs in the Berries Product Healthy Food Representation. The imagery includes the depictions of an active healthy young boy engaged in tree climbing in conjunction with the prominent pictures of wholesome fresh fruit and vegetables. The tree itself conveys an image of natural and healthy growth. The prominent statements that the Product comprises 99% fruit and vegetables together with the pictures of the fruit and vegetables conjure up impressions of nutritiousness and health. The impression of naturalness and goodness is reinforced by the statement that the fruit and vegetables have not been adulterated by preservatives or artificial colours or flavours. The description of the Berries Product on the reverse side of the packaging under the heading “5 packs inside” reinforces the representation conveyed by the imagery and words on the front the packaging. The first sentence emphasises that the Berries Product comprises 99% fruit and vegetables and that it is appropriate for toddlers “on the go”. This suggests that the Product has the “goodness” needed for active healthy children. Any tendency which the word “treats” may have had to suggest that the Product was a sweet treat (like, say, confectionery) is negated by the reference which follows almost immediately to the Product being a “snack”. In the second sentence, Heinz placed the Product as part of its range of “snacks and meals”. This reinforces the implication that, by eating the Berries Product, toddlers will be consuming a nutritious food. The third sentence conveys Heinz’s aspiration to encourage a love of nutritious food with the implicit representation that the Berries Product is of that kind. The reference to Heinz’s “dedicated nutritionists who are also mums” conveys implicitly that those responsible for the Product know, by both training and practical experience as parents, that the Product is wholesome and nourishing. It lends credibility to the claim that the Product is both nutritious and healthy.
4. The information in the Nutrition Information and Ingredients panels does not detract from this overall impression. I accept that many ordinary reasonable consumers who are interested in providing their children with healthy food would have regard to these panels. But there would be many with the same interest who would respond in a more impressionistic way, especially in the press of the supermarket aisle. In many respects the Ingredients and Nutritional Information panels, especially given their smaller font, are in the nature of the “fine print”. In my view, the eye of ordinary reasonable consumers generally is likely to pass over them and to respond to the dominant message conveyed by the more prominent words and imagery.
5. It follows that I do not accept the submission of Heinz that the packaging conveyed no more than that the Berries Product was a nutritious snack for toddlers in the limited sense that it was derived from fruit and vegetables and did not include preservatives, artificial colours or flavours.
6. Although the view of Heinz’s own employees is not of course decisive, I note that Ms Weaver (Heinz’s Nutrition Specialist for Australia and New Zealand) said that she had thought that the packaging of the Berries Product and of the Peach Product represented that they were “a nutritious food … part of a healthy diet”. Ms Weaver had been involved in the assessment of the claims which could be made of the packaging. Ms Weaver’s evidence was close to an acknowledgement that the packaging contained both limbs of the ACCC’s pleaded Healthy Food Representation, but not exactly so. For completeness, I also note that earlier Ms Weaver had said that while she considered the Berries Product and the Peach Product to be nutritious, she “wouldn’t make the link that they were specifically beneficial to health”.
7. I am satisfied that the packaging of the Berries Product does convey a representation that it is a nutritious food and beneficial for the health of children aged 1‑3 years. A not insignificant number (at the least) of ordinary reasonable consumers would have understood it in this way. The ACCC has established both limbs of the composite representation it alleges.

### Was the Berries Product Healthy Food Representation false or misleading?

#### The ACCC pleaded case

1. As already noted, the ACCC’s pleaded case is that the Berries Product Healthy Food Representation was false or misleading because it:

(a) is high in sugar;

(b) has a low moisture content;

(c) has a low satiety value;

(d) is high in kilojoules per gram; and/or

(e) has a sticky texture and is therefore likely to increase the risk of poor dental health in children aged 1‑3 years.

1. Satiety, to which (c) refers, is the feeling of being satisfied by the consumption of food after the initial feeling of fullness subsides. Some foods are rapidly digested and absorbed giving rise of a feeling of hunger relatively soon. Others, including fresh fruit and vegetables, give a feeling of substantial fullness for longer.
2. The kilojoule to which (d) refers is the metric unit of energy. All foods containing protein, fats and carbohydrates (including dietary fibre) contribute energy to the diet of humans. Water does not provide any energy. Energy density is the number of kilojoules per 100 g of a food. Foods with a high water/moisture content have a low energy density, and vice versa. In common parlance, the term “calorie” is often used as the unit of measurement of the energy value of a food. One calorie is equivalent approximately to four kilojoules.
3. The ACCC’s pleading as to falsity did not distinguish between the two limbs of the pleaded representation. The effect, as I understand it, was that the ACCC relied on all of the pleaded matters as a basis for the falsity of each limb. However, as the evidence emerged it became apparent that some matters did not bear on the nutrition of the Products (moisture content, satiety value and texture) whereas those matters did bear on whether the Products were beneficial to the health of toddlers.
4. The ACCC submissions as to falsity raised some matters which went beyond its pleaded case. In particular, it submitted that the Berries Product was an “unnecessary” part of a toddler’s diet because the nutrients it does provide are “amply provided by the fruits and vegetables recommended as essential foods for children – and without the concentration of sugars”. An allegation to that effect (if to be relied upon as a free standing matter) should have been pleaded with appropriate particulars. Such particularisation would have informed an assessment of the matters said to make the representation misleading or deceptive. I accept Heinz’s submission that it may also have led to further evidence had this been part of the ACCC’s pleaded case. That being so, I uphold the Heinz submission that the ACCC should not be able to depart from its pleaded case. Accordingly, I will not include a lack of necessity as a free standing matter supporting the falsity of the Healthy Food Representation.
5. However, that does not mean that the issue of necessity is of no relevance at all. I accept the ACCC submission that it is relevant to consideration of the Heinz submission that the Products are beneficial to the health of toddlers because they are a source of some essential nutrients. The evaluation of that submission involves implicitly consideration of whether the Products provide a source of nutrients which would otherwise be lacking in a child’s diet. To that limited extent, the evidence and submissions bearing on the issue of necessity are relevant.
6. The ACCC also relied on other matters which Heinz submitted were beyond its pleading, namely, the high energy density of the Product and its resemblance to confectionery. I accept the Heinz submission concerning the latter but not the former. As already noted, the energy density of a food is usually expressed as the number of kilojoules per 100 g. It correlates with its fat and water content. The greater the amount of fat the higher the energy density. The lower the water content, the higher the energy density. The ACCC did plead that the Products were high in kilojoules per gram. This was an express pleading concerning energy density. I also observe in this respect that Heinz requested both Dr Barclay and Mr Shrapnel to address the issue of energy density.
7. As will be seen later, I also consider that the ACCC submissions concerning the effect of consumption of the Products on the development of healthy eating habits and, in particular, on consumption of fresh fruit and vegetables, do not relate to matters within its pleaded case of falsity of the Healthy Foods Representation.
8. A particular focus of the ACCC case was on the high sugar content and the lack of dietary fibre. Heinz submitted that concentrated sweetness, to which the ACCC’s expert witness Dr Stanton referred, was not part of the ACCC’s pleaded case. In my view, that submission involves an unduly narrow view of the ACCC plea that the Berries Product is “high in sugar”.
9. The ACCC had not pleaded specifically that the Berries Product lacked or was low in dietary fibre. It submitted, however, that this was a corollary of the high level of sugar. Dr Barclay, to whom I will refer shortly, confirmed the correlation between these elements when he said of the Berries Product, that “overall, the nutrient profile clearly reflects the use of apple juice concentrate in the ingredients, increasing the free sugars content and decreasing the fibre content”. Dr Barclay also explained that the dietary fibre is removed during the processing of concentrating the juice. Accordingly, I consider it appropriate to take account of the low dietary fibre in the sense that it is a corollary of the high sugar but not otherwise.
10. Some of Heinz’s submissions were to the effect that the ACCC case, insofar as it concerned the effect on dental health, was confined to the sticky texture of the Products. In my opinion, that submission also involves an unduly narrow view of the ACCC’s pleading and I do not accept it. There is no reason to suppose that the effect on dental health was not one of the matters to which the issue of high sugar content related.

#### Nutrition and health benefits: The expert witnesses

1. In relation to the nutritional value and health benefits of the Products, the ACCC led expert evidence from Dr Rosemary Stanton. Dr Stanton is a well‑qualified nutritionist with considerable experience. In addition, she has published extensively in the area of nutrition, including authoring a textbook concerning food for children. Between 2008 and 2012, Dr Stanton was a member of the working party established by the National Health and Medical Research Council (NHMRC) to develop the Dietary Guidelines for Australians. She was also a member of the working party of the NHMRC which developed the “Infant Feeding Guidelines for Health Workers”. It is obvious that Dr Stanton is able to speak with authority in the area of diet and nutrition, including the diet and nutrition of children.
2. I considered that Dr Stanton gave her evidence in an appropriate manner. She was careful to expose in her first report a matter which could possibly impact on the Court’s assessment of her independence. I am satisfied that generally I can act on Dr Stanton’s opinions and conclusions.
3. Heinz led evidence from Dr Alan Barclay and Mr Bill Shrapnel. Dr Barclay is a Consultant Dietician. He too is well‑qualified and has considerable experience, although not as extensive as that of Dr Stanton. I accept that he has the expertise to express the opinions which he has in the trial.
4. However, for reasons which I will elaborate below, I have less confidence in Dr Barclay’s opinions than I do in Dr Stanton’s. At the general level, I thought that there was a certain amount of argumentativeness in Dr Barclay’s evidence and that at times he had a tendency to shape his evidence so as to favour the position of Heinz as the party calling him.
5. I will refer shortly to assumptions which Dr Barclay made concerning the extent of free sugars in the Products which I consider to be unsound and which seem to have resulted in an underestimation by him of these amounts. Another matter giving rise to my reservations about his evidence appears in the opinion which he expressed concerning the relationship between the intake of free sugars and body weight:

Finally, it is worth noting that the WHO determined that the evidence about the relationship between free sugars intake and body weight is based on “low and moderate quality evidence” (9) and that the systematic review and meta‑analysis that underpinned the 2015 Guideline “Sugars intake for adults and children” determined that “Trials in children, which involved recommendations to reduce intake of sugar sweetened foods and beverages, had low participant compliance to dietary advice; these trials showed no overall change in body weight.” (25). *In other words, despite popular perception, there is little evidence to support a link between free sugars consumption and body weight in children*.

