

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID180/2018
File Title: DAVARIA PTY LIMITED & ANOR v 7-ELEVEN STORES PTY LTD & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 17
Rule 8.05(1)(a)

No: VID180/2018

Federal Court of Australia
District Registry: Victoria
Division: General

Davaria Pty Limited (ACN 165 206 404) and another named in the Schedule
Applicants

7-Eleven Stores Pty Ltd (ACN 005 299 427) and another named in the Schedule
Respondents

SecondThird Further Amended Statement of Claim

(filed pursuant to leave granted by Middleton J on 22 February 2021)

(Notes:

1. *Terms defined in the standard form Franchise Agreements referred to in this Second Further Amended Statement of Claim (**SOC**) appear in capitals and italics in the pleading, and in plain type and capitals in the particulars. Terms defined in this pleading are capitalised and appear in bold at the place of definition.*
2. *In this SOC, references to “Articles” and “Exhibits” are to Articles and Exhibits (respectively) in Franchise Agreements as numbered in the 2009 version of the Franchise Agreement identified as SA/04/09. Unless otherwise indicated, the material express terms of the Franchise Agreements referred to in this SOC appear in each version of the standard form Franchise Agreement in force during the Relevant Period, although the numbering of the Articles containing those terms may not correspond with the numbering used in SA/04/09).*

Filed on behalf of:	Applicants
Prepared by:	Levitt Robinson and counsel
Tel	02 9286 3133
Email	711@levittrobinson.com
Address for service	PO Box 850, Darlinghurst NSW 1300

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A. INTRODUCTION

1. The First Applicant commences this proceeding as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) on its own behalf and on behalf of all persons who:

(a) at any time between 20 February 2012 and 19 February 2018, (the Relevant Period) were or commenced to be franchisee parties (**Franchisees**) to a standard-form franchise agreement (**Franchise Agreement**) with the first respondent, 7-Eleven Stores Pty Ltd (**7-Eleven**);
and

~~(b) have not entered into a release of all of their claims against both 7-Eleven and the ANZ Banking Group Limited (**Bank**) arising out of the conduct of 7-Eleven and the Bank described in this statement of claim~~

but does not make any representative claim in respect of the Goodwill Value Representation.

1AA. The Second Applicant:

(a) is a further representative party pursuant to Part IVA of the FCAA on its own behalf and on behalf of all persons who at any time during the Relevant Period~~between 20 February 2012 and 19 February 2018~~, were or commenced to be Franchisees under any Franchise Agreement ~~and have not entered into a release of all of their claims against both 7-Eleven and the Bank arising out of the conduct of 7-Eleven and the Bank described in this statement of claim;~~
but

(b) does not make any claim in respect of the Average Store Financials Representation or the Future Average Payroll Cost Representation, ~~or the matters alleged in Part F below.~~

1A. As at the date of commencement of this proceeding there are, as against each of the respondents against whom this proceeding is pursued, seven or more Franchisees who have claims against that respondent.

Particulars

Levitt Robinson acts for more than 7 clients in connection with this proceeding who have claims against each respondent against whom this proceeding is pursued.

2. The First Applicant:

- (a) is, and was at all material times, a duly incorporated company and entitled to sue in its own name;
- (b) entered into a Franchise Agreement with 7-Eleven on 19 September 2013, (**Campbelltown Store Franchise Agreement**) in relation to the 7-Eleven store identified in 7-Eleven's records as "Store 2073E" at 229 Queen Street Campbelltown (**Campbelltown Store**);
- (c) is and at all times since about 13 September 2013 has been the operator of the Campbelltown Store;
- (d) entered into a Franchise Agreement with 7-Eleven on 27 May 2015 (**Northmead Store Franchise Agreement**) in relation to the store identified in 7-Eleven's records as "Store 2319B" at 137 Windsor Road, Northmead (**Northmead Store**);
- (e) is and at all times since about 27 May 2015 has been the operator of the Northmead Store;
- (f) entered into:
 - (i) a loan agreement with the Bank on or about 22 August 2013 (**Campbelltown Loan**); and
 - (ii) a further loan agreement with the Bank on or about 12 June 2015 (**Northmead Loan**); and
- (g) has, since about 22 August 2013, been a customer of the [ANZ Banking Group Limited \(Bank\)](#).

2A. The Second Applicant:

- (a) is, and was at all material times, a duly incorporated company and entitled to sue in its own name;
- (b) entered into a Franchise Agreement with 7-Eleven on 2 October 2013, (**South Melbourne Store Franchise Agreement**) in relation to the 7-

Eleven store identified in 7-Eleven's records as "Store 1191C" at 322 – 326 Clarendon Street, South Melbourne (**South Melbourne Store**);

- (c) is and at all times since about 29 October 2013 has been the operator of the South Melbourne Store;
- (d) entered into a loan agreement with the Bank on or about 24 September 2013 (**South Melbourne Loan**);
- (e) has, since about 24 September 2013, been a customer of the Bank.

3. 7-Eleven:

- (a) is, and was at all material times:
 - (i) a duly incorporated company pursuant to law and capable of being sued in its own name;
 - (ii) the franchisor in Australia of a system for the identification, fixturation, layout, merchandising and operation of extended-hour retail stores, identified principally by the trade name and service mark "7-ELEVEN" (*7-Eleven System*) under licence from the Second Respondent (**Master Franchisor**);

Particulars

- (1) *The 7-Eleven System is described and defined in Recital A of the Franchise Agreement.*
- (2) *The agreements between 7-Eleven and the Master Franchisor are referred to in Recital D of the Franchise Agreement.*
- (iii) a trading or financial corporation for the purposes of section 4 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (which definition unless otherwise indicated includes the cognate provision in the *Trade Practices Act 1974* (**TPA**)) and, or alternatively, a trading corporation for the purposes of section 12BA of the *Australia Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**);
- (iv) a "person" within the meaning of: section 18 of the *Australian Consumer Law* (Cth) set out in Schedule 2 of the CCA as applicable pursuant to section 131 of the CCA, and/or its cognates as applicable pursuant to legislation in the States and Territories of

Australia (collectively, **ACL**) and, or alternatively, section 12DA of the ASIC Act.

- (b) at all material times, supplied services or was engaged in or with the possible supply of services, to each of the Applicants, and to each of the Franchisees in trade or commerce within the meaning of sections 2 and 21 of the ACL, [and/or section 4 of the TPA](#) and, or alternatively, financial services, to each of the Applicants, and to each of the Franchisees, in trade or commerce within the meaning of sections 12BA and 12CB of the ASIC Act, in respect of the *Open Account*;
- (c) at all material times, published and controlled a website located at <https://www.7eleven.com.au> (the **Website**).

4. The Master Franchisor:

- (a) is a duly incorporated company pursuant to law, incorporated in Texas in the United States of America, and capable of being sued in its own name;
- (b) is a foreign corporation, or alternatively a trading or financial corporation, for the purposes of, and within the meaning of those words as found in, section 4 of the CCA, [and/or section 4 of the TPA](#);
- (c) ~~is subject to section 23 of the ACL by reason of section 131 of the CCA;[not used]~~
- (d) since at least April 2009 and throughout the remainder of the Relevant Period, has been a third-party beneficiary under the Franchise Agreements with an independent right to exercise each right of 7-Eleven and to enforce each obligation of the Franchisee under the Franchise Agreements.

Particulars

Article 48 of the Franchise Agreement.

5. ~~[Deleted]The Bank is, and was at all material times from 20 February 2012 to 19 February 2018 (Relevant Period):~~

- ~~(a) a company duly incorporated pursuant to law and capable of being sued in its own name; and~~
- ~~(b) a "person" within the meaning of Part 2, Division 2 of the ASIC Act.~~

B. BACKGROUND

B1. The 7-Eleven System

6. The *7-Eleven System* has the following features:

- (a) There were, in February 2018, approximately 670, and now more than 700, stores operating pursuant to the *7-Eleven System* in Victoria, New South Wales, Queensland and Western Australia;
- (b) there are two formats for the stores operating within the *7-Eleven System*:
 - (i) a convenience store format (**Convenience Stores**); and
 - (ii) a combined motor vehicle fuel station and convenience store (**Fuel Stores**),

(together, **Stores**);

- (c) the majority of the Stores are individually franchised, with the remaining Stores being operated by 7-Eleven or a related entity of 7-Eleven (**Franchisor Stores**);
- (d) over 90% of the Stores operate 24 hours a day, seven days a week. The remaining Stores operate for extended trading hours;
- (e) in addition to the terms of the Franchise Agreement, the method of operation of each Store is set out [or conveyed](#) in:
 - (i) the 7-Eleven Franchise System Manual, as current from time to time (**Manual**); and
 - (ii) the 7-Eleven Franchisee Training Participant Workbook (**Training Workbook**),

as updated from time to time (together **Franchise Material**), [and in written and oral instructions and directions issued by 7-Eleven staff to Franchisees from time to time](#);

- (f) each Store is operated at a site (**Site**) in respect of which:
 - (i) 7-Eleven is the lessee under a lease for the Site from the owner of the property on which the Store is located or is the owner of the property (*Lease*) [Article 2(e)];

- (ii) where 7-Eleven is the lessee of the Site, the Lease may be for a primary term of less than 10 years plus one or more options to renew the Lease;

Particulars

At the time that the First Applicant entered into the Campbelltown Store Franchise Agreement (on 19 September 2013), 7-Eleven's Lease of the Campbelltown Store Site was for an initial term of 5 years commencing 1 April 2009, with an option to renew for a further 5 years commencing on 1 April 2014, and an option to renew for a further 5 years commencing on 1 April 2019.

At the time that the First Applicant entered into the Northmead Store Franchise Agreement (on 5 June 2015), 7-Eleven's Lease of the Northmead Store Site was for an initial term of 15 years commencing on 2 February 2014, with three further options to renew for 5 years.

At the time that the Second Applicant entered into the South Melbourne Store Franchise Agreement (on 2 October 2013), 7-Eleven's lease of the South Melbourne Store Site was for an initial term of 5 years commencing on 5 January 2004, with three further options to renew, each for 5 years.

- (iii) *7-Eleven owns the chattels and equipment installed at the Site, referred to as the Licensed Equipment in Recital E of the Franchise Agreement;*
- (iv) *the Franchisee is granted a contractual licence to occupy the Site, and use the Licensed Equipment, pursuant to Article 2 of the Franchise Agreement.*

B2. Entry into the System

7. In order to become a Franchisee and participate in the 7-Eleven System:
- (a) a prospective Franchisee is required to apply to 7-Eleven for approval, and may be approved if 7-Eleven considers the Franchisee suitable, according to its franchise qualification requirements;
- (b) the Franchisee is required to execute an indenture in the form of Exhibit G of the Franchise Agreement charging all of its assets to 7-Eleven;

- (c) each of the directors of a prospective Franchisee is required to execute a personal guarantee of the Franchisee's debts to 7-Eleven in the form of Exhibit H of the Franchise Agreement;
- (d) the prospective Franchisee is required to pay an amount for the "goodwill" associated with the Store (**Goodwill Payment**), in an amount to be determined by negotiation with the outgoing Franchisee or (in the case of Franchisees who purchased a new store from 7-Eleven), determined by 7-Eleven;

Particulars

- (e) *A Franchisee who purchased a new Store or a Franchisor Store from 7-Eleven has been charged a higher Franchise Fee than for a Store purchased from an existing Franchisee. It may be inferred from this, [and \(inter alia\) from 7-Eleven's New Store \(Calculator\) Goodwill and Franchisee Fee Calculator \(SEV.0042.0001.0041\)](#) and from the [content of the 7-Eleven Stores Pty Ltd Submission to the Board of Directors \(Meeting 366\) \(SEV.0031.0001.0055 - 0101\)](#), that the higher Franchise Fee for a new Store incorporates an amount for goodwill payable to 7-Eleven.*
- (f) the prospective Franchisee is required to pay to 7-Eleven an *Application/Training Fee*, a *Franchise Fee* and a cash *Investment* [Exhibit E], on entering into the Franchise Agreement (**Franchisee Payments**);

Particulars

- (i) *Under Article 6(c) of the Franchise Agreement the Application/Training Fee is currently \$5,500 (including GST).*
- (ii) *The Franchise Fee is specified in each case in Article 6(a) and paragraph (l) of Exhibit D of the Franchise Agreement and is usually calculated as a percentage of gross sales revenue in the previous year.*
- (iii) *The First Applicant's Franchise Fee for the Campbelltown Store was \$98,670 (including GST).*
- (iv) *The First Applicant's Franchise Fee for the Northmead Store was \$105,842 (including GST).*

- (iva) *The Second Applicant's Franchise Fee for the South Melbourne Store was \$100,400 (including GST).*
- (v) *Under Article 7 and paragraph (c) of Exhibit D of the Franchise Agreement, the Franchisee is required to make an Investment of \$45,000 consisting of \$43,800 contribution to Inventory [Exhibit E], \$1,000 in the Cash Register Fund [Exhibit E] and \$200 for payment of licences, permits and bonds.*
- (vi) *The First Applicant made a Goodwill Payment*
 - (1) *of \$390,000 for the Campbelltown Store, and*
 - (2) *of \$880,000, for the Northmead Store.*
- (vii) *The Second Applicant made a Goodwill Payment of \$550,000 for the South Melbourne Store.*

B3. The Franchise Agreements

- 8. The material terms of the Franchise Agreements between 7-Eleven (on the one hand) and each of the Applicants and each of the Franchisees (on the other), insofar as they were express terms, were in writing and contained in the following documents:
 - (a) the Franchise Agreements, which were in materially the same terms for each of the Applicants and all of the Franchisees:

Particulars

- (i) *In the period from February 2001 to January 2004, 7-Eleven's standard form of agreement was that identified internally as 02/2001 (2001 Version).*
- (ii) *In the period from January 2004 to April 2009, 7-Eleven's standard form of agreement was that identified internally as SA/01/04 (2004 Version).*
- (iii) *In the period from April 2009 to at least 27 May 2015, 7-Eleven's standard form of agreement was that identified internally as SA/04/09 (2009 Version).*
- (iv) *The material terms of the Franchise Agreements of all Franchisees, as set out in Part B4 of this SOC, and the defined terms used in the*

Franchise Agreements set out in the Schedule, are materially the same.

- (b) on and from in or about December 2015, in the case of each of the Applicants and some or all of the other Franchisees, a variation agreement in materially the same terms (**Variation Agreement**),

[Note: where applicable, a reference in this SOC to a Franchise Agreement includes, after December 2015, a reference to that agreement as varied by the Variation Agreement].

Particulars

The Variation Agreements of the First Applicant were signed in or about December 2015, in respect of the Campbelltown Store and the Northmead Store.

The Variation Agreement of the Second Applicant was signed on or about 7 December 2015, in respect to the South Melbourne Store.

B4. Material express terms of the Franchise Agreements

Term

9. The term of each Franchise Agreement commenced on the *Effective Date* [Exhibit E] and continues (or continued, in respect of those Franchise Agreements that have been terminated or which have expired by effluxion of time) until termination or until expiration of the Franchise Agreement on the earlier of:
- (a) the expiry of the primary term or extended term of the *Lease*; or
 - (b) 10 years from the *Effective Date*; or
 - (c) the exercise by 7-Eleven of its *Option to Purchase* under Article 27(d) of the Franchise Agreement [Article 24].
10. The Franchisee acknowledges that 7-Eleven has no obligation to renew or exercise any option to renew the *Lease* [Article 2(f)].

Primary obligations

11. The material express terms of the Franchise Agreements include (or included, in respect of those Franchise Agreements that have been terminated or which have expired by effluxion of time):

- (a) The Franchisee agrees to diligently promote the business of the Store and to cause the Store to be:
- (i) operated continuously throughout the term;
 - (ii) open for business for the hours specified in the Franchise Agreement (which in over 90% of cases, is 24 hours per day, 7 days per week, and in all other cases, for extended opening hours), unless otherwise consented to in writing by 7-Eleven (**Continuous Opening Term**);
 - (iii) operated in accordance with the *7-Eleven System* and the Manual in a manner that enhances the *7-Eleven Image* [Article 1(k)].
- (b) 7-Eleven agrees to use its best endeavours to carry on and conduct its business in a proper and efficient manner and to ensure that any undertaking, scheme or enterprise to which the Franchise Agreement relates is carried on in a proper and efficient manner (**7-Eleven's Proper and Efficient Obligation Term**) [Article 1(o)].
- (c) Provided the Franchisee maintains a *Net Worth* (defined in Exhibit E of the Franchise Agreement) greater than the minimum *Net Worth* specified in paragraph (g) of Exhibit D of the Franchise Agreement (**Minimum Net Worth**) and is not in breach of its bookkeeping obligations under the Franchise Agreement, 7-Eleven agrees to remit to the Franchisee from the *Open Account* [Article 22]:
- (i) a weekly draw on anticipated profits of an amount nominated in the Franchise Agreement (**Weekly Draw**);

Particulars

- (1) *The First Applicant's Weekly Draw in relation to the Campbelltown Store is \$1500.00.*
 - (2) *The First Applicant's Weekly Draw in relation to the Northmead Store is \$1500.00,*
 - (3) *The Second Applicant's Weekly Draw in relation to the South Melbourne Store is \$700.00.*
- (ii) and

- (iii) the amount by which the *Net Worth* exceeds total assets as reflected on the balance sheet provided by 7-Eleven in each monthly *Accounting Period* [Exhibit E] (**Profit Draw**).

Particulars

- (1) *Net Worth is defined in Exhibit E of the Franchise Agreement to mean the value of the Franchisee's assets employed in the Franchisee's Operation (meaning the Franchisee's operation of the Store under Article 1(a) of the Franchise Agreement) less the Franchisee's liabilities from the Franchisee's Operation. In effect, this means that a Franchisee may draw as profit from any positive balance in its Open Account with 7-Eleven.*
- (2) *The Minimum Net Worth in paragraph (g) of Exhibit D of the Franchise Agreement is \$35,000.*
- (d) The Franchisee's Weekly Draw during an *Accounting Period* shall be reduced by an amount equal to the amount by which the Franchisee's draw plus the amount of the Franchisee's payroll for the Store for the previous draw period exceeds the greater of:
- (i) 11% of the *Net Sales* (as defined in Exhibit E and excluding any gasoline sales, if any) for the previous draw period; or
- (ii) \$750 [Article 22, Exhibit D, paragraph (h)] (**Reduced Draw Term**).

Particulars

*The formula to calculate the amount paid to the Franchisee is:
Weekly Draw – [(Weekly Draw + payroll from previous draw period)
– (11% of Net Sales from previous period or \$750, whichever is
greater)]*

However, if the amount is less than zero (ie negative), then no amount is paid.

- (e) In consideration of the Franchise Agreement, the Franchisee agrees to pay to 7-Eleven a percentage of the Franchisee's *Gross Profit* as stipulated in the Franchise Agreement (*7-Eleven Charge*) [Article 23(a)] as modified (in relation to each of the Applicants and each other Franchisee) by the Variation Agreement.