(Emphasis added)

1. The reference (25) given by Dr Barclay in this passage is to Morenga, Mallard and Mann (2013) “Dietary sugars and body weight: Systematic review and meta-analyses of randomised controlled trials and cohort studies” *BMJ* 346:e7492.
2. The passage from that article quoted by Dr Barclay is incomplete. When read in full, a different conclusion emerges. Immediately after the passage quoted by Dr Barclay, the article continued:

However, in relation to intakes of sugar sweetened beverages after one year follow‑up in prospective studies, the odds ratio for being overweight or obese increased was 1.55 (1.32 to 1.82) among groups with the highest intake compared with those with the lowest intake. Despite significant heterogeneity in one meta‑analysis and potential bias in some trials, sensitivity analyses showed that *the trends were consistent and associations remained after these studies were excluded*.

(Emphasis added)

1. In the very next paragraph of the article, the authors expressed the following conclusion:

Among free living people involving ad libitum diets, *intake of free sugars or sugars sweetened beverages is a determinant of body weight*.

(Emphasis added)

1. Later, the authors said, at 7:

The extent to which population based advice to reduce sugars might reduce risk of obesity cannot be extrapolated from the present findings, because few data from the studies lasted longer than ten weeks. However, when considering the rapid weight gain that occurs after an increased intake of sugars, *it seems reasonable to conclude that advice relating to sugars intake is a relevant component of a strategy to reduce the high risk of overweight and obesity in most countries*.

(Emphasis added)

1. Given these conclusions in the very same article to which Dr Barclay had referred, his statement that “there is little evidence to support a link between free sugars consumption and body weight in children” does not seem appropriate. Dr Barclay’s selective quotation from the article in question was one of the matters which undermined my confidence in his opinions generally.
2. Mr Shrapnel does not have the same academic qualifications as do Dr Stanton and Dr Barclay but he does have extensive experience as consultant nutritionist. It emerged during Mr Shrapnel’s cross‑examination that he has a continuing association with the sugar industry in Australia. Mr Shrapnel is a consultant nutritionist providing assistance to the Sugar Research Advisory Service (SRAS) which is funded by Sugar Australia. One of the functions of the SRAS is promoting the dissemination of information about sugars to health professionals, including dieticians. Sugar Australia is an industry body with Australia’s leading sugar refineries as its members. I think it fair to infer that Sugar Australia has an interest in the promotion of sugar consumption or at least avoidance of a decline in consumption. Mr Shrapnel did not disclose these involvements in his written report.
3. These matters gave rise to concerns as to the extent to which Mr Shrapnel was truly independent.
4. These concerns were increased by other matters. In the past, Mr Shrapnel maintained a website with the name “Sceptical Nutritionist”. He was the “Sceptical Nutritionist”. The website contained the following explanation of its purpose:

The Sceptical Nutritionist is my response to the dogma that has found its way into advice about healthy eating. Even well respected scientific organisations and nutritionists now weave ideological view points into advice that is supposed to be evidence‑based nutrition.

1. Mr Shrapnel acknowledged that he holds “fairly conservative scientific views” and that he is often seen as a “contrarian”. It seems that Mr Shrapnel insists on rigorous proof before accepting that a cause and effect relationship may exist and that he had a tendency to be sceptical of evidence which, although pointing to the existence of such a relationship, fell short of the standard he considered appropriate.
2. Mr Shrapnel’s general view is that sugar of itself has not been shown to be harmful: it is only when it is taken in excess that it may be so.
3. The mere fact that Mr Shrapnel may hold opinions which are unpopular in the field of nutrition does not of course mean that his views are of no weight. However, I consider that caution is appropriate before acting on Mr Shrapnel’s opinions. He is to an extent a participant in the activities of the sugar industry, which it can be inferred is concerned with the promotion, or at least the defence, of the consumption of sugar. Further, the premises upon which his opinions are based seem to involve questioning of at least some commonly accepted matters.

#### The process of manufacture

1. In order to provide a setting for some of the findings which follow, it is necessary to make some findings concerning the process of manufacture of the Berries Product. For this purpose, I rely principally on the material supplied by Heinz in response to a notice issued by the ACCC under s 155 of the CC Act and on a Product Information Form (PIF) dated 17 October 2012.
2. Each of the Products was manufactured for Heinz in New Zealand by Taura. It supplied the PIF to Heinz.
3. In its response to the s 155 notice, Heinz identified the raw materials used by Taura for the Berries Product as apple paste, apple juice concentrate, berry purees, raspberry puree, sweetcorn puree, pumpkin puree and natural flavours. The Heinz response did not specify the means by which the apple juice concentrate was obtained but it is reasonable to infer, and I do, that it resulted from a process of dehydration of natural apple juice. The raspberry puree and some of the strawberry puree (being two of the berry purees identified) were described in the Heinz response as “concentrated” and again I infer that these were obtained by a process which included dehydration. The pumpkin and some of the sweet corn purees were described as “UHT” which is the commonly used acronym for “Ultra Heat Treatment”. This suggests that they too had been subject to a process of dehydration.
4. Although the packaging for the Berries Product indicated that its principal ingredient was apple paste (36%), the PIF provided by Taura indicated that the ingredient was instead “Concentrated apple puree, Ascorbic Acid”. Ms Russell, a senior research and development technologist employed by Heinz, said that it had been a decision by Heinz to call this ingredient a paste rather than a puree. She described the process by which the puree/paste was obtained as the mashing of peeled and cored apples followed by dehydration until the product had the viscosity of a paste. Ascorbic acid was then added to avoid browning of the paste.
5. It was common ground that the effect of the dehydration of the ingredients was to increase the amount of sugar as an overall proportion in the ingredients. Another and related effect was to increase the energy density of the ingredient because, when the moisture is removed, it is the macronutrients containing the calories which remain.
6. In addition to the use of ingredients in concentrated form, Taura’s manufacturing process involved further concentration. Heinz described that process as follows:

Taura uses a patented technology process, URC®, to manufacture the Products. The individual Shredz pieces are produced using a unique rapid *concentration* process of a homogenous blend of the ingredients … The speed of the *concentration* process ensures the URC® pieces retain their typical flavour and colour.

(Emphasis added)

1. Taura provided a document setting out the separate steps in this process. This included:

Raw materials are batch blended together. Batches are standardised for Brix and pH. Inline filter screens (CCP1) are used to reduce and eliminate foreign matter.

Concentration of the blend takes approximately 2 to 3 minutes with temperatures of approximately 100°C. Processor discharge temperature is CCP 2 (> 78°C).

The product is cooled to approximately 10°C.

1. I am satisfied that the concentration which occurred, both in the individual ingredients and by Taura’s process of manufacture, involved the removal of moisture. This removal was necessary in order to prevent microbial spoilage without the use of food additives. It also explains the high concentration of sugar in the Berries Product.

#### Is the Berries Product nutritious?

1. Earlier, I indicated my view that ordinary and reasonable consumers would understand the word “nutritious” and its cognates as referring to the nourishment which a food provides, that is, to the extent to which it provides the nutrients which sustain life.
2. In general, this understanding accorded with the approaches of the nutrition experts.
3. Dr Stanton compared the nutrients in 18 g of the Berries Products with 100 g of a serve of fresh fruit and vegetables (using those in approximately the same proportions as the fruit and vegetables depicted on the front of the pack of the Berries Product). Necessarily, this involved some imprecision but Heinz did not submit that the technique adopted by Dr Stanton was inappropriate. As I understand it, Dr Stanton selected the measure of 100 g for the fresh fruit and vegetables because that is an average quantity of a single serve of fruit and vegetables, this being the recommended daily consumption of fruit and vegetables for children in the 1‑3 year age group. The results of Dr Stanton’s comparison are as follows:

|  |  |  |
| --- | --- | --- |
|  | Berries Shredz**18g** | Fruit & veg**1 serve (100g)** |
| Kilojoules  | 232 | 230 |
| Sugars (g) | 11.3 | 9.5 |
| Dietary fibre (g) | 1.2 | 2.5 |
| Vitamin C (mg) | 8 | 15 |
| Beta carotene (µg) | 441 | 310 |
| Moisture (g) | 2.4 | 82 |

1. Dr Stanton noted the following features from this comparison: the amount of kilojoules are essentially the same; the sugars in the Berries Product are 19% higher and would result in a concentration of sweet flavour on a child’s palate; the values for beta carotene are higher in the Berries Product reflecting the concentrated fruit products used; the amounts of dietary fibre, vitamin C and moisture content are significant lower in the Berries Product; and the higher dietary fibre level and greater bulk of fresh fruit and vegetable products in the 100 g serve would be expected to make the fresh products more filling than the Berries Product.
2. The analyses of Dr Barclay and Mr Shrapnel of the nutrient content of the Products took different formats but, subject to one aspect of Dr Barclay’s evidence to which I will refer shortly, I did not understand their conclusions to differ in substance from those of Dr Stanton. Both Dr Stanton and Dr Barclay considered that the Berries Product could be regarded as “a source” (as that term is used in the Food Standards Code) of vitamin A (beta carotene) and vitamin C. Dr Stanton did not consider that it could be regarded as a source of dietary fibre (although she considered that the Fruit and Chia Product was a source). Both Dr Barclay and Mr Shrapnel considered that the Berries Product can be regarded as a nutritious food.
3. Dr Stanton said, and I accept, that the Products would provide between 4% and 7% of the estimated energy requirement of 1‑3 year olds, depending on the child’s age, gender and level of activity. This is a wider range than that given by Dr Barclay, namely, that an 18 g serve of the Products would provide between 5.3% and 5.7% of the estimated daily average energy requirement of a 1‑3 year old. To the extent that it is necessary to do so, I prefer Dr Stanton’s evidence on this topic, as there seems little point in calculating an average, given the divergent energy needs of one and three year olds.
4. Given all of this evidence, I am not satisfied that the ACCC has established that the Berries Product was not nutritious. On the contrary, it did have some of the nutrients necessary to sustain human life. In addition to the matters I have mentioned, it is significant to my mind that, although Dr Stanton was critical of the Products in a number of respects, she did not say that they were not nutritious.
5. Accordingly, I am satisfied that the ACCC has not established this aspect of its case on falsity.

#### Is the Berries Product beneficial to the health of children aged 1-3 years?

1. The ACCC case that the Berries Product was not beneficial to the health of young children was based on a number of effects of consumption of the Product said to be attributable to the pleaded qualities of the Product. One of these was the effect on the dental health of young children having regard to the sweetness and stickiness of the Berries Product. I will consider that effect separately.
2. The other matters relied on by the ACCC were concerned with dietary effects more generally, such as the importance of maintaining a healthy diet, healthy eating habits and a healthy weight. These considerations are important for the health and growth of young children and because a significant proportion of Australian children are overweight and obese. In this respect, I note that the Australian Institute of Health and Welfare reported in 2016 that 25% of Australian children are overweight or obese. I have already referred to the evidence supporting the association between the consumption of free sugars by children, on the one hand, and weight gain, on the other.