Particulars

- (i) *Article 23 of the Franchise Agreement stipulated a 7-Eleven Charge of 57% of Gross Profit, or such lesser amount as is necessary to enable the Franchisee to earn a minimum Gross Income of \$120,000 p.a. prior to 30 June 2015 and thereafter, \$310,000 p.a. for Fuel Stores and \$340,000 p.a. for Convenience Stores (referred to as Minimum Gross Income (Merchandise) in clause 26 the Variation Agreement). 7-Eleven notified Franchisees of increases to the Minimum Gross Income (Merchandise) from time to time after December 2015.*
- (ii) *Gross Profit [Exhibit E] is the amount of Net Sales less the Cost of Goods Sold [Exhibit E]. Net Sales means the total amount reflected on the applicable point of sale register electronic journals for the Franchisee's sales, rentals, royalties, fees and commissions relating to the Franchisee's Operation, less overrings, refunds to customers, taxes collected incidental to sales and GST liabilities in respect of taxable supplies made in the course of the Franchisee's Operation.*
- (iii) *Gross Income [Exhibit E] and Gross Income (Merchandise) [Article 23(b), as varied by the Variation Agreement] means Gross Profit less the 7-Eleven Charge. Under the Variation Agreement, clause 28(e) stipulated a sliding scale for the 7-Eleven Charge of between 50-57% depending on the level of Gross Profit. The Variation Agreement provides for an adjustment under clause 28(e) if the Franchisee's Gross Income (Merchandise) was less than either \$310,000 p.a. for Fuel Stores or \$340,000 p.a. for Convenience Stores. 7-Eleven notified Franchisees of increases to the Minimum Gross Income (Merchandise) from time to time after December 2015.*
- (f) *On or after calculating the 7-Eleven Charge, 7-Eleven will credit to the Open Account the remaining portion of Gross Profit including the applicable portion of any royalties, fees or commissions less the Cost of Goods Sold and other allowable deductions (**Franchisee Commission Profit Term**).*

Particulars

- (i) *The Applicants repeat the particulars to subparagraph 11(e) above.*
- (ii) *See also (after in or about December 2015), Variation Agreement, Article 22B.*

Open Account and Financial Accounting

12. In relation to the provision of working capital to finance the on-going operations at each Store, the material express terms of the Franchise Agreements are (or were, in respect of those Franchise Agreements which have been terminated, or which have expired by effluxion of time):
- (a) the Franchisee is responsible for the payment (from its share of *Gross Profit*) of all *Operating Expenses* and the purchase of all *Inventory* as defined in Exhibit E of the Franchise Agreement (Articles 4(a), 8(a), 8(c), 12(a), 15(a), 17(a), 20(f), 20(j));

Particulars

Operating Expenses are defined in Exhibit E of the Franchise Agreement to include:

- (i) *payroll;*
- (ii) *payroll tax, employer's indemnity insurance premiums and payroll insurance premiums;*
- (iii) *Inventory Variation (which includes stolen goods and bad merchandise);*
- (iv) *Cash Variation (including stolen cash and fraudulent transactions);*
- (v) *general maintenance and repairs, laundry expense and janitorial services (only as applicable to the Franchisee's obligations);*
- (vi) *telephone;*
- (vii) *Store Supplies;*
- (viii) *licences, permits and bonds;*
- (ix) *interest on the balance of the Open Account;*
- (x) *returned cheques;*
- (xi) *inventory and business taxes;*

- (xii) *special charges noted in paragraph (e) of Exhibit A of the Franchise Agreement;*
 - (xiii) *stamp duties and taxes; and*
 - (xiv) *other miscellaneous expenditure which 7-Eleven, in its sole discretion (regardless of the classification thereof by the Franchisee or for income tax purposes), determines to be Operating Expenses.*
- (b) 7-Eleven agrees to establish an *Open Account* for each Store, and to provide any necessary financing to the Franchisee through the *Open Account* (if necessary) for:
- (i) purchases of merchandise by the Franchisee for sale at the Store;
 - (ii) wages, payroll taxes and employee on-costs;
 - (iii) interest;
 - (iv) general maintenance and repairs, telephone and other *Operating Expenses* as defined in Exhibit E of the Franchise Agreement, including;
 - (1) the unpaid balance of the Franchisee's Investment in the Store (being that part of the initial *Inventory* and the *Cash Register Fund* not paid at the commencement of the Franchise Agreement); and
 - (2) the cost of initial and ongoing business and software licences and permits [Article 8(a)];
- (c) the Franchisee is required to deposit in a bank account designated by 7-Eleven (**Designated Account**), all *Sales Receipts*, discounts, credits and rebates received by the Franchisee, and any miscellaneous income from the *Franchisee's Operation*, except for cash expended by the Franchisee for properly reported and substantiated *Purchases* or *Operating Expenses* [Article 20(j)];
- (d) 7-Eleven agrees to maintain on the Franchisee's behalf the *Open Account* and to enter all credits and debits from the *Open Account* [Article 8(a), 20(d)];
- (e) at the time of executing the Franchise Agreement, the Franchisee agrees to grant a first ranking security interest to 7-Eleven over the *Opening*

Inventory [Article 14(a)], the *Inventory* held by the Franchisee at the Store from time to time and the *Sales Receipts* at the Store (**Current Assets**), irrespective of whether there is a negative balance on *the Open Account*, and to execute any other document required by 7-Eleven to perfect that security interest [Article 8(e)];

- (f) the Franchisee agrees not to grant any other security interest over the Current Assets of the Store without the express written consent of 7-Eleven [Article 8(f)].

13. In relation to the making of payments by 7-Eleven to or on behalf of the Franchisee, the material express terms of the Franchise Agreements are (or were, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time):

- (a) financing is only available to a Franchisee on the *Open Account* if the Franchisee's *Net Worth* is above the Minimum Net Worth stipulated in the Franchise Agreement [Article 8(a)];
- (b) 7-Eleven agrees to pay in a timely manner on behalf of the Franchisee, and subject to certain conditions set out in Article 20(d):
 - (i) all drafts and invoices for *Purchases*, provided the merchandise is purchased from a *Bona Fide Supplier*;
 - (ii) all *Operating Expenses* which 7-Eleven in its sole discretion deems are a necessary expense for the operation of the Store;
 - (iii) the Franchisee's payroll for the Store provided that nothing shall oblige 7-Eleven to make any payment on behalf of a Franchisee the effect of which would be to reduce the Franchisee's *Net Worth* below the Minimum Net Worth [Article 20(d)];
 - (iv) provided the Franchisee's *Net Worth* exceeds the Minimum Net Worth, the Franchisee's Weekly Draw and any Profit Draw.

14. In relation to the keeping of *Financial Records* [Exhibit E] by 7-Eleven for the Franchisee, the material express terms of the Franchise Agreements are (or were, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time):

- (a) 7-Eleven shall have the right, at its expense, to prepare and maintain complete bookkeeping records of the *Franchisee's Operation* [Article 18(a)];
 - (b) all *Purchases* and *Operating Expenses* shall be debited to the *Financial Records* and all *Sales Receipts* shall be credited to the *Financial Records* [Article 8(c)];
 - (c) the Franchisee is required to submit information either in hard copy or electronic format, in the manner and at the times designated by 7-Eleven [Article 20(b)]:
 - (i) daily summaries of all *Purchases*, and copies of drafts, orders, receipts and invoices for all *Purchases* and all *Operating Expenses*;
 - (ii) daily reports of all *Sales Receipts*;
 - (iii) weekly time and wage authorisations for the *Employees* [Article 9(g)], being the persons employed by the Franchisee in connection with the conduct of the business from the Store;
 - (iv) any additional reports as 7-Eleven may require from time to time.
15. 7-Eleven agrees (or agreed, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time) to prepare for the Franchisee [Article 20(a)]:
- (a) copies of financial statements for the Store within 30 days on an annual and monthly basis;
 - (b) "payroll money" for the Franchisee's payroll for the Store (within the time prescribed by applicable law);
 - (c) the Weekly Draw and/or Profit Draw amounts.

Inventory and pricing

16. In relation to the purchase and carrying of inventory at each Store, the material express terms of the Franchise Agreements are (or were, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time):
- (a) 7-Eleven agrees to procure for the Franchisee, and the Franchisee agrees to acquire, the initial *Inventory* for the Store [Article 14(a)];

- (b) thereafter, the Franchisee agrees to purchase, and carry in *Inventory* at the Store, merchandise for sale that is adequate to provide customers at the Store with merchandise of a type, quality, quantity and variety consistent with the *7-Eleven Image* and display such merchandise in a manner consistent with the *7-Eleven Image* [Article 15(a)];
- (ba) the Franchisee acknowledges (and the Franchise Agreement contemplated):
- (i) that suppliers of stock recommended by 7-Eleven (including those affiliated with 7-Eleven) may offer stock at prices or on terms more favourable than those offered or obtainable from other suppliers of comparable merchandise. Such favourable pricing or terms, which are of benefit to the Franchisee, are referable to and linked with, the volume of merchandise ordered by 7-Eleven and the Franchisee on the recommendation of 7-Eleven [Article 15(b)];
 - (ii) accordingly, that
 - (1) 7-Eleven may enter agreement with suppliers for the provision of stock to Franchisees' Stores upon prices or terms referable to and linked with, the volume of merchandise ordered by 7-Eleven and the Franchisee on the recommendation of 7-Eleven;
 - (2) If 7-Eleven did so, then the terms of such an agreement would be on terms favourable to the Franchisee,

[Volume Pricing Agreement Term and, or alternatively, Volume Pricing Representation];