#### The high level of sugar

1. It seemed to be common ground that the level of sugar in the Berries Product is high. Heinz itself had indicated on the packaging that 68.27% of the Berries Product was sugar. The formal analysis by the National Measurement Institute was a little less than that figure, at 62%.
2. Dr Stanton gave evidence concerning the significance of high levels of sugar with particular reference to free sugars. She noted that in 2015 the World Health Organisation (WHO) had published a document entitled “Guideline: Sugars intake for adults and children” (the WHO Guidelines). The stated objective of the WHO Guidelines was:

[T]o provide recommendations on the intake of free sugars to reduce the risk of NCDs in adults and children, with a particular focus on the prevention and control of unhealthy weight gain and dental caries. The recommendations in this guideline can be used by policy‑makers and programme managers to assess current intake levels of free sugars in their countries relative to a benchmark. They can also be used to develop measures to decrease intake of free sugars, where necessary, through a range of public health interventions.

1. The WHO Guidelines contain the following statement of the rationale for concern about consumption of high levels of free sugars, at 1:

Noncommunicable diseases (NCDs) are the leading causes of death and were responsible for 38 million (68%) of the world’s 56 million deaths in 2012. More than 40% of those deaths (16 million) were premature (ie, under the age of 70 years). … Modifiable risk factors such as poor diet and physical inactivity are some of the most common causes of NCDs; they are also risk factors for obesity – an independent risk factor for many NCDs – which is also rapidly increasing globally. A high level of free sugars intake is of concern, because of its association with poor dietary quality, obesity and risk of NCDs.

Free sugars contribute to the overall energy density of diets, and may promote a positive energy balance. Sustaining energy balance is critical to maintaining healthy body weight and ensuring optimal nutrient intake. There is increasing concern that intake of free sugars – particularly in the form of sugar‑sweetened beverages – increases overall energy intake and may reduce the intake of foods containing more nutritionally adequate calories, leading to an unhealthy diet, weight gain and increased risk of NCDs. Another concern is the association between intake of free sugars and dental caries. …

(Citations omitted)

1. The NHMRC has published “Dietary Guidelines for Children and Adolescents in Australia”. Those guidelines also state the basis for concern about consumption of sugars (not distinguishing between free and naturally occurring sugars):

The evidence for sugar’s role in the aetiology of dental caries is strong. When energy intake exceeds energy expenditure over a sustained period, overweight or obesity will result. Excess dietary energy intake – from whatever source, including sugars – can thus contribute to weight gain, overweight and obesity. Inappropriately high levels of intake of sugars may also displace other nutrients from the diet. No other links to the causation of specific disease have been identified.

1. I did not understand these statements as to the potential adverse effects of free sugars to be contentious and I accept them.
2. The WHO Guidelines contain a “strong recommendation” that the intake of “free sugars” be reduced to less than 10% of total energy intake, being the sum of all daily calories/kilojoules consumed from food and drink. In addition, the WHO Guidelines contain a “conditional recommendation” that the intake of “free sugars” be further limited to below 5% of the total energy intake. A conditional recommendation is made when there is less certainty “about the balance between the benefits and harms or disadvantages of implementing a recommendation”. The WHO Guidelines make it apparent that its conditional recommendation is based on the association between free sugars and dental caries, to which I will refer shortly.
3. Although Dr Stanton did not say so expressly, it is implicit in her opinions that she agrees with the WHO Guidelines. She said that the lower recommendation in the WHO Guidelines was the appropriate recommendation.
4. Dr Barclay also used the WHO Guidelines. He said that he supported the strong recommendation but did not consider the conditional recommendation to be appropriate in Australia given the general fluoridation of water supplies. On my understanding, the fluoridation of water supplies was adopted as one measure of reducing the incidence of dental caries and it has been successful in doing so. However, given the significant continued prevalence of dental caries in Australia, it is plain that fluoridation has not been wholly successful in satisfying this objective. That being so, it is not immediately apparent that a recommendation directed to a (perhaps “the”) primary cause of dental caries would not be appropriate in Australia. Dr Barclay’s evidence did not explain why that should be so.
5. Mr Shrapnel noted that the quality of the evidence supporting the conditional recommendation described by the WHO as “very low” but I did not understand him otherwise to disagree with the overall rationale and approach contained in the WHO Guidelines.
6. The WHO Guidelines use the term “free sugars” with the following meaning:

Free sugars *include* monosaccharides and disaccharides *added* to foods and beverages by the manufacturer, cook or consumer, and sugars naturally present in honey, syrups, *fruit juices and fruit juice concentrates*.

(Emphasis added)

As can be seen, this is not an exhaustive definition. It includes both added sugars and some sugars which are naturally present in some products, in particular, those present in fruit juices and in fruit juice concentrates. Monosaccharides include glucose, fructose and galactose. Disaccharides include sucrose, maltose and lactose. In Australia, the primary free sugar is sucrose.

1. Dr Stanton noted that keeping free sugars to a maximum of 10% of total energy intake meant no more than about five teaspoons of sugar per day for children of 12 months, six teaspoons for children of two years of age, and eight teaspoons for children of three years of age. The effect of the WHO conditional recommendation is to reduce these amounts to no more than approximately two and a half teaspoons per day at 12 months, three teaspoons at two years of age and four teaspoons at three years of age.
2. Dr Stanton then said that a single serve of each of the Products (18 g) contained the equivalent of just under three teaspoons of free sugars. This meant that the free sugars in a single serve of the Products represented more than one half of the recommended daily intake of 10% of energy from free sugars for 1‑2 year olds and over 35% for three year olds. In the case of the stricter conditional recommendation, a single serve of the Products exceeded the recommended intake of free sugar for children aged 12 months, was equal to the recommended intake for two year olds and provided 75% of the recommended intake for three year olds. Dr Stanton said that a single serve of any product contributing so much of the recommended levels of free sugars could not be regarded as healthy food**.** This is understandable given the probability, if not the inevitability, of children consuming free sugars in the rest of their daily diet.
3. I accept Dr Stanton’s opinions about these matters.
4. It is to be remembered that the WHO Guidelines recommendations relate to free sugars. A toddler’s intake of those sugars will be in addition to the intake of the sugars naturally occurring (found in the cell structures) in many fruits and vegetables and other foods (sometimes referred to as “intrinsic sugars”). As Mr Shrapnel observed, naturally‑occurring sugars and similar sugars added in the processing of a food cannot be distinguished by chemical analysis. They are the same substances. However, the naturally occurring sugars are rarely as energy dense as free sugars.
5. Heinz submitted that the ACCC pleaded case is concerned only with total sugars, and not free sugars. It is true that the Amended Statement of Claim refers to “sugars” and not to “free sugars” but, in my view, that does not preclude the ACCC from relying on the significance of the free sugars in the context of total sugars.
6. The report entitled “Australian Health Survey: Consumption of Added Sugars” published by the Australians Bureau of Statistics in April 2016 (reporting on data obtained in 2011‑12) states that:
* Australians consumed an average of 60 g of free sugars per day (equivalent to 14 teaspoons of white sugar);
* just over half of all Australians aged two years and over “usually” exceeded the WHO strong recommendation to limit energy from free sugars to less than 10% of dietary energy. Children and teenagers were most likely to “usually” exceed the recommendation;
* the majority (81%) of free sugars were consumed from energy‑dense, nutrient‑poor “discretionary” foods and beverages;
* 2‑3 year olds had an average daily intake of free sugars of 39‑42 g (or 9‑10 teaspoons); and
* 89% of people exceeded the WHO conditional recommendation with 97% of children and teenagers (aged between four and 18 years) deriving 5% or more of their energy intake from free sugars.
1. I consider that these statistics tend to confirm the concern expressed by Dr Stanton about the levels of free sugars in the Products.
2. Dr Barclay provided a different form of analysis of the sugar content from that of Dr Stanton. His analysis indicated that there were only 3.6 g of free sugars in each 18 g serve of the Berries Product. I infer that this is less than that calculated by Dr Stanton.
3. For the reasons which follow, I do not accept Dr Barclay’s analysis. He assumed that the only sources of free sugars in the Berries Product were the apple juice concentrate and the sucrose in the gelling agent (pectin). The latter was in minor quantities only (0.40 g per 100 g) and for relevant purposes can be ignored.
4. I consider that Dr Barclay’s assumption is not sound. First, Dr Barclay assumed that “fruit juices” and “fruit juice concentrates” were not included in the definition of free sugars in the WHO Guidelines because these were refined products with the pulp contained in the dietary fibre removed. In the case of purees, the dietary fibre is retained. The sugars are integrated in that fibre and hence are not free. This explanation involved the surmise that the process of forming the puree does not result in the release of free sugars. Dr Barclay described a puree as a “food which has been *crushed or beaten* *and sieved* so that it forms a thick, smooth liquid” (emphasis added). That suggests that whether free sugars are produced in the pureeing process would depend on the extent to which the mashing and pulping released those sugars from the fibre. Further, the extent to which dietary fibre in the form of pulp is retained or removed would depend on the nature of the sieving process.
5. Ultimately, Dr Barclay accepted that it was probable that the purees would have some free sugar. He then said that “we have no idea of what proportion it would be”. That being so, Dr Barclay’s analysis of the amount of free sugar by reference only to the apple juice concentrate and the pectin seems inappropriate. It meant that he excluded all the free sugars contributed by the principal ingredient of the Berries Product (the apple puree at 36%) as well as all the free sugars contributed by the other pureed ingredients.
6. Dr Barclay also said that some of the free sugars may, during the Taura manufacturing process, have become re‑encapsulated or re‑entrapped in the homogenous product. He attributed this to the effect of the pectin. However, when pressed in the cross‑examination he said that he did not know whether the pectin did have the effect of converting free sugars into non‑free sugars, saying:

We honestly don’t know. It could because it may entrap some of those free sugars, so it will depend on the matrix of the food and we don’t have any information on that.

1. In my opinion, this was an example of Dr Barclay’s willingness to make an assumption favouring Heinz as the party calling him which was not sustained on closer scrutiny.
2. The effect is that Dr Barclay’s analysis appears to involve an underestimation, perhaps a significant underestimation, of the amount of free sugars in the Berries Product. As the very least, he has not shown that his analysis is soundly based. This was one of the matters which caused me to have less confidence in Dr Barclay’s evidence.
3. Dr Stanton’s views about the level of sugar received some support from Heinz’s own internal documents. Heinz’s New Product Development Guidelines for the Little Kids Products published in 2008 included the following statement:

Limiting added sugar content is aimed at delaying the development of taste preference for high sugar foods

1. Heinz’s Global Toddler Snacking Guidelines developed in May 2011 included the following:

**Sugars**

Sugars are naturally present in foods such as fruit, dried fruit, milk and yoghurt. These foods are healthy foods which we do not want to limit the supply based on sugar content. Our aim is to use the minimum amount of added sugars needed for product acceptability.