- (bb) the Franchisee shall purchase or otherwise acquire items of stock only from *Bona Fide Suppliers* who are engaged in the business of supplying retailers at normal wholesale prices [Article 15(c)];
- (c) the Franchisee must carry as part of its *Inventory* stock items, whether 7-Eleven branded or not, nominated by 7-Eleven as being essential to the *7-Eleven System* and *7-Eleven Image*, and such stock items must be held at the Store's *Inventory* in quantities nominated by 7-Eleven [Article 15(g)];
- (d) the Franchisee agrees to order, place and maintain in stock during any marketing campaign arranged by 7-Eleven (7-Eleven Promotion), merchandise in such quantity or volume as is reasonable and appropriate

to the Store, having regard to its size, volume, location and general level of trading and will comply with any directions by 7-Eleven as to the quantity or volume of the merchandise which the Franchisee should place, display and maintain in *Inventory* in any particular case [Article 13(c)];

- (e) the Franchisee is responsible for all losses to the *Inventory* and *Store Supplies* and all losses of *Sales Receipts* [Article 12(a)];
- (f) the Franchisee will not sell stock which 7-Eleven deems to be part of its “Core Range” and “Recommended Range” at prices in excess of the prices recommended by 7-Eleven;

Particulars of 16(f)

The term arises expressly on the proper construction of:

- (i) *Article 1(k) of the Franchise Agreement which provides that the Franchisee will diligently promote the business of the Store and shall cause the Store to be operated continuously throughout the term of and as provided by the Franchise Agreement and in accordance with the 7-Eleven System and the Franchise Material (which is defined to include the Manual) in a manner that enhances the 7-Eleven Image; and*
- (ii) *the following provision of the Manual which was incorporated by reference into the Franchise Agreement by operation of Article 1(k):*

“There are a range of products that customers choose to come to 7-Eleven to buy, such as drinks, confectionary, snack foods, newspapers and cigarettes. These articles form part of our Core Range and Recommended Range that you can stock in your store that are from our recommended vendors. These articles are supplied by our recommended vendors and are sold at retail prices we recommend”.
- (g) further and in the alternative, the Franchisee will not sell stock at prices in excess of the prices published by 7-Eleven for the Stores (**Maximum Price Control**).

Particulars of 16(g)

The term arises expressly on the proper construction of Articles 1(k), 16(c) and 17(b) of the Franchise Agreement which respectively provide that:

- (i) *the Franchisee will diligently promote the business of the Store and shall cause the Store to be operated continuously throughout the term of and as provided by the Franchise Agreement and in accordance with the 7-Eleven System and the Franchise Material (which is defined to include the Manual) in a manner that enhances the 7-Eleven Image;*
- (ii) *7-Eleven will, at its own expense, periodically provide to the Franchisee lists of recommended maximum selling prices (inclusive of any GST applicable) recommended by 7-Eleven for merchandise (**Recommended Price**);*
- (iii) *the Franchisee acknowledges in terms of customer confidence and protection, the essential importance to the 7-Eleven System, of ensuring that merchandise is not sold at prices that are in excess of those published by 7-Eleven.*

Acquisition of stock

17. In relation to the acquisition of stock, the material express terms of the Franchise Agreements are (or were, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time):
- (a) 7-Eleven agrees to periodically provide to the Franchisee, a list of merchandise vendors recommended by 7-Eleven, and a list of merchandise items recommended by 7-Eleven for purchase by the Franchisee, and may include in any such list merchandise vendors who are owned by or affiliated with 7-Eleven [Article 16(a), (b)];
 - (b) the Franchisee is required to purchase items bearing the *Trade Marks*, or items, products or combinations of items or products which are exclusive to 7-Eleven, only from sources authorised by 7-Eleven [Article 17(a)];
 - (c) the Franchisee agrees to purchase or otherwise acquire items of stock only from *Bona Fide Suppliers*, being persons or entities:
 - (i) carrying on the business of supplying products or services: (a) in the area in which the Franchisee's Store is located; and (b) on a commercial and competitive basis; and
 - (ii) who are not: (A) associated in any manner with the Franchisee; or (B) an entity which has entered into an arrangement whether formal

or otherwise with the Franchisee which is not consistent with the Franchisee being a bona fide, arms-length customer [Article 15(c), Exhibit E];

- (d) the Franchisee is not required to purchase merchandise from merchandise vendors recommended by or owned or affiliated with 7-Eleven (**Recommended Suppliers**), however if the Franchisee purchases merchandise other than from Recommended Suppliers and the price of that merchandise exceeds the *Fair Wholesale Price* [Exhibit E] for that merchandise, 7-Eleven may charge the Franchisee a \$75 fee for each tax invoice processed in respect of such stock purchases [Article 15(f)] (**Outside Supplier Charge Term**);
- (e) the Franchisee agrees to conform to 7-Eleven's stock ordering and receipt system, and if the Franchisee does not so comply, 7-Eleven may charge a fee of up to \$150 for processing each stock order (**Stock Ordering Compliance Term**) [Article 15(h)].

Discounts and allowances

18. In relation to any discounts or allowances paid or payable in relation to, or applicable or attributable to, stock purchased by a Franchisee (**Supplier Discounts**), the material express terms of the Franchise Agreements are (or were, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time):

- (a) the Franchisee authorises 7-Eleven to collect, on behalf of the Franchisee, all discounts and allowances applicable to ~~Purchases stock purchased by the Franchisee~~ which ~~are were~~ not deducted from the face of the Franchisee's receipts or invoices [Article 20(f)(i)];
- (b) 7-Eleven shall credit to the *Cost of Goods Sold* (for stock purchased by the Franchisee):
 - (1) that portion of all discounts and allowances which are allowed to or are reasonably traceable to *Purchases*, and which are paid to 7-Eleven by merchandise vendors (**Direct Purchase Discount Payments**); and, or alternatively,
 - (2) the value of any miscellaneous discounts and allowances attributable to merchandise and which are not specifically allocated

to, or cannot be reasonably traced to, *Purchases*, and which are paid to 7-Eleven by merchandise vendors (**Direct Miscellaneous Discount Payments**);

- (3) less the cost to 7-Eleven (**7-Eleven's Advertising Rebate**) of promotional materials, media advertising and other costs that fall within Articles 20(g)(i) to 20(g)(iii), but not otherwise;

(c) the Franchisee:

- (i) will report to 7-Eleven all discounts and allowances received by it; and
- (ii) shall deposit into the Designated Account any discounts credits and rebates received directly by the Franchisee; and
- (iii) covenants to inform 7-Eleven of full particulars of all gratuities, enticements and other benefits of any description made by or on behalf of any supplier to the Franchisee or any other party arising from the purchase by the Franchisee of stock and if 7-Eleven believes such benefit has been given or received, it will treat such sum it deems to be equivalent to the value of such benefit as part of the Cost of Goods Sold by the Store,

[Article 20(f)(ii), 20(f)(iii), 20(j)(i)(2)];

~~(e)~~(d) where 7-Eleven has obtained an offer, or entered into an agreement, for the provision of stock at prices or on terms more favourable than those offered or obtainable from other suppliers of comparable merchandise, and which may be referable to and linked with, the volume of merchandise ordered by 7-Eleven and the Franchisee on the recommendation of 7-Eleven:

- (1) the benefit of those prices or terms, including any discounts and allowances applicable or attributable to any *Purchase* made by the Franchisee, accrues to the Franchisee [Articles 20(f), 20(g)]; and,
- (2) 7-Eleven must, or alternatively, will, pass on the benefit of such favourable pricing or terms to the Franchisee [Articles 1(o) 15(b), 20(f), 20(g)].

Employees and Wages

19. In relation to the engagement of employees, the express terms of the Franchise Agreement are (or were, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time) (**Franchisee Employment Obligations**):
- (a) the Franchisee is responsible to ensure that it has sufficient persons employed and rostered on for duty as are needed to operate the Store at the times and in the manner provided by the Franchise Agreement (including operation for 24 hours a day 7 days a week, where applicable) [Article 1(k)];
 - (b) the Franchisee shall have the sole right to employ and discharge *Employees* as in the Franchisee's judgment may be necessary. Such *Employees* shall be employees or agents of the Franchisee, and the Franchisee shall exercise full and complete control over, and shall have full responsibility for, the conduct of the *Employees* and any and all labour relations, including the hiring, firing, supervision, disciplining, compensation (and taxes related thereto) and work schedules of the *Employees* [Article 35(b)];
 - (c) the wages of the *Employees* will be paid by 7-Eleven from the *Open Account* upon the submission to 7-Eleven of weekly time and wage authorisations, provided that the Franchisee's *Net Worth* is not below the Minimum Net Worth. [Article 20(b)(i)(3), Article 20(d)(iii), Variation Agreement, Article 19A].
20. In relation to the provision of payroll services, the express terms of the Variation Agreement include (or included, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time) that:
- (a) the Franchisee agrees to use the *Payroll Services* provided by 7-Eleven, inter alia, for the processing and payment of wages and employee entitlements, the provision of pay records and other advices, payment of superannuation entitlements and payment of workcover premiums and the generation of end of year pay as you go (**PAYG**) summaries [Article 19A(c), Variation Agreement];

- (b) the Franchisee agrees to provide 7-Eleven with all information as and when required by 7-Eleven to enable 7-Eleven to provide or facilitate the provision of the *Payroll Services* [Article 19A(c), Variation Agreement];
- (c) 7-Eleven agrees to pay, on behalf of the Franchisees, the wages and all mandatory superannuation contributions of all employees of the Franchisee including all accrued but unpaid recreation, long service and other leave entitlements on termination of an employee of the Franchisee, with such amounts to be deducted to the *Open Account* but subject to the proviso that 7-Eleven is not obliged to make any payment on behalf of a Franchisee the effect of which would be to reduce the Franchisee's *Net Worth* below the Minimum Net Worth [Article 19A(d)].