Guidance from the Committee on Medical Aspects of Food and Nutrition Policy (COMA) in the UK has suggested that the contribution from non‑milk extrinsic sugars (similar to added sugars and sugars from fruit purée and juice) should contribute < 10% of energy.

As a guide we aim for < 5% of added sugars for savoury snacks and < 30% total sugars for a sweet snack, this taking into consideration sugars that may come from food juice and fruit pastes for the development of fruit based snacks. The use of a percentage of sugar was selected rather than a percentage of energy to make it easier to calculate as labels often do not distinguish between intrinsic and added sugars.

(Citation omitted)

1. I indicate now my acceptance of Dr Stanton’s opinions in preference to those of Dr Barclay and Mr Shrapnel concerning the sugar levels of the Berries Product and of the significance of those levels.
2. I will defer to later my findings concerning the level of sugars in relation to the alleged falsity of the Healthy Food Representation.

#### Consumption of fresh fruit and vegetables and healthy eating habits

1. The ACCC submissions emphasised the desirability of consuming fruit and vegetables in their fresh form in the development of healthy eating habits. It submitted that the Berries Product would not encourage such consumption. Again, the ACCC relied on the evidence of Dr Stanton.
2. Dr Stanton referred to the Australian Dietary Guidelines (the ADG). These were published in February 2013 by the NHMRC. As already noted, Dr Stanton was a member of the group appointed by the NHMRC to compile the ADG. They were prepared over a four year period commencing in 2009 and concluding in 2013. The evidence indicates that the nutritionists employed by Heinz made frequent reference to the ADG in the course of their work.
3. Dr Stanton noted that the ADG recommends that Australians of all ages increase their consumption of fresh fruit and vegetables. It is evident that Dr Stanton agrees with that recommendation. Dr Stanton said that the bulk of fresh fruit and vegetables and their relatively low nutrient density made them ideal foods to replace foods high in sugar, salt or saturated fat.
4. Dr Stanton considered that the Berries Product would not encourage the development of healthy eating habits for children given the recommendation that toddlers should be consuming fresh fruit and vegetables in order to meet their recommended daily fruit intake and the recommendations of the WHO, referred to earlier, to the effect that the intake of “free sugars” should be reduced. Dr Stanton also noted data from the Australian Bureau of Statistics published in 2016 indicating that 99% of two to three year olds do not consume the recommended daily amount of vegetables and that 22% do not consume the recommended daily amount of fruit.
5. In response to a question as to whether the Products would encourage the development of healthy eating habits for children, Dr Stanton expressed the following opinion:

My strong opinion is that the Shredz Sticks will *not* encourage the development of healthy eating habits for children. Indeed, I consider they may have the opposite effect.

It is important for 1‑3 year‑olds to develop healthy eating habits. My reasons include:

(a) There is good evidence that many young children’s diets do not meet [the ADG]. This means these children have poor eating habits, generally with an inadequate intake of fruits and vegetables and too many “discretionary” foods …

(b) 99% of 2‑3 year‑olds do not meet the recommended guidelines for vegetables and 22% fail to consume the recommended amounts of fruit. In this same age group, 30% of the daily kilojoules come from “discretionary” foods. These products are not recommended and are taking the place of the nutritious foods from the major food groups. Adding to the many “discretionary” products with some specifically marketed for young children goes *against* the development of healthy eating habits”.

(c) Shredz Sticks are *not* equivalent to fruit and vegetables (in appearance, taste, texture or nutritional value) …

(Emphasis in the original)

1. In my view, it is not necessary to consider these opinions in relation to the Berries Product Healthy Food Representation. That is because they concern matters which are outside the ACCC pleaded case on the falsity of that Representation.

#### The low moisture content and high energy density

1. For the reasons already explained, these two features of the Products are related and it is convenient to consider them together.
2. Plainly, the dehydration process results in the moisture content of the Products being low and the energy density being higher than found in the fruit and vegetable ingredients in their natural state.
3. Other than a general statement that diets with low energy density continue be favoured, the evidence of Dr Stanton did not indicate how these particular features, whether considered individually or together, meant that the Berries Product was not beneficial to the health of young children. In fact, in her first report, Dr Stanton said that she would not regard the kilojoule levels of the Products as being “of any major concern”. Later, Dr Stanton referred to a concern that discretionary high energy products like the Products could take the place of the nutritious foods listed in the ADG, which she considered undesirable. However, this opinion seemed to refer only to the possibility that this kind of substitution may occur.
4. Dr Stanton identified the low moisture content as being “mainly of the concern” because the increased density of the Products may make them less filling than the equivalent amount of natural fruits and vegetables. However, she went on to acknowledge that she was not certain of the extent to which that could be a problem. Later, Dr Stanton referred to both the high sugar content and the energy density as being of concern because of their contribution to weight gain in children. To the extent that the high energy levels reflect the high sugar content, that feature has already been addressed in the previous section of these reasons.
5. Dr Barclay considered that the Products had a nutrient density similar to dried fruit and vegetable equivalents. The implication was that, just as dried fruit and vegetables may be consumed occasionally with benefit, so may the Products. Further, Dr Barclay considered that the energy contribution of the Products of between 5.3% and 5.7% of a 1 to 3 year old’s established average energy requirements was reasonable, especially given that parents may control the amount consumed on any given day.
6. Mr Shrapnel regarded both moisture content and energy density as being of little or no relevance to the question of whether the Products were beneficial to the health of young children.
7. In the light of all this evidence, I consider that neither the low moisture content or the high energy levels, by themselves, warrant a conclusion that the Berries Product was not beneficial for the health of young children.

#### Low satiety values

1. In some respects, the low satiety value of the Products is related to their lower moisture content and low dietary fibre.
2. Dr Stanton considered that the higher dietary fibre levels and the greater bulk of fresh fruit and vegetables would make them more filling than the Products. As I understood it, the implication of this is that the Products had a low satiety value. This makes it likely that a toddler consuming them will feel hungry again sooner than would be the case had the child consumed fresh fruit and vegetables. The theory is that the child will wish to satisfy that hunger by eating more than would have been the case had the child eaten fresh fruit and vegetables originally.
3. However, as Dr Stanton herself acknowledged, there is a certain amount of conjecture in this given that the satiety value of the Products had not been measured. She agreed with Dr Barclay that it was “plausible” that the Products are less satiating than fresh or dried fruit and that it was “feasible” that a toddler’s stomach would feel fuller after consuming fresh fruit and vegetables in the quantities necessary to provide the same kilojoules as does 18 g of the Product.
4. Satiety is capable of a form of measurement using a Satiety Index, but no such measurements had been made of the Products. One matter adding to the plausibility of the hypothesis of Dr Stanton and Dr Barclay that the Products have a lower satiety value than fresh fruit and vegetables is that the satiety of fresh fruit including grapes, bananas, apples and oranges have been assessed using the Satiety Index. The index for those fruits is relatively high compared with other food groups.
5. However, given the degree of conjecture involved in the evidence, I am not willing to conclude that the Products have a low satiety value, let alone that their satiety value makes them not beneficial to the health of toddlers.

#### The effect on dental health

1. The ACCC led evidence from Professor David Manton who is the Elsdon Storey Chair of Child Oral Health at the University of Melbourne. Professor Manton obtained a PhD from that University in 2010, having previously (in 1994) obtained a Master of Dental Science. It is obvious that Professor Manton is well qualified and has extensive experience in child dental health. He was an impressive witness.
2. Heinz led evidence from Associate Professor James Lucas. He is an experienced and well qualified Paediatric Dentist who has for over 30 years held positions at the Department of Dentistry at the Royal Children’s Hospital in Melbourne. He is presently the Deputy Director in that Department, and is an Associate Professor at the University of Melbourne.
3. In addition, the expert nutritionists gave some evidence concerning the effect of sugar consumption on dental caries. Both Dr Stanton and Dr Barclay acknowledged that dental health was not the area of their primary expertise, and I am satisfied that that is also true in Mr Shrapnel’s case.
4. My impression was that Professor Manton was a more objective witness than Associate Professor Lucas and that, to an extent, the opinions of the latter were somewhat dogmatic and narrowly focussed. To the extent to which there were differences between the opinions of the two dental experts, I give greater weight to those of Professor Manton.
5. On the basis of the evidence of Professor Manton, I make the following findings. Dental caries is caused by the metabolism (fermentation) of dietary sugars by bacteria in the dental biofilm (the layer of plaque on the surface of the tooth, sometimes referred to as dental plaque). That fermentation leads to acids being produced by the bacteria, and these acids dissolve the mineral tooth structure.
6. If a child consumes a diet with regular exposure to free sugars, there develops an over‑abundance of the bacteria in the biofilm which cause dental caries. These cariogenic bacteria then limit the growth of healthy bacteria by creating an environment which is non‑conducive to their growth. Accordingly, the acid‑causing biofilm increases the risk of a child developing dental caries.
7. Dental caries (dental decay) is prevalent amongst Australian children with some 48% of Australian five year olds having experience of dental decay at a level requiring treatment such as restoration (fillings) or extraction. In 2010, the proportion of children with experience of dental caries in either their deciduous or permanent teeth varied from 48.2% for children aged five to 68.7% for children aged nine. In many cases (described by Professor Manton as “the vast majority”), the disease is untreated with the consequence that the 10% most severely affected children have greater than nine teeth (out of a total of 20) with decay.
8. A number of matters can influence the development of dental caries in an individual, including individual susceptibility, genetics, oral hygiene in combination with the use of fluoridated toothpaste, fluoridation of the water supply, the composition of the person’s saliva, and the extent of the bacteria in the person’s mouth. However, the main contributing factor to dental caries is diet. This seemed to be the view also of Associate Professor Lucas and Mr Shrapnel gave evidence to similar effect.
9. The longer sugars are in the mouth, the greater the effect they have on the constituents of the dental biofilm. The frequency of consumption of sugar is a factor, but the length of time during which sugars remain in the mouth is more critical in the development of dental caries.
10. Professor Manton said that free sugars are far more cariogenic, especially when associated with sticky retentive material and that children who snack on foods with free sugar content have greater numbers of decayed teeth. I accept that opinion even though Associate Professor Lucas said that he did not agree with the conclusion in one study that, within diet, it is free sugars which are the specific cause.
11. There is also evidence linking a long‑term relationship between poor oral health as a child with poor oral health as an adult.
12. Professor Manton described the link between foods with high sugar content, especially those which are “sticky” in nature, and dental caries as being irrefutable. Mr Shrapnel expressed a similar view, saying that there was “little doubt that high sugar consumption is associated with increased risk for dental caries”.
13. Heinz tendered an article by Moynihan and Kelly (2014) “Effect on caries of restricting sugars intake: Systematic review to inform WHO guidelines” 93(1) *Journal of Dental Research* 8‑18. I consider that this article is consistent with these conclusions. The authors had conducted a systematic review of the reported studies concerning the association between the amount of sugar intake and dental caries in humans and on the effect of restricting sugar intake as a proportion of daily energy intake. They found that the majority of the studies examining the association between the intake of sugars and dental caries selected for review had reported higher dental caries with higher sugars intake. This was so across all age groups. Moreover, the greater the amount to which sugars contributed to a person’s energy intake, the greater the incidence of dental caries. The review contained the following conclusion, at 16:

This in‑depth systematic review shows consistent evidence of moderate quality supporting a relationship between the amount of sugars consumed and dental caries development.