Advertising expenses

21. It is (or was, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time) an express term of the Franchise Agreement [Article 13(a)] that 7-Eleven shall periodically:
- (a) provide the Franchisee with banners, signs and in-store advertising materials (including point of sale materials) developed by 7-Eleven for use in the Stores or available from merchandise vendors for use in the Stores (**7-Eleven In-store Advertising**);
 - (b) arrange general institutional advertising of and relating to 7-Eleven Stores, the *7-Eleven Image* and the *Trade Marks* (**Institutional Advertising**); and
 - (c) that such advertising would be at the expense of 7-Eleven and/or the merchandise vendors (**Advertising Expense Term**).

Termination

22. In relation to the parties' termination rights, the express material terms of the Franchise Agreement are (or were, in respect of those Franchise Agreements that have been terminated, or which have expired by effluxion of time):
- (a) 7-Eleven may terminate the agreement at any time by giving the Franchisee reasonable notice of the termination (which in any event will not be more than 30 days) for any *Material Breach* of the agreement [Article 25(c)(i)];

- (b) a *Material Breach* includes any act of *Fraudulent Behaviour* as defined in Exhibit E of the Franchise Agreement [Exhibit E definition at (xxi)];
- (c) 7-Eleven may terminate the Agreement immediately in the event that the Franchisee or a *Nominated Director* [list of parties; Article 45(a)(i)] of the Franchisee engages in *Fraudulent Behaviour* as defined in Exhibit E of the Franchise Agreement [Article 25(e)(vi)];
- (d) *Fraudulent Behaviour* includes a failure of the Franchisee to maintain the Minimum Net Worth.

B5. Implied, or partly express and partly implied terms of the Franchise Agreement

23. At all times during the Relevant Period, it was an implied, or partly express and partly implied term of the Franchise Agreements that 7-Eleven owed the following duties to the Franchisees (**Contractual Duties Term**):

- (a) a duty of cooperation to:
 - (i) achieve the objects of the Franchise Agreement; and, or alternatively,
 - (ii) not act unreasonably, arbitrarily or capriciously, in disregard of the Franchisee's interests; and, or alternatively, so as to prevent or deny the Franchisee from enjoying the full benefit of the Franchise Agreement.
- (b) a duty to:
 - (i) act reasonably and in good faith towards the Franchisee; and, or alternatively,
 - (ii) promote the mutual business interests of the Franchisee and 7-Eleven;
- (c) a duty:
 - (i) to exercise any powers or discretions under the Franchise Agreement in good faith and reasonably and with reasonable cause; and, or alternatively,
 - (ii) not to exercise any powers or discretions under the Franchise Agreement otherwise than:
 - (1) in good faith; and, or alternatively,

- (2) reasonably, having regard to:
- I. the Franchisee's interests (including the Franchisee's interest in obtaining the full benefit of the Franchise Agreement); and, or alternatively
 - II. the proper purposes for which the powers or discretions were contemplated to be exercised.

Particulars

The duties:

- (i) *arise in consequence of:*
- (1) *the existence, and proper construction, of 7-Eleven's Proper and Efficient Obligation Term and the Volume Pricing Agreement Term; and, or alternatively,*
 - (2) *the existence of a term implied at common law in each of the Franchise Agreements that requires the parties to act at all times in good faith towards the other in respect of the exercise of powers under, and in performance of obligations under, the Franchise Agreements; and,*
- (ii) *are otherwise implied by law in each of the Franchise Agreements, and including (without limitation) in the case of all Franchise Agreements entered into, renewed or varied after 1 January 2015 to which Schedule 1 of the Competition and Consumer (Industry Codes – Franchising) Regulation 2014 (Cth) (**Franchising Code 2014**) by the operation of clause 6 of the Franchising Code 2014.*

24. The objects of, or alternatively the full benefit of, the Franchise Agreement, relevant to the content of the duties in subparagraphs 23(a) to 23(c) above, include:

- (a) the opportunity for the Franchisee to earn profits and/or income by operating the Store in accordance with the *7-Eleven System*; and
- (b) the opportunity for the Franchisee to realise a return on their capital on the sale of the Store by reason, or in the event, of the successful operation of the Store by the Franchisee.

Particulars

- (i) *Each of the above objects of, or benefits contemplated under, the Franchise Agreement, can be inferred, inter alia, from the nature of the franchising relationship and the structure and content of the Franchising Agreement as a whole, including (inter alia):*
- (1) *The express terms of the Franchise Agreement set out in paragraphs 8 - 22 above, having regard to the contextual matters set out in paragraphs 6 and 7 above, the nature of a franchise relationship, as expressed, for example, in the definition of “franchise” in section 9 of the Corporations Act 2001 (Cth) and the definition of a “franchise agreement” in clause 5 of the Franchising Code 2014 and clause 4 of the Franchising Code of Conduct set out in the Schedule to the Trade Practices (Industry Codes—Franchising) Regulations 1998 (Cth) as in force before 1 January 2015 (**Franchising Code 2010**), and the pre-contractual statements made by 7-Eleven to each of the Applicants and each other Franchisee as set out in paragraphs 42 - 44 below.*
 - (2) *Recital E of the Franchise Agreement by which the Franchisee is taken to: (a) “recognise the advantages of the 7-Eleven System and the 7-Eleven Image”; and (b) express a desire (inter alia) to “acquire from [7-Eleven] rights to participate in the use of the 7-Eleven System, the Trade Marks and the Trade Secrets and the exploitation of the 7-Eleven Image in connection with a business to be conducted by the Franchisee at [the Store]”;*
 - (3) *the fact that the Franchisee is required to invest significant funds to pay the Franchise Fee, in the Initial Investment and for any Goodwill Payment, and the reasonable expectation thereby created, in combination with Articles 27 – 29, that the Franchisee would be able to on-sell the Store to a new franchisee and receive a Goodwill Payment on so doing;*

- (4) *the fact that, under the terms of the Franchise Agreement, the Franchisee is described as an independent contractor and is:*
- I. *responsible for engaging and paying employees in the Store;*
 - II. *entitled (in addition to the Weekly Draw) to a Profit Draw in prescribed circumstances;*
 - III. *entitled to a minimum level of Gross Income under the agreement.*

B6. 7-Eleven's inventory practices

C-Store Practices

25. At all material times during the Relevant Period, 7-Eleven:

- (a) established a relationship and entered into one or more agreements (**C-Store Agreements**) with Metcash Limited (ACN 112 073 480), or one or more of its related bodies corporate (**Metcash**), for the supply of stock items through an entity known as "C-Store" (**C-Store**);
- (b) designated C-Store as a recommended merchandise supplier under Article 15(b) of the Franchise Agreement for the supply of, or the majority of, stock items to be sold by its Franchisees from their Stores;
- (c) did not:
 - (i) designate or recommend to Franchisees any alternative recommended merchandise vendors under Article 15(b) (or otherwise) of similar stock items to those that had been offered or agreed to be supplied by C-Store under the C-Store Agreements; or,
 - (ii) enter into any other agreement with a *Bona Fide Supplier* of similar stock items to those that had been offered or agreed to be supplied by C-Store under the C-Store Agreements, so as to generate any price competition with C-Store in relation to the supply of stock items to its Franchisees;
- (d) negotiated the price and terms for the supply of items with Metcash and/or C-Store, including any discounts, allowances, rebates, incentives,

commissions, bonuses, concessions or other price variations or benefits (collectively **C-Store Discounts and Rebates**) to, for, or associated with, the supply of stock items through C-Store to its Franchisees;

(da) agreed, by the C-Store Agreements:

- (i) to use its best endeavours to procure at least 90% of the combined total dollar value from time to time of Goods (as therein defined) required by Franchisees for sale at their Stores (**90% Participation Arrangement**);

Particulars

(A) Clauses 3.2 and 23.1 of the C-Store Agreement dated 27 April 2005.

(B) Clauses 3.2 and 24 of the C-Store Agreement dated 13 November 2012.

(ii) that Metcash would pay 50% of all applicable:

- (1) supplier rebates, ullage and supplier agreed co-op (as therein described); or
- (2) Campbells Supplier co-op, rebates and ullage as received by Campbells Cash & Carry Pty Ltd (as therein described),

as 7-Eleven may claim (**Metcash Shared Discount Arrangement**);

Particulars

(A) Clauses 1 and 6 of the C-Store Agreement dated 27 April 2005.

(B) Clauses 1 and 6 of the C-Store Agreement dated 13 November 2012.