There is evidence of moderate quality to show that dental caries is lower when free‑sugars intake is < 10%E.

Dental caries progresses with age, and the effects of sugars on the dentition are lifelong. Even low levels of caries in childhood are of significance to levels of caries throughout the life course. Analysis of the data suggests that there may be benefit in limiting sugars to < 5%E to minimize the risk of dental caries throughout the lifecourse.

1. It was common ground that dental caries is harmful. In addition to the adverse effect on an individual’s health, its treatment is a cause of significant cost, both to individuals and to the community more generally.
2. Professor Manton gave evidence, without objection, of his experience when tasting two of the Products, although he was unable to say which. I do not regard that inability as significant, as it was not suggested that there was any relevant difference between the texture, sweetness and stickiness of the Products. He said that the Products had a “sticky” consistency, which I am satisfied is attributable to the high level of sugar.
3. Professor Manton said that he had continued to experience the taste of the Products for a period of up to 20 minutes after chewing them “considerably” and then swallowing. He attributed this to portions of the product having stuck to his teeth and to the continued presence of sweetness in his saliva. He accepted that “the perceived stickiness of a product is not necessarily connected to its retentiveness”, referring to some research which indicated that some foods such as potato chips and salted crackers have a higher retentiveness than perceived sticky foods such as caramels and chocolate bars.
4. Dr Stanton also noted the stickiness of the Products. She said:

[W]hen I tasted the product, when I opened the packet, they looked a bit like jubes; they smelt like jubes; and they tasted like jubes. And they stuck in my teeth like jubes.

1. Obviously, Professor Manton’s report of his experience in tasting the Products involved some subjectivity and the configuration of teeth in his mouth would be different from the configuration of teeth in the mouths of toddlers. However, his evidence concerning the adherence of the Products to his teeth (which was corroborated by Dr Stanton) and the retentiveness of the flavour was not contradicted by any of the other expert witnesses. In fact, it seemed that neither Associate Professor Lucas nor Mr Shrapnel had tasted the Products. If they did, they did not report on the experience. Some of the Heinz witnesses agreed that the Products had the stickiness of dried fruit. As already indicated, I regarded Professor Manton as an impressive witness and accept as reliable his report of his experience.
2. Professor Manton considered that the Products increased the risk of developing dental caries. A number of features of the Products indicated to him that that is so.
3. First, the “stickiness” of the Products, especially when mixed with saliva, meant that the chewed product adheres readily to the teeth and will remain so adhered for a considerable period of time. This allowed the bacteria in the mouth to metabolise the sugars for longer, decreasing the pH (acidity) of the environment at the tooth’s surface, and increasing the amount of dissolved tooth structure. This conclusion of Professor Manton appears to be consistent with an article tendered by Heinz (Kashket, Zhang and Van Houte (1996) “Accumulation of fermentable sugars and metabolic acids in food particles that become entrapped on the dentition” 75(11) *Journal of Dental Research* 1885-91)) which reported on a study undertaken to measure sugars, starches and metabolic acids in retained food particles. The authors of that article reported at 1890:

The study clearly demonstrated that soluble, fermentable sugars remained associated with particles of food throughout the time that these were retained on the dentition. Although always assumed, this has not been demonstrated in the past. … The present study also demonstrated that metabolic acids are produced and remain associated with particles of foods that are retained on the dentition.

1. Secondly, the high level of sugar in the Products is unlike the sugar naturally occurring in fruit and vegetables. Sugar of that kind is integrated in the cellular structure of the fruit and vegetables and therefore cleared from the mouth readily when the bolus of food is swallowed. In the case of the Products, the sugar is released in the mouth during the chewing of the product, making it readily available to microorganisms in the oral biofilm.
2. Thirdly, the Products had pH levels below 3.9. Tooth minerals dissolve from a pH of approximately 5.7 and below, depending on the local fluid conditions and the ionic content. Accordingly, the Products contain a concentration of acid close to 100 times higher than that required to dissolve tooth minerals.
3. Overall, the high level of free sugars increases the risk of dental caries much more than does the consumption of natural fruits and vegetables.
4. Dr Stanton, while recognising the limitations on her expertise in the area of dental health, said that a single product contributing as much of the recommended levels of free sugars as do the Products could not be regard as a healthy food.
5. Associate Professor Lucas identified four major factors influencing the progress of dental caries:
6. oral bacteria and the biofilm;
7. host factors such as teeth, tooth structure and saliva as some defects in teeth can predispose a child to dental decay;
8. a diet high in fermentable carbohydrates and which is frequently consumed provides the bacteria with dietary sugars which can be metabolised to produce acids which may dissolve the mineral content in the tooth enamel; and
9. the frequency and length of the exposure to the dietary sugars.
10. The first two of these factors appear to be in the nature of static conditions (although not necessarily constant) and the second two to be factors which may vary in a more dynamic way. Associate Professor Lucas declined to differentiate between the importance of these factors, saying that each was of equal importance and, further, that “the most important person to have up the top is the three year old child and its oral environment”. To the extent that Associate Professor Lucas may have intended by this to indicate that diet is not the principal contributor to dental caries, I do not accept his opinion. It is inconsistent with that of Professor Manton and with other evidence which I regard as reliable.
11. Associate Professor Lucas expressed the following opinions:

To state categorically that Shredz will increase the risk of poor dental health would require assessing frequency of consumption.

Therefore Shredz consumed once per day in a healthy mouth with low sugar exposure, less than three exposures per day, with appropriate infant practices and good oral hygiene will not cause poor dental health.

It must be remembered that it is the parent giving the child an inappropriate dietary balance and excessive exposure to cariogenic products that causes poor dental health in one to three year old[s]. It is not the specific food that causes early childhood caries.

1. Dr Barclay considered that the Products may, in some circumstances, contribute to the development of dental caries:

As Shredz contain free sugars, are acidic and sticky like dried fruits, it is likely that they may contribute to the development of dental caries in children if consumed frequently and in the absence of good overall dental hygiene practices.

1. As can be seen, each of these opinions was qualified. Further, each seemed to focus on the effect of consumption of the Products considered by themselves. However, I accept the ACCC submission that the assessment needs to be more broadly based and to take account of the effect of consumption of the Products in conjunction with other aspects of a toddler’s diet. Account should be taken of the probability that, even with a balanced diet, toddlers will consume sugars, including free sugars, from a variety of sources. The issue of whether consumption of the Products is beneficial to the health of children should be assessed in that context.
2. The high incidence of dental caries in young children to which I referred earlier suggests that, even with the widespread availability of fluoridated water, there are significant problems in achieving good hygiene practices with young children. This was Dr Stanton’s opinion. Alternatively, it may suggest that, even with good hygiene practices and the use of fluoridated water, the influence of diet is pervasive in the development of dental caries. The question of whether the Products are beneficial to the health of children should also be assessed having regard to these matters.
3. I note that with respect to the possible effect on the development of dental caries, neither Associate Professor Lucas nor Dr Barclay stated positively that consumption of the Products would be beneficial to the health of toddlers.
4. Mr Shrapnel expressed the following opinion as to the effects of consumption of Products on dental health:

Whether a carbohydrate‑rich food has adverse effects on dental health depends on many factors, including retention time in the mouth. If it could be demonstrated that the retention time of Shredz products was significantly longer than that of other carbohydrate-rich foods there would be an argument for potential adverse dental health implications. However, such data are not available. Based on available evidence, high perceived “stickiness” of foods does not appear to equate to long retention time in the mouth. In the absence of hard data, it is difficult to argue that the dental health implications of consuming Shredz are better or worse than a wide variety of available carbohydrate‑rich foods.

1. Later, Mr Shrapnel said:

It would not be expected that Shredz products would provide a dental health benefit. As with all carbohydrate-rich foods the relevant question is whether they provide a dental health detriment. Lack of data prevents a definitive answer.

1. Some aspects of these opinions are to be noted. First, Mr Shrapnel accepted that the length of time in which a carbohydrate‑rich food is retained in the mouth is related to the effect on dental health. However, he was prepared to attach significance to that consideration in the present context only in the presence of evidence that the retention time of the Products was “significantly longer” than that of other carbohydrate‑rich foods. Noting that there was no “hard data” to that effect, he discounted this as a consideration. This seems an unduly narrow approach, especially given the evidence of Professor Manton (which, as indicated I accept) that the link between foods with high sugar content, especially those which are sticky in nature, and dental caries is irrefutable.
2. Secondly, Mr Shrapnel seemed to think that the enquiry was to be resolved by a comparison with other carbohydrate‑rich foods. It is not self‑evident why that should be so. If other carbohydrate‑rich foods which are productive of cariogenic bacteria are retained in the mouth, then the fact that the Products are retained for an approximately equivalent period (and not longer), does not seem material. The question for the Court’s consideration presently is whether the Products are beneficial to the health of young children: not whether they are no worse than other products. The circumstance that the Products may be no more harmful than another harmful product (if that be the case) is immaterial to the resolution of that question.
3. Despite the evidence of Associate Professor Lucas, Dr Barclay and Mr Shrapnel, I am satisfied that it is appropriate to accept and rely on the opinions of Professor Manton. His evidence satisfies me that dental caries is a major problem among young children, that foods with high sugar content, especially those which are retained in the mouth are a significant cause of dental caries, and that the Berries Product is of that kind. In turn, it warrants the conclusion that consumption of the Berries Product cannot be regarded as beneficial from the perspective of dental health. That remains the case even if the deleterious effects of the consumption can be mitigated, and perhaps avoided, by good oral hygiene practices. In any event, the evidence that dental caries remains prevalent despite the widespread fluoridation of water supplies suggests that such practices are far from universal.