(iii) that, at least in respect of the agreement dated 27 April 2005, its continuation was predicated on its providing the profitability anticipated in a business model developed by 7-Eleven;

(e) prevented Franchisees from ordering stock from alternative *Bona Fide Suppliers* (other than C-Store) at all, or on a regular basis, by:

- (i) acquiring from C-Store opening inventory to stock the relevant Stores prior to the Franchisee taking possession, which the

Franchisee was required to acquire in accordance with Article 14(a) of the Franchise Agreement (*Opening Inventory*) (see paragraph (a) above);

- (ii) only offering stock from C-Store or Daily Fresh on its in-store online portal (**Online Portal**) for all or most stock items;
- (iii) requiring Franchisees who order stock other than from C-Store or Daily Fresh (as permitted pursuant to the conditions referred in paragraphs 17(d) and 17(e) above) to submit invoices to 7-Eleven prior to payment of the invoice from the *Open Account* (or reimbursement of the Franchisee for its direct payment to the supplier, as the case may be) via means other than the Online Portal;
- (iv) for the purposes of meeting the 90% Participation Arrangement, informing Franchisees that:

(1) they were required to use C-Store and, or alternatively, they should not, or could not, order stock items outside of C-Store; and, or alternatively,

(1A) they were required to accept, not less than 80% or 85% of the time, the quantity of products from C-Store recommended in orders generated automatically in the Online Portal for Stores (defined below as “Suggested Orders”);

Particulars

Franchisees were informed by 7-Eleven Retail Business Managers and District Managers that:

(a) Franchisees had to accept not less than 80% or 85% of the time the quantity of products recommended in orders generated in the Online Portal for Stores; and, or alternatively,

(b) Store shelves had to conform to 7-Eleven’s planograms, and be maintained full of stock at all times;

or in default of which the Franchisees might:

(A) be marked down in retail reviews conducted in respect of the Franchisee's Store; and

(B) receive a breach notice, in the event of receipt of 3 or more low scores in respect of retail reviews,

(as to (A) and (B) above, **Breach Threats**):

(C) have their capacity to undertake ordering through the Online Portal removed, and receive stock in accordance with orders dictated by 7-Eleven; and, or alternatively,

(D) have stock items not ordered through C-Store removed from Store shelving and discarded;

and, or alternatively,

(2) it would be looked upon badly by 7-Eleven head office or senior management if the Franchisee did not use C-Store; unless they could not acquire a particular stock item in time from C-Store.

Particulars

Franchisees were informed of these matters by 7-Eleven Retail Business Managers, District Managers, or State Managers from time to time, in District Meetings or individual conversations, often in response to a query from Franchisees as to whether they could order goods outside of C-Store.

26. At all material times during the Relevant Period, the C-Store prices actually paid and payable by, and charged to, each of the Applicants and each of the Franchisees for stock items ordered by them from C-Store (including all allowances or discounts deducted from invoices or receipts issues to Franchisees) (**Franchisee Wholesale Prices**), plus any or any other, Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments applicable or attributable to such stock items (**Fully Rebated Prices**), exceeded:
- (a) the price or prices at which the Franchisee, if not required by, or subject to, the systems and conduct described in paragraph 25 above, to acquire stock items via C-Store, would have been able to purchase those stock items in similar quantities or normal trade volumes from alternative Bona

Fide Suppliers other than C-Store (**Independent Fair Wholesale Price**); and/or

- (b) further and in the alternative, the lowest price or prices reasonably obtainable by 7-Eleven using its best endeavours (**Best Endeavours Wholesale Price**),

for all, or alternatively a substantial number of, stock items.

Particulars

Particulars may be provided after discovery and the service of expert evidence.

27. Further, the aggregate difference between the Franchisee Wholesale Prices actually charged to and paid by Franchisees (that is, excluding any Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments), and the Independent Fair Wholesale Price or the Best Endeavours Wholesale Price for the equivalent stock items, has exceeded, in each full calendar year of the Relevant Period, the amount of 7-Eleven's Advertising Rebate reported for that year by a material amount.

Particulars

Particulars may be provided on the service of the Applicants' expert evidence.

(paragraphs 25 to 27 are individually or in combination, **7-Eleven's C-Store Practices**).

Inventory Practices

28. Further, and in the alternative, to the matters pleaded in paragraphs 25 and 26 above, on and from the time of entry by each of the Applicants and each other Franchisee into their Franchise Agreements, 7-Eleven:

- (a) listed on its Online Portal the stock items (and quantities thereof) to be purchased by each of the Franchisees (**Suggested Order**), and required any alteration to the Suggested Order to be undertaken manually by Franchisees~~did not provide an option allowing Franchisees to vary the items on the list (other than by quantity);~~

- (b) nominated a weekly deadline for Franchisees to vary the items or quantity of stock on the Suggested Order, then delivered stock to the Store within 1-2 days;
- (ba) increased, and required Franchisees to accept, nominated quantities of any product(s) the subject of 7-Eleven Promotions concerning the sale of those products at Stores (Promoted Products);
- (bb) maintained in Suggested Orders, following the cessation of a 7-Eleven Promotion concerning a particular Promoted Product, the same quantity(s) for the Promoted Product as had been required to be accepted by Franchisees during the (concluded) 7-Eleven Promotion concerning the Promoted Product;
- (bc) thereby foisted upon Franchisees increased quantities of products in Suggested Orders that:
- (i) were unlikely to be sold, or to be able to be sold, by Franchisees prior to the next Suggested Order, the cost of which unsold products would be borne wholly or in part by Franchisees; and, or alternatively,
- (ii) led, in the event of deletion or reduction in quantity by Franchisees of those increased quantities in Suggested Orders, to Breach Threats;

Particulars

(A) Affidavit of Ambika Nand filed on 8 October 2020, paragraphs 64, 65.

(B) Affidavit of Xuejiao Amy Zhu filed on 28 September 2020, paragraphs 171 to 179.

(C) Affidavit of Prabhakar Reddy Veldurthi filed on 30 September 2020, paragraphs 63 to 71.

- (b)(c) in the case of each of the Applicants and Franchisees who obtained working finance capital from 7-Eleven through the *Open Account* (being some or all of the Franchisees), debited interest on any negative balance pursuant to Article 8(b) of the Franchise Agreement to the *Open Account* of those Franchisees;

~~(e)~~(d) when stock was ordered by the Applicants or Franchisees from the Online Portal, debited the cost of ordered stock items (at the time of delivery) to the respective outstanding balances of the *Open Account* of the Applicants and Franchisees, and calculated interest on such purchases from that time; and

(e) determined the prices at which the Franchisees were to sell items of merchandise (**Retail Prices**) by setting those prices in the Online Portal and point of sale scanning systems (and not allowing, or limiting the ability of, the Franchisees to alter those selling prices, by controlling POS codes which could be applied to merchandise items for the purposes of altering prices);

(f) audited stock levels in Stores, in respect of which:

(i) any stock levels in Stores that were lower than recorded on the Online Portal and POS system were treated by 7-Eleven, in respect of the value of the difference, as stock items sold by Franchisees and for which adjustment was made in 7-Eleven's favour in respect of the 7-Eleven Charge; and

(ii) any stock levels in Stores that were higher than recorded on the Online Portal and POS system were treated by 7-Eleven, in respect of the difference, as a gratuity or rebate and subject to adjustment in accordance with Article 20(f)(iii) of the Franchise Agreement;

and rejected any arguments from Franchisees to the effect that 7-Eleven's audit, or its record of stock levels recorded through the Online Portal and POS system, were or might be inaccurate,

(individually or in combination, **7-Eleven's Inventory Practices**).

Fund practices

28A. By Article 20(f)(i) of the Franchise Agreement, each Franchisee appointed 7-Eleven as the Franchisee's agent to collect any Supplier Discounts applicable or attributable to any *Purchase* made by the Franchisee which are not deducted from the face of the Franchisee's receipts or invoices, which included Direct Purchase Discount Payments and/or Direct Miscellaneous Discount Payments.

28AA. During the Relevant Period, 7-Eleven collected Supplier Discounts applicable or attributable to any *Purchase* made by Franchisees, including the Applicants, which

were not deducted from the face of the Franchisee's receipts or invoices, which included Direct Purchase Discount Payments and/or Direct Miscellaneous Discount Payments.

- 28B. By Article 20(g) of the Franchise Agreement, 7-Eleven was permitted to expend monies arising from Direct Purchase Discount Payments or Direct Miscellaneous Discount Payments on those matters described in Articles 20(g)(i) to 20(g)(iii), but was otherwise required to credit Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments to the Cost of Goods Sold.
- 28C. Monies collected by or otherwise paid to or received by, 7-Eleven by virtue of its appointment under Article 20(f)(i) and, or alternatively, as pleaded in paragraph 28AA, arising from Direct Purchase Discount Payments or Direct Miscellaneous Discount Payments, were paid into a collective fund (the **Fund**).

Particulars

That the Fund was a single collective fund is to be inferred from statements to that effect made by 7-Eleven in:

- (a) *the Franchising Code Disclosure and Oilcode Disclosure, as pleaded in 43(e) and 44(d) below;*
- (b) *the Manual, in respect of "Stock Management; Recommended Vendors", and "7-Eleven Promotions; Buy-in Period"; and*
- (c) the references to "a fund maintained by [7-Eleven]" and "the Fund" in a letter dated 9 August 2019 from Norton Rose Fulbright to Levitt Robinson, sections 12 and 14.

28CA. The amount of the monies collected or received by 7-Eleven by virtue of its appointment under Article 20(f)(i) and, or alternatively, as pleaded in paragraph 28AA:

- (a) is not known to either of the First Applicant or Second Applicant, or to some or all of the other Franchisees; and
- (b) has not been made known by 7-Eleven to either of the First Applicant or Second Applicant, or to some or all of the other Franchisees.

- 28D. In the premises of the matters pleaded in 28A – 28C above, the Fund was a "marketing or other co-operative fund", within the meaning of those words as found in the Franchising Code 2010 and Franchising Code 2014 (collectively, **Franchising Codes**) and the *Competition and Consumer (Industry Codes –*

*Oilcode) Regulation 2006 (Cth) and the Competition and Consumer (Industry Codes–Oil) Regulations 2017 (Cth) (collectively, **Oilcode**).*

28E. Further or alternatively, by reason of the matters pleaded in paragraphs 28A, ~~and 28AA~~, 28B ~~and 28CA~~ above, 7-Eleven was and remains obliged to account to each Franchisee (**Accounting Obligation**) in respect of:

- (a) all Supplier Discounts applicable or attributable to any *Purchase* made by the Franchisee and collected by, or paid to, 7-Eleven; and
- (b) the application of those monies.

Particulars

- (i) *At no time did any of the Applicants or other Franchisees grant to 7-Eleven the express right to receive or utilise any portion of any discount or allowance available on account of, or attributable to, any Purchase made by any Franchisee, save as provided by Articles 20(f) and 20(g) of the Franchise Agreement.*
- (ii) *Further or alternatively, Article 15(b), upon its proper construction, contemplates that Franchisees will receive the benefit of “favourable pricing and terms referable to and linked with the volume of merchandise ordered by the Franchisee” offered by suppliers to stock recommended by 7-Eleven to Franchisees.*
- (iii) *Further or alternatively, the price payable by Franchisees under the 2012 C-Store Agreement included “all applicable trade discounts and allowances”, which included Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments.*
- (iv) *In the premises, 7-Eleven held all Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments received by 7-Eleven on trust for Franchisees.*

C. BREACH OF CONTRACT CLAIMS

Breach of Accounting Obligation

28F. In breach of the Accounting Obligation, during the Relevant Period and subsequently 7-Eleven has:

- (a) denied that the Fund is a “marketing or other co-operative fund”, within the meaning of those words as found in the Franchising Codes and the Oilcode:

Particulars

- (i) *Letter dated 5 June 2019 from Levitt Robinson to 7-Eleven, section 13.*
- (ii) *Letter dated 9 August 2019 from Norton Rose Fulbright to Levitt Robinson, sections 12.1 and 12.2.*
- (b) failed to account, or to properly account, at any time to the Franchisees, in respect of:
- (i) the full amount of Supplier Discounts collected on behalf of Franchisees by, or otherwise paid to or received by, 7-Eleven (**Supplier Discount Payments**); or
- (ii) the application of the Supplier Discounts ~~payments~~ by 7-Eleven.

Particulars

(A) In response to oral inquiries made by Franchisees during the Relevant Period for information concerning what Rebates were paid in respect of stock items purchased by Franchisees, 7-Eleven Retail Business Managers and District Managers either:

(1) did not answer the substance of the inquiry; or

(2) stated that they did not know; or

(3) stated that it was a matter for more senior management.

(B) At no time has 7-Eleven ever provided to either of the Applicants, or to any other Franchisee, any statement or document detailing any of:

- (1) *the monies received into the Ffund, including any interest earned thereon, or the Supplier Discount Payments;*

- (2) *the source of the monies received into the Fund, or the Supplier Discount Payments;*
- (3) *the monies expended from Fund, or from the Supplier Discount Payments;*
- (4) *to whom monies have been expended from the Fund, or from the Supplier Discount Payments;*
- (5) *any products or services acquired on account of monies sd expended from the Fund, or from the Supplier Discount Payments;*
- (6) *the cost of such products or services (including how such cost has been calculated or determined);*
- (7) *any costs claimed by 7-Eleven to have been incurred in relation to any such products or services; or*
- (8) *any costs alleged to have been incurred in respect of administering the Fund or the Supplier Discount Payments.*

Breach of Volume Pricing Agreement Term, 7-Eleven's Proper and Efficient Obligation Term, and Contractual Duties Term

29. The conduct of 7-Eleven referred to in ~~sub~~paragraphs 25(c), ~~to 25(d)(iii) and paragraphs~~ 26 and 27 above (alone and in combination, **Wholesale Pricing Conduct**) constituted, in breach of the Volume Pricing Agreement Term and/or, in breach of 7-Eleven's Proper and Efficient Obligation Term and/or, in breach of the Contractual Duties Term:

- (a) a failure by 7-Eleven to, or to use its best endeavours to, ensure that the business of each of the Applicants and each other Franchisee, being an undertaking, scheme or enterprise to which their respective Franchise Agreements relate, has been carried on in a proper and efficient manner;
- (b) further and in the alternative, a failure by 7-Eleven to cooperate with each of the Applicants and each other Franchisee to enable them to achieve the objects, or to enjoy the full benefit, of their respective Franchise Agreements;
- (c) further and in the alternative, a failure by 7-Eleven to:

- (i) act reasonably and in good faith towards each of the Applicants and each other Franchisee; and/or
 - (ii) promote, reasonably or genuinely, the mutual business interests of each of the Applicants and each other Franchisee, and 7-Eleven; and/or
- (d) further and in the alternative, a failure by 7-Eleven to exercise its powers or discretions under the Franchise Agreement:
- (i) in good faith and reasonably and with reasonable cause; and/or
 - (ii) reasonably, having regard to:
 - (1) each of the Applicants' and each of the other Franchisees' interests (including obtaining the full benefit of the Franchise Agreement); and/or
 - (2) the proper purposes for which those powers or discretions were contemplated to be exercised.

Particulars

- (i) *Throughout the Relevant Period, and subsequently, the effect of 7-Eleven's Wholesale Pricing Conduct was to increase the Cost of Goods Sold, and reduce the income and/or profit margins, for each of the Applicants and each other Franchisee arising from the operation of their Stores, and thereby deny each of them the opportunity to earn a level of profits, income and/or achieve commercial success that reflected:*
 - (1) *the prominence and reputation of 7-Eleven brand;*
 - (2) *the skill, time, money and effort invested by the Franchisee in the acquisition and operation of the Store; and*
 - (3) *the risks undertaken by the Franchisee in operating the business at the Store.*
- (ii) *Further, and in the alternative, by reason of the matters pleaded in paragraphs 17, 18, 21, 25, 26 and 27 above, the difference between the Franchisee Wholesale Prices and the Independent Fair Wholesale Price or Best Endeavours Wholesale Price of those goods cannot be reasonably attributed to the amount of the rebates received by Franchisees and by 7-Eleven, as disclosed by 7-Eleven*

to the Franchisees in respect of each year in the Relevant Period. Accordingly, it is to be inferred that:

- (1) *7-Eleven agreed C-Store prices, including by virtue of the Metcash Shared Discount Arrangement, with Metcash that were by any reasonable and objective measure excessive for the goods supplied by Metcash to each of the Applicants and the Franchisees, to the detriment of each of the Applicants and the Franchisees as set out in (i) above;*
 - (2) *in negotiating the C-Store prices, 7-Eleven acted in a manner which was: (i) not necessary to advance its legitimate contractual interests under the Franchise Agreements; (ii) extraneous to the legitimate object of its powers to engage in the Wholesale Pricing Conduct (if and where such powers existed, which is not admitted); and (iii) contrary to the interests of the Franchisees and to the benefits contemplated as accruing to the Franchisees under, and to the objects of, the Franchise Agreements; and*
 - (3) *in the premises, 7-Eleven thereby failed to cooperate with the Franchisees sufficiently to achieve the objects, or to enable the Franchisees to enjoy the full benefits, of the Franchise Agreements set out in paragraph 23(c)(ii) above.*
- (iii) *Further and in the alternative, in the circumstances identified above, it may be inferred that, in negotiating C-Store prices which exceeded significantly the Independent Fair Wholesale Price or Best Endeavours Wholesale Price, and the amount of 7-Eleven's Advertising Rebate throughout the Relevant Period, without any apparent legitimate contractual justification for such conduct, 7-Eleven acted (and/or exercised its contractual powers under the Franchise Agreements) unreasonably and arbitrarily, and not for the purpose for which such contractual powers were granted (if and where such powers exist, which is not admitted).*
- (iv) *In the premises of particulars (i)-(iii) above, 7-Eleven failed to act reasonably and in good faith and/or failed to exercise its powers or discretions under the Franchise Agreement reasonably and in good faith, or in a proper and efficient manner, having regard to the*

objects of, and to the benefits contemplated as accruing to Franchisees under, the Franchise Agreement set out in paragraph 23(c)(ii) above.

- (v) *Further particulars may be provided after discovery and service of the Applicant's expert evidence.*

30. Further and in the alternative to paragraph 29 above, the Wholesale Pricing Conduct, in combination with some or all of 7-Eleven's Inventory Practices referred to in paragraph 28 above, constituted, in breach of 7-Eleven's Proper and Efficient Obligation Term and/or the Contractual Duties Term:

- (a) a failure by 7-Eleven to use its best endeavours to ensure that the business of each of the Applicants and each other Franchisee, being an undertaking, scheme or enterprise to which their respective Franchise Agreements relate, is carried on:
- (i) in a proper and efficient manner; and/or
- (ii) for the mutual benefit of the Franchisees and 7-Eleven;
- (b) further and in the alternative, a failure by 7-Eleven to cooperate with each of the Applicants and each other Franchisee to achieve the objects, or to enjoy the full benefit, of their respective Franchise Agreements;
- (c) further and in the alternative, a failure by 7-Eleven to act reasonably and in good faith towards the Applicants and each other Franchisee; and/or
- (d) further and in the alternative, a failure by 7-Eleven to exercise its powers or discretions under the Franchise Agreement in good faith and reasonably and with reasonable cause.

Particulars

- (i) *See the particulars to paragraph 29 above and as further set out below.*
- (ii) *Due to 7-Eleven's Inventory Practices pleaded and particularised in subparagraphs 28(a) and 28(e) above, each of the Applicants and some or all of the Franchisees were unable (at all, or on a regular basis) to purchase stock items from alternative wholesalers or suppliers (other than C-Store) in order to mitigate the effects of the Wholesale Pricing Conduct and/or exacerbated the adverse*

financial impact of the Wholesale Pricing Conduct on each of the Applicants and some or all of the Franchisees.