### Conclusion on whether the Berries Product is beneficial to the health of toddlers

1. I note again that a representation that a food is “beneficial to the health” of toddlers is not to be regarded as synonymous with a representation that the food “is not detrimental” to their health or will not be detrimental if consumed only occasionally. The task the ACCC has set for itself is to establish that the Products are not beneficial to the health of toddlers: not that they are positively detrimental to their health. Contrary to the effect of some of the submissions of Heinz, the ACCC does not have to establish that the Products are detrimental to toddlers’ health, although that would be one way by which it could prove that the Products are not beneficial.
2. Proof that a food contains some essential nutrients does not, in the absence of evidence that those nutrients are unlikely to be obtained from other foods, indicate that the food is beneficial to the health of those who consume it. Confectionery may contain some of the nutrients which are essential for human life but that would not warrant a conclusion that it is beneficial to the health.
3. As already noted, the principal focus of the ACCC case was on the high sugar level in the Berries Product.
4. There is no reason to suppose that the strong recommendation contained in the WHO Guidelines is not authoritative. No one suggested that that was so.
5. I refer again to Dr Stanton’s evidence concerning the amount of sugars contained in a single serve of the Berries Product and the comparison of that amount with the consumption levels recommended in the strong recommendation of the WHO Guidelines. It is not easy to accept that consumption of that amount of sugar in a single snack can be regarded as *beneficial* to the health of 1‑3 year olds. That is especially so given that excess weight and obesity is a significant problem among Australian children, as the statistics indicate and having regard to the role of sugars in the development of dental caries.
6. These matters are not answered by pointing to the prospect that parents can ensure that a child has a balanced diet, can limit the consumption of the Products, and can insist on good oral hygiene practices. That may well be so. The question, however, is whether the positive representation that the Berries Product is beneficial to the health of 1‑3 year olds is false or misleading: not whether the Product will not be detrimental to the health of 1‑3 year olds if consumed as part of a healthy balanced diet accompanied by good oral hygiene practices. If consumption of the Products is not beneficial, then it is immaterial that such detrimental effects as may result may be avoided by parental action.
7. Some witnesses likened the Products to dried fruit, such as sultanas. Heinz itself referred to this in its submissions. The implication was that as dried fruits consumed occasionally are accepted as an appropriate part of a toddlers diet, especially as a snack, so also could the Products.
8. I agree with the ACCC response to these submissions. There are significant differences between the Products and the typical dried fruits, such as sultanas: unlike dried fruits, the Products are a homogenous blend of multiple highly processed ingredients; the Products have significant amounts of free or added sugar (in the form of apple juice concentrate and probably from other ingredients) whereas typical dried fruits have none; and the Products have less moisture than dried fruit (although there was evidence that some dried fruits have higher levels of sugars overall). The sweetness of dried fruits is well known, so much so that the adjective “dried” can be taken to convey implicitly to the ordinary and reasonable consumer that they are a sweet product.
9. Further, and in any event, this case concerns representations made in respect of the Products and not in respect of dried fruits. In my view, it is a distraction to consider whether a like claim made in respect of a different product could have been false or misleading.
10. Mr Shrapnel appeared to recognise the difficulty in saying that the Products were beneficial to the health of children aged 1‑3 years. He said that it was “difficult to provide a yes or no answer” to the question of whether the Products were beneficial in that way. Mr Shrapnel then continued:

Nutritional health depends on the whole diet and, as many foods make contributions, it is difficult to attribute benefit or detriment to individual foods. Children need dietary energy to meet the needs for growth and development, and essential nutrients and dietary fibre to enable their bodies to develop and function normally. Shredz Products provide dietary energy, essential nutrients and dietary fibre and so would contribute the meeting these nutritional needs.

The average energy requirement of boys and girls at the age of two years is 4,300 kJ per day. An 18 g serve of Shredz provides 260 kJ, which equates to 6 percent of daily energy requirements. *No specific benefit* or detriment *to the health of a two year old child would be expected if a 260 kJ serve of a Shredz product was introduced* or removed from a child’s diet. This would be the case with a 260 kJ serve of most foods. The whole diet is the key.

(Emphasis added)

1. In the first paragraph of this passage, Mr Shrapnel notes that the Products contain some nutrients essential for the growth and development of children and so contribute to meeting those nutritional needs. However, as appears to be implicit in the second paragraph, this is beneficial only if those needs of children are not being met from their diet more generally. Regard is to be had to the whole diet and when that is done, it is difficult to state positively (or for that matter negatively) that the Products are beneficial.
2. It is apparent that Mr Shrapnel excluded from consideration in providing his answer considerations of dental health. On that topic, I refer again to Mr Shrapnel’s opinion, quoted earlier in these reasons that he would not expect the Products to provide a dental health benefit. For the reasons already given, the Products may well have a detrimental effect.
3. I conclude that the high levels of sugars in the Berries Product are not beneficial to the health of toddlers, having regard to the general dietary considerations to which I have referred and to their potential to cause dental caries. That conclusion can be reached with greater confidence when it is remembered that it is probable that the diet of toddlers consuming the Products is likely also to include amounts of naturally occurring sugars.
4. In summary, I am satisfied that the ACCC has made good its allegation that the Berries Healthy Food Representation was misleading or deceptive, or was likely to mislead or deceive. It would lead a not insignificant number (at the least) of ordinary reasonable consumers to think that consumption of the Berries Produce would be beneficial to the health of children aged 1‑3 years. I am satisfied therefore that Heinz contravened s 18(1) of the ACL.
5. I will defer consideration of the ACCC allegations concerning the contraventions of ss 29(1)(a), 29(1)(g) and 33 of the ACL to later in these reasons.

## The Shredz Berries Healthy Habits Representation

1. By its third pleaded representation, the ACCC alleged that the packaging of the Berries Product conveyed a representation that it would encourage the development of healthy eating habits for children aged 1‑3 years. It alleged that this representation arose from “the totality” of the packaging and in particular from the statement of the back of the box “… we aim to inspire a love of nutritious food that lasts a life time”.
2. The ACCC alleged that this representation was false or misleading because the Berries Product “discourages” the development of healthy eating habits for children aged 1‑3 years because:

(a) [it is likely to] inhibit the development of a child’s taste for natural fruit and vegetables, due to [its] much higher sugar content, compared to the natural fruit and vegetables depicted on the packaging; and/or

(b) [it is likely to] encourage a child to become accustomed to, and develop a preference for, sweet tastes, due to [its] high sugar content compared to the natural fruit and vegetables depicted on the packaging.

1. As is readily apparent, the Berries Product box does not contain any reference to eating habits, let alone an express statement that its consumption would encourage the development of healthy eating habits. The closest suggestion of such a reference is in the words which the ACCC emphasised, namely, “we aim to inspire a love of nutritious food that lasts a lifetime”.
2. In my view, the ordinary reasonable consumer would understand this particular aspect of the box of the Berries Product as being aspirational in kind, conveying in effect an assurance of Heinz’s good intentions in offering the Product and, implicitly, that the Product is nutritious and beneficial for toddlers. The aspirational nature of the claim is evident in the use of the word “aim”. The ordinary reasonable consumer is likely to understand that there is a relationship between a continuing love of nutritious food, on the one hand, and the development of healthy eating habits, on the other. However, such consumers would not, in my opinion, readily think that a representation was being made that consumption of one processed product would encourage the development of healthy eating habits.
3. The ACCC pleading of the Berries Product Healthy Habits Representation seems to be derived from a Heinz document entitled “Heinz Little Kids Promise” issued on 23 November 2013. This document commences with the statement:

The Heinz Little Kids Promise is our commitment to kick start a toddler’s journey of healthy eating for life. We know that healthy food habits, preferences and behaviours established early contribute to lifelong health.

1. Ms Weaver said that the Heinz Little Kids Promise had been developed for potential public use, but was not aware whether it had actually been used in that way. It was not part of the ACCC case that the ordinary reasonable consumer would have understood the packaging in the context of the Heinz Little Kids Promise.
2. Accordingly, even if the Heinz Little Kids Promise be the source from which the Healthy Habits Representation was derived, I am not satisfied that it would have made any difference to the understanding of the ordinary reasonable consumer.
3. I am not satisfied that ordinary reasonable consumers would have understood the Berries Product to be conveying a representation that the Product encourages the development of healthy eating habits for young children. As indicated, they are likely to regard it as a statement of general aspiration.
4. Even if that conclusion be wrong, the ACCC has difficulties in establishing the falsity of the Berries Product Healthy Habits Representation. It is to be noted that its pleading is that the representation was false or misleading because the Product “discourages” the development of healthy eating habits for young children. That is to say, the ACCC case on falsity was that the Berries Product positively discourages the development of healthy eating habits. It was not expressed in negative terms, namely, that the Berries Product does not encourage the development of such habits. I do not accept the ACCC submission that the “discourages” is synonymous with “does not encourage”.
5. The evidence which the ACCC adduced to support that positive averment was slight. While Dr Stanton expressed the “strong opinion” that the Products will not encourage the development of healthy eating habits for children, she said only that they *may* have the opposite effect. Elsewhere, she said that they were a “possible hindrance” to toddlers developing healthy eating habits. Dr Stanton elaborated this by referring to the prospect of discretionary foods being substituted for fresh fruit and vegetables and therefore to children having an inadequate diet.
6. Dr Barclay thought it unlikely that the Products would inhibit the development of child’s taste for natural fruit and vegetables given that they primarily made from fruit and vegetables. He also thought it unlikely that they would encourage a child to become accustomed to, and develop a preference for, sweet taste due to their sugar content. He said that he was not aware of any evidence that consumption of dried fruits or vegetables (which he likened to the Products) inhibited the development of a child’s taste for their fresh counterparts. He also noted that other products recommended for toddlers are often sweet without it being suggested that this accustoms them to develop a preference for sweet tastes.
7. Mr Shrapnel regarded as “purely speculative” the suggestion that the Products were likely to inhibit the development of healthy eating habits or encourage a child to become accustomed to, and develop a preference for, sweet tastes.
8. Given this evidence, I would not be satisfied that, even if the Berries Product Healthy Habits Representation was conveyed, the ACCC has established that it was false or misleading. Accordingly, this aspect of the ACCC case in respect of the Berries Product fails.

## The Peach Product

1. Earlier in these reasons, I set out tables containing the ingredients of each Product and the nutrition information for each Product. The differences between the Berries Product and the Peach Product are minor, with the latter comprised of 3% more apple juice concentrate, no berry purees and 9% of peach paste. The nutrient information for each was also very similar, although the average quantity of sugars in the Peach Product was 0.4 g more than that in the Berries Product. Apart from these differences and some differences in the colouring, the packaging for the two Products was, for material purposes, the same.
2. The evidence and submissions bearing upon the representations alleged by the ACCC with respect to the Peach Product did not differ in any material respects from those concerning the Berries Product.
3. In these circumstances, the reasoning and conclusions set out earlier with respect to the Berries Product apply with equal force in relation to the Peach Product. This means that the ACCC case with respect to the Peach Product Nutritional Value Representation and the Peach Product Healthy Habits Representation fails, but it succeeds with respect to the second limb of the Peach Product Healthy Food Representation. That representation was misleading or deceptive and contravened s 18(1) of the ACL.

## The Fruit and Chia Product

1. Again, the differences in the composition of the Fruit and Chia Product and the differences in its packaging have been set out earlier in these reasons.
2. The nutrition information on the Fruit and Chia box indicated that on average, each 100 g of the Product contained 67.6 g. The ingredients of the Fruit and Chia Product also differed from the Berries Product in a much more significant way than did the Peach Product.
3. I have already found that the packaging of the Fruit and Chia Product did not convey the Nutritional Value Representation alleged by the ACCC.
4. The Healthy Foods Representation requires separate consideration. Unlike the packaging for the Berries and Peach Products, the Fruit and Chia box does not contain multiple uses of the word nutrition or its cognates. In fact, the word nutrition or a cognate appears only twice. The first is in the heading “Nutrition Information” to the panel on the reserve side of the box. For the reasons already given, I consider that the eye of the ordinary and reasonable consumer may easily pass over that usage. The second is on the side of the box containing the same claim with respect to the Heinz Little Kids range as was made on the boxes for the Berries and Peach Products, namely:

Our wide range of snacks and meals is packed with the tasty goodness of vegetables, fruits, grains, meat and pasta to provide **nutritious** options for your toddler.

(Emphasis added)

This usage is not prominent.

1. However, in my view, the two entries “Just The Good Stuff” do convey a representation that the Product is nutritious. This is confirmed by the words “No Nasties” and the emphasis given to the fruit ingredients of the Product. The ordinary reasonable consumer would, in my view, understand those references as making a claim that the Product is nutritious.
2. I also consider that the ordinary reasonable consumer would have understood the packaging as conveying a representation that the Product is beneficial to the health of children aged 1‑3 years. The images on the Product are relevantly the same as those on the Berries and Peach Products and my reasoning with respect to those Products applies with equal force in the present instance. In addition, the twice repeated entry “Just the Good Stuff” conveys that the Product is good for little children. That impression is reinforced by statements indicating that the Product has not been adulterated with artificial colours, flavours or preservatives, that 99% of it is derived from fruit ingredients and chia seeds, and that such sweeting as it has is natural, being derived from the fruit ingredients.
3. However, I am not satisfied, for the same reasons as given with respect to the Berries Product that the Fruit and Chia Product conveys the Healthy Habits Representation. Accordingly, the ACCC case with respect to the Fruit and Chia Healthy Habits Representation fails.
4. The matters upon which the ACCC relies for the falsity of the Fruit and Chia Healthy Food Representation are the same as those on which it relies for the falsity of the Berries Product Representation. The considerations addressed with respect to the Berries Product Healthy Food Representation apply with equal force in the case of the Fruit and Chia Product. For those reasons, I consider that the ACCC has not established that the representation that the Fruit and Chia Product is a nutritious food is misleading or deceptive. However, it has established that the claim that it is beneficial to the health of children aged 1‑3 years is misleading or deceptive in contravention of s 18(1) of the ACL.

## Sections 29(1)(a), 29(1)(g) and 33 of the ACL

1. Although both the ACCC’s opening and closing submissions indicated that it pursued its allegations of contraventions of ss 29(1)(a), 29(1)(g) and 33 and its closing submissions identified in an distinct way the elements of contraventions of those provisions, it did not address any submissions relating the evidence in this case to those elements or seek to show how those contraventions were established. Its position seemed to be that the contraventions would be established by the same matters indicating that Heinz’s conduct was misleading or deceptive.
2. In her final submissions, senior counsel for Heinz drew attention to the absence of particulars and to the absence of submissions by the ACCC as to these contraventions and submitted that Heinz had some difficulty in responding to the allegations in that circumstance.
3. In these circumstances, I consider that it is appropriate to be especially circumspect in relation to these aspects of the ACCC case. That is particularly so given that penalties may be imposed for contravention of these provisions.
4. The allegations concerning s 29(1)(a) can be disposed of shortly. Consideration of the alleged contraventions of that provision would require assessment of the “particular” quality, value or composition said to have been represented taking into account judicial elaborations of that term, including *Gardam v George Wills & Co Ltd (No 1)* (1988) 82 ALR 415 at 422‑3. Further, it is not clear how the terms “quality, value or composition” are to be related to the circumstances of this case. The Court should not have to speculate about the ACCC case in these respects, and there would be some unfairness to Heinz in doing so. That being so, I am not satisfied that contraventions of s 29(1)(a) have been established.
5. The allegations concerning s 29(1)(g) are that the Healthy Food Representations were false or misleading representations that the Products had “uses or benefits”. Given that the ACCC has not particularised the term “uses”, I am not willing to find those allegations established. However, my finding that the representations in the Healthy Food Representations that the Products were beneficial to the health of 1‑3 year old children were misleading or deceptive is sufficient to establish the second limb of this allegation in relation to each Product.
6. The alleged contraventions of s 33 are that the Healthy Food Representations were “liable to mislead” the public as to the “nature” and/or “characteristics” of the Products, or as to their “suitability” for their purpose. In the absence of submissions, I am not prepared to find these allegations established, as there is some uncertainty about the application of these concepts in the present context.
7. As noted earlier, the term “liable to mislead” in s 33 requires an actual probability that the public would be misled: *ACCC v Coles Supermarkets* at [44]. It is not sufficient that the Healthy Food Representations be “likely to mislead or deceive”. However, on my findings, it is probable that the public would be misled. Had I been satisfied that the other elements of s 33 contraventions were present, I would have found these contraventions to be established.
8. In summary, in the absence of submissions from the ACCC, I find that it has established only contraventions of s 29(1)(g) of the ACL. I do not think that conclusion involves unfairness to Heinz as the elements of the contraventions are the same as those it knew it had to confront in relation to s 18.

## Heinz’s knowledge

1. As noted at the commencement of these reasons, the ACCC sought findings that Heinz knew, or ought to have known, that it had made each of the pleaded representations and that each of those representations was false or misleading. Having regard to my findings, this claim need be considered only in relation to the three Healthy Food Representations.
2. The ACCC’s Amended Statement of Claim does not include any plea that Heinz knew, or ought to have known, that it had made the pleaded representations concerning the Berries Products. However, no point was taken about this at the trial and it was conducted on the basis that the ACCC allegations related to the pleaded representations with respect to all three Products. Heinz adduced evidence and made submissions on the basis that the ACCC allegations are that it knew, or ought to have known, that the packaging of each of the Products made each of the pleaded representations and that each was false or misleading.
3. There is another awkwardness in the ACCC’s pleading because, while it pleads that Heinz knew or ought to have known that each Product was not a nutritious food, not equivalent to the nutritional value of the depicted fruit and vegetables and that it discouraged the development of healthy eating habits for children aged 1‑3 years, it does not plead positively that Heinz ought to have known that the Products were not beneficial to the health of children. Its only plea, so far as it concerned this particular representation, was the broader plea that Heinz knew or ought to have known that the representation was false or misleading. Again, Heinz did not take any point about this feature in the pleading.
4. In its plea of knowledge with respect to the Berries Product and the Peach Product, the ACCC pleaded the knowledge of Heinz’s employed nutritionists and regulatory affairs specialists, the knowledge which Heinz had of the sugar, kilojoule and moisture product of each of the three Products, and two internal documents of Heinz, being the “Heinz Global Toddler Snacking Guidelines” dated May 2011 and the “The New Product Development Guidelines Little Kids (1‑3)” dated October 2008.
5. The plea concerning the knowledge of Heinz with respect to the Fruit and Chia Product was separate from the pleas concerning the Berries Product and the Peach Product. The plea of knowledge with respect to the Fruit and Chia Product raised the same three matters relied on in relation to the Berries Product and the Peach Product and then three further matters. The first two additional matters were “Heinz Wattie’s Infant and Toddler Nutrition Guidelines” dated November 2014 and the “Heinz Wattie’s Infant and Toddler Nutrition Guidelines” dated May 2015. These two documents were adduced into evidence but the ACCC did not refer to them in relation to the issue of Heinz knowledge in either its opening or closing submissions. The third additional matter was said to be correspondence which Heinz had received from the ACCC outlining its concerns in relation to the Berries Product and the Peach Product. However, the ACCC did not identify the correspondence on which it relied in this respect and it is not clear that it was even in evidence. Accordingly this part of its case can be ignored.
6. As already seen, the WHO Guidelines were at the heart of the ACCC case on the falsity of the Healthy Food Representations which I have found established. Those Guidelines were issued in March 2015, well after August 2013 when Heinz had commenced selling the Berries Product and the Peach Product using the packaging which is the subject of this litigation. Perhaps because of this, the ACCC did not rely on knowledge of the WHO Guidelines for any part of its claim concerning the actual or constructive knowledge of Heinz. Although Heinz did not commence selling the Fruit and Chia Product until January 2016, the ACCC did not rely on knowledge derived from the WHO Guidelines for the knowledge of Heinz it alleged in relation to that Product.
7. The submissions on both sides concerning Heinz’s actual or constructive knowledge were relatively brief.
8. The ACCC claim that Heinz had actual knowledge that it had made the Healthy Food Representations in relation to each of the three Products can be disposed of quite shortly. The Healthy Food Representation is not alleged to have been express but instead to have been conveyed to the ordinary reasonable consumer by a combination of the words and imagery used on the packaging. The ACCC allegation therefore is that Heinz had actual knowledge that the Healthy Food Representation was conveyed in this way by the packaging.
9. Subject to one qualification, the evidence does not establish that foundational proposition. First, there is nothing in Heinz’s own internal documentation which indicates an awareness on the part of any of its employees that a representation in terms of the Healthy Food Representation was being made. Secondly, none of the five Heinz employees who were witnesses in the trial said in her evidence in chief (contained in affidavit form) that she had been aware that a representation in terms of the Healthy Food Representation was being made. Thirdly, with one exception, none of the five Heinz employee witnesses was cross‑examined on this topic.
10. The exception is Ms Weaver to whom I referred earlier. The effect of her cross‑examination was that she had not considered that a representation that the Products were “specifically beneficial to health” was being made. She had thought only that a representation that the Products were a nutritious food and part of a healthy diet was being made.
11. I also observe that Ms Weaver had not been involved in the development of the Fruit and Chia Product or of its packaging.
12. The only documents to which the ACCC referred in its closing submissions in seeking the finding that Heinz knew that the Healthy Food Representations were being made were the same three documents to which I referred when addressing the question of whether the Healthy Food Representation had been conveyed, namely, the Nielsen Presentation dated 15 June 2012, the Project Totes Update and the presentation entitled “Heinz Infant FY 14 comms Briefing”. I indicated earlier my satisfaction that the latter two documents did support an inference that the general intention of Heinz with respect to the packaging of the Little Kids Products had been to promote them as nutritious and healthy. If there had been other evidence supporting a conclusion that Heinz’s employees were aware that the packaging conveyed a representation in terms of the pleaded Healthy Food Representation, that general intention of Heinz may have enabled that conclusion to be drawn more readily. However, evidence of that kind is lacking.
13. In these circumstances, I am not satisfied that the ACCC has established the premise for its case of actual knowledge, because it has not established that any Heinz employee had been aware that a representation in terms of the Healthy Food Representation was being made. That conclusion makes it unnecessary to address the significance of the circumstance that, in its closing submission on the topic of actual knowledge, the ACCC did not refer to any of the Heinz internal documents it had pleaded.
14. I turn then to the claim of constructive knowledge. Given my finding that ordinary reasonable consumers would have understood the Healthy Food Representation to be made, there is no difficulty in concluding that Heinz ought to have been aware that it was making such a representation.
15. The critical question therefore is whether Heinz should have known that the second limb of the Healthy Food Representation was false.
16. The ACCC’s submissions as to the basis upon which the Court should find constructive knowledge by Heinz were brief. Its closing submissions said only:

Heinz knew or ought to have known that the products were not nutritious, of equivalent nutritional value to fresh fruit and vegetables, nor a product that would encourage healthy eating habits. It also knew or ought to have known that this was not the case.

1. The ACCC’s opening submissions indicated that it relied on the “Heinz Global Toddler Snacking Guidelines” (the Toddler Snacking Guidelines) and the “New Product Development Guidelines Little Kids (1‑3)” (the NPD Guidelines).
2. The Toddler Snacking Guidelines were issued by Heinz Global in May 2011. It is apparent that they were of application to Heinz’s worldwide operations and not just to its operations in Australia. The Toddler Snacking Guidelines stated their purpose as follows:

The purpose of [the Guidelines] is to provide our business with best practice guidelines based on nutritional targets to support product development in developing toddler snacks that are nutritionally superior to the competitors. This will enable Heinz to continue the lead in bringing healthy toddler snacks to market that meet the public health recommendations, mums’ desires and are foods that little kids will eat.

The [Toddler Guidelines] are based on 4 principles:

1. consideration was given to the specific nutritional issues that impact toddlers from a public health perspective
2. consideration was given to the concerns of health care professional[s] regarding toddler nutrition
3. consideration was given to parents’ insights, attitudes and desires for toddler snacks
4. consideration was given to recommended servings and relevant reference values specific to toddlers.
5. The Toddler Snacking Guidelines also noted the following:

Toddlers diet [sic] usually consists of several smaller meals throughout the day or the traditional three meals supplemented with *healthy*, fun snack foods. 2‑3 small snacks per day is sufficient for most healthy toddlers. The smaller meals timed with *healthy* snacks set the pattern for a lifetime. Research suggests that early experiences with food can have an influence on the future food habits.

(Emphasis added and citations omitted)

1. The Toddler Snacking Guidelines noted that sodium and sugar are a *public health concern* and said that “their intake is recommended to be limited”. The specific recommendation in the guidelines with respect to sugars are set out earlier in these reasons but for convenience will repeat them:

Sugars are naturally present in foods such as fruit, dried fruit, milk and yoghurt. These foods are healthy foods which we do not want to limit the supply based on sugar content. Our aim is to use the minimum amount of added sugars needed for product acceptability.

Guidance from the Committee on Medical Aspects of Food and Nutrition Policy (COMA) in the UK has suggested that *the contribution from non‑milk extrinsic sugars (similar to added sugars and sugars from fruit purée and juice) should contribute < 10% of energy*.

As a guide we aim for < 5% of added sugars for savoury snacks *and < 30% of total sugars for a sweet snack, this taking into consideration sugars that may come from fruit juice and fruit pastes for the development of fruit based snacks*. The use of a percentage of sugar was selected rather than a percentage of energy to make it easier to calculate as labels often do not distinguish between intrinsic and added sugars.

(Emphasis added and citation omitted)

1. The NPD Guidelines were issued on 16 October 2008. The guidelines commenced with the statement that they had been developed “in consultation with and reviewed by paediatric nutrition professionals”.
2. They noted that dietary guidelines recommend that toddlers “[c]onsume only moderate amounts of sugars and foods containing sugars”.
3. Under the heading “Qualitative Aims”, the NPD Guidelines stated:

The nutritional quality of children’s diet can be improved by increasing content of vegetables, legumes, fruits and wholegrains, as per the dietary guidelines. At the same time, reducing intake of foods high in saturated fat, salt *and sugars*.

(Emphasis added)

1. With respect to the development of sweet snacks, the NPD Guidelines recommended that total sugars should comprise less than 30% of the aggregate nutrients in a product. It was common ground that the Products are within the description of “sweet snacks”.
2. Finally, the NPD Guidelines stated that “[l]imiting added sugar content is aimed at delaying the development of taste preferences for high sugar foods”.
3. Plainly, the sugar level in each of the Products exceeded the level recommended in both the Toddler Snacking Guidelines and in the NPD Guidelines. It is also plain that Heinz nutritionists were aware of the levels of sugar in the Products.
4. Some of the Heinz employees (for example, Ms Hodson and Ms Weaver) gave evidence that the Toddler Snacking Guidelines had not been prepared with foods like the Products in mind and/or that they did not regard them as being relevant to the Products. I had the strong impression that the evidence to this effect was in the nature of retrospective rationalisation given the realisation that the Products well exceeded the recommended maximum of 30% sugar. Their evidence indicates, however, that they were aware at relevant times of the recommendations in the Toddler Snacking Guidelines.
5. Each of the Heinz employee witnesses, with the exception of Ms Rigas, also said that she was aware of the document bearing the title “Heinz Little Kids Promise – Technical Criteria” issued on 14 December 2012. I accept that Ms Russell’s knowledge of the document was limited. Ms Weaver was in fact the author of the Technical Criteria document. In preparing the document, she had had regard to the draft Australian Dietary Guidelines incorporating the Australian Guide to Healthy Eating issued by the NHMRC in December 2011. The latter document included the following statement:

Fruit should mostly be eaten fresh and raw because of the low fibre content of fruit juice and the high energy density and “stickiness” (which may have implications for dental caries) of dried fruit … Some processed fruits and vegetables are nutritious alternatives as long as they are produced without *added* salt, *sugar (including concentrated fruit juice)* or fat.

(Citation omitted and emphasis added)

1. In the Technical Criteria document, Ms Weaver described the document as being Heinz’s:

Internal supporting document outlining the background technical criteria to the Little Kids Promise … which will be used in external communications. The Criteria and Promise applies to Heinz Australia and New Zealand Little Kids Products for 1‑3 years including snacks, meals and beverages.

1. I set out earlier in these reasons, the Heinz Little Kids Promise to which reference was made in this passage.
2. With respect to fruit and vegetable products, the Technical Criteria stated:

Aim to use fresh, frozen, single strength purees and juices

*Aim to limit and avoid use of concentrated fruit juices and pastes*

(Emphasis added)

1. The Technical Criteria also required “restricted use of refined sugar” and defined “added sugar” to include “concentrated fruit juice, deionised fruit juice”.
2. Each of the Products involved a departure from that part of the Technical Criteria if only because apple juice concentrate comprised approximately one‑third of each Product and therefore involved the inclusion of a form of added sugar. Further, as Ms Weaver accepted, the effect of added sugar and of sugar naturally occurring “in terms of the actual sugar structure and the energy content per gram” is the same.
3. I am satisfied that each of the Heinz nutritionists ought to have known that a representation that a product containing approximately two‑thirds sugar was beneficial to the health of children aged 1‑3 years was misleading. Each ought to have known that consumption of a product with that level of sugar may have the effects which underpin the WHO Guidelines. This is a natural inference arising from their training and experience as nutritionists. Accordingly, I am satisfied that this aspect of the ACCC case is established, namely, that Heinz ought to have known that the representation that the Products were beneficial to the health of children aged 1‑3 years was false or misleading.
4. I indicate, however, my satisfaction that each of the Heinz witnesses had endeavoured to carry out their roles in the development of the Products and of their packaging in a conscientious and diligent way. In particular, those responsible for the development of the packaging had endeavoured to avoid the making of any statements, express or implied, which may be misleading or deceptive and, for that purpose, had adopted a generally conservative approach to the claims which should be made.

## Summary

1. For the reasons given above, I reject the ACCC claims with respect to the Nutritional Value and Healthy Habits Representations. I uphold the ACCC claim with respect to the second limb of the Healthy Foods Representations and find that the ACCC has established that Heinz ought to have known that it was making the Healthy Food Representation in relation to each Product and that that representation was false or misleading.
2. I will in due course make declarations of the following kinds:

(a) Heinz, in trade or commerce, in connection with the manufacture and supply of the Products, represented that each of the Berries Product, the Peach Product and the Fruit and Chia Product was beneficial to the health of children aged 1‑3 years when by reason of their high sugar content and sticky texture, the Products were not beneficial to the health of children aged 1‑3 years and Heinz thereby:

* 1. engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the ACL; and
	2. made a false or misleading representation to consumers in contravention of s 29(1)(g) of the ACL.

(b) Heinz ought to have known that the representations referred to in the first declaration had been made and ought to have known that representations to that effect were false.

1. However, before making the formal declarations, I will give the parties the opportunity to be heard concerning them.
2. The remaining claims of the ACCC are dismissed.
3. I will also hear from the parties as to the orders which are appropriate to give effect to these conclusions and as to the conduct of the remaining parts of the trial.

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| I certify that the preceding three hundred and eighteen (318) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice White. |

Associate:

Dated: 19 March 2018

**APPENDIX A**

**An unfolded copy of the packaging for the Berries Product**