- (iii) *Further and in the alternative, due to 7-Eleven's Inventory Practices pleaded and particularised in subparagraphs 28(b) and 28(d) above, each of the Applicants and some or all of the Franchisees incurred interest liabilities to 7-Eleven on inflated wholesale prices from the date of ordering C-Store merchandise.*
- (iv) *In the premises, by 7-Eleven's Inventory Practices pleaded and particularised in subparagraphs 28(a) and 28(e) above, 7-Eleven failed to cooperate with each of the Applicants and some or all of the Franchisees by preventing them from purchasing stock items from alternative wholesalers (other than C-Store) at all, or on a regular basis, or by creating commercial and or practical disincentives for them to do so. By such conduct, 7-Eleven prevented each of the Applicants and some or all of the Franchisees from mitigating the effects of the Wholesale Pricing Conduct (or impaired their ability to do so) and thereby failed to cooperate with the Franchisees to achieve the objects, and enjoy the full benefit, of their Franchise Agreements set out in paragraph 23(c)(ii) above.*
- (v) *Further particulars may be provided on service of the Applicants' expert evidence.*

B7. Loss and Damage

31. By reason of 7-Eleven's breaches of contract referred to in paragraphs 29 and/or 30 above, each of the Applicants and each of the Franchisees have suffered loss and damage.

Particulars

- (a) Each of the First and Second Applicant's and damage will be calculated by reference to loss of profits referable to:
 - (i) the prices for stock purchased through C-Store, compared with the Independent Fair Wholesale Prices, and/or the Best Endeavours Wholesale Prices for that stock;

- (ii) each of the First and Second Applicant's loss of opportunity to earn additional profits from the charging of prices for the sale of merchandise in excess of the maximum prices set by 7-Eleven.
- (b) Further particulars of each of the First and Second Applicant's loss and damage calculated or determined on the above bases may be provided after service of expert evidence.
- (c) The loss suffered by the Franchisees will also be calculated in accordance with the particulars (a) and (b) above but are not particularised in this SOC; particulars in relation to the Franchisees' losses will be obtained (and particulars may be provided) following opt out, the determination of each of the First and Second Applicant's claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees.

31A. Further, by reason of 7-Eleven's breaches of contract referred to in paragraph 28F above 7-Eleven must account to each of the Applicants and each of the other Franchisees in respect the Supplier Discount Payments.

[NOT USED]

- 32. [NOT USED]
- 33. [NOT USED]
- 34. [NOT USED]
- 35. [NOT USED]
- 36. [NOT USED]
- 37. [NOT USED]
- 38. [NOT USED]
- 39. [NOT USED]
- 40. [NOT USED]

D. FRANCHISOR DISCLOSURES – CODE BREACHES AND MISLEADING OR DECEPTIVE CONDUCT – APPLICANTS AND FRANCHISEES

D1A. Goodwill Value Representation Contravention [and Renewal Representation Contravention](#)

40A. At all times material to the Relevant Period ([which includes the Goodwill Guidance Period, as defined below](#)):

- (a) within the Website, 7-Eleven published a section or webpage entitled “Franchising Opportunities” (**Franchising Opportunities Webpage**);
- (b) 7-Eleven published on the Franchising Opportunities Webpage:
 - (i) details of the Stores (**Listed Stores**) of existing Franchisees who sought to sell their Stores (**Outgoing Franchisees**); and
 - (ii) specific information in respect of each of the Listed Stores, (**Listed Stores Information**);
- (c) the Listed Stores Information:
 - (i) was published on the Franchising Opportunities Webpage by state, in respect of Listed Stores for each of Victoria, New South Wales and Queensland; and
 - (ii) could be downloaded, printed and reviewed by a prospective purchaser of a Store;
 - (iii) was also publishable, and published (in whole or in part, electronically or in hard copy), by 7-Eleven to existing Franchisees, employees and prospective franchisees.

Particulars

7-Eleven published Listed Stores Information to prospective franchisees, electronically (by emails to a list of interested prospective franchisees in Queensland, NSW, the ACT, Victoria and Western Australia and by emails to individuals who requested the Listed Stores Information), and in hard copy, in correspondence and meetings with prospective franchisees.

7-Eleven also provided to its employees and Franchisees, or enabled its employees to access, Listed Stores Information, which could then be passed on to other Franchisees and to prospective franchisees.

40B. The Listed Stores Information included:

- (a) the name and location of each of the Listed Stores;
- (b) the Franchisee Fee payable in respect of the purchase of each Listed Store;
- (c) the duration of the Franchise Agreement (**Franchise Agreement Term**) for any incoming Franchisee for each Listed Store, being either 10 years or the remainder of the existing lease term plus the period of any options to extend the existing lease;
- (d) the total retail sales achieved by each Listed Store in recent financial years;
- (e) the Franchisee total retail income, from retail sales for the Store (**Total Franchisee Retail Income**);
- (f) miscellaneous non-retail income for the Store (**Miscellaneous Non-Retail Income**);
- (g) the price sought for the goodwill by the Outgoing Franchisee, in respect of each Listed Store (**Goodwill Price**);
- (h) the *Franchise Fee* payable in respect of the purchase of the Store; and
- (i) no information concerning any of the *Operating Expenses* for any of the Listed Stores.

40C. During a period commencing on a date unknown to the Second Applicant but ending in about late November ~~September~~ 2015 (**Goodwill Guidance Period**), 7-Eleven advised some or all of the existing Franchisees, that if they sought to sell their Store, they should:

- (a) calculate a Goodwill Price by reference to the Total Franchisee Retail Income and Miscellaneous Non-Retail Income (together, the **Income Number, or IN**) of the most recent year's financial statements for the Store;
- (b) list their Store for sale with a Goodwill Price equal to (the Goodwill Formula):

- (i) in Victoria, as much as 2.2 to 2.7 x IN for the Store during the previous financial year (**Total Franchisee Income**);
 - (ii) in New South Wales, as much as 2.3 to 2.7 x IN; and
 - (iii) in Queensland, as much as 2.1 to 2.6 x IN,
- (**Goodwill Price Advice**).

Particulars

(A) *Internal 7-Eleven presentation titled “Franchising Fee & Goodwill Review” (SEV.0108.0062.2536).*

(B) *Document titled “Information and Tips for Selling your 7-Eleven Franchise” which is Exhibit PN-1 to the affidavit of Pawan Narang sworn 27 June 2019, p 36. By this document, 7-Eleven recommended, in 2015, that an Outgoing Franchisee in Victoria should adopt the following pricing strategy:*

- (1) *listing the Store with a Goodwill Payment of 2.7 times the Store’s “Income Number” (being a figure equivalent to the Total Franchisee Income) (**Store IN**) for the previous financial year, for a maximum period of 90 days;*
- (2) *in the absence of a sale during that period, listing the Store with a Goodwill price of 2.5 - 2.6 times the Store IN for the previous financial year, for a maximum period of a further 90 days;*
- (3) *in the absence of a sale during that second 90-day period, listing the Store with a Goodwill Payment of 2.4 - 2.5 times the Store IN for the previous financial year, for a maximum period of a further 90 days; and*
- (4) *in the absence of a sale during that third 90-day period, listing the Store with a Goodwill Payment of 2.3 times the Store IN for the previous financial year;*

(C) 7-Eleven Stores Pty Ltd Submission to the SLT (Senior Leadership Team) (SEV.0019.0001.0088).

(D) Email of 20 November 2015 from Scott Buckman (7-Eleven National Franchise Manager) to Brett Reading, Michael

McNamara, Peter O'Hara and Shayne Boogaard (7-Eleven's Franchise Development Managers) advising that Braeden Lord (of 7-Eleven) had requested "to NOT supply guidelines on Goodwill to Franchisees anymore" (SEV.0017.0012.5280).

(E) In or about May 2011, Len Campbell (7-Eleven Franchise Development Manager) orally advised Saj Rahman, in relation to the potential sale of the Boronia Store, "You will need to calculate the goodwill. Times your total retail income by around 2.4. It is usually a figure within the range of 2.2 to 2.7".

(F) In or about 24 July 2013, Peter O'Hara (7-Eleven Franchise Development Manager) orally advised Safwat Girgis, in relation to the value of the goodwill of the Ascot Vale Store, "We will have to take last year's sales figures and multiple them by 2.5... that is what the store will be valued at".

(G) Email dated 12 February 2013 from Michael McNamara (7-Eleven Victorian Franchise Development Manager) to 1230a Store Manager (SEV.0311.0002.2854).

(H) 7-Eleven Stores Pty Ltd Submission to the Board of Directors (Meeting 366) (SEV.0031.0001.0055 - 0101).

(I) Email dated 26 September 2012 from Michael McNamara (7-Eleven Franchise Development Manager) to Peter O'Hara, Brett Reading and Shayne Howarth (7-Eleven Franchise Development Managers) (SEV.0017.0060.7260).

40CA. Further, during the Goodwill Guidance Period, 7-Eleven advised prospective purchasers (or their principals) of franchises of existing Stores that the value of the goodwill of Stores was calculated by reference to:

- (a) the Goodwill Formula; or, alternatively,
- (b) a multiple of the Store franchisee's gross income in the most recent year's financial statements for the Store,

(Goodwill Purchase Advice).

Particulars

- (a) Goodwill Purchase Advice was provided to the Second Applicant:

- (i) orally, in conversations in about April 2013 between Jatinder Pal Singh on behalf of the Second Applicant, and Jatin Dewan of 7-Eleven; and
 - (ii) orally, in meetings and conversations, between June and July 2013 between Jatinder Pal Singh on behalf of the Second Applicant, and Michael McNamara (7-Eleven Victorian Franchise Development Manager); and
- (b) Goodwill Purchase Advice was, during the Goodwill Guidance Period, also provided to some of the other Franchisees (**Goodwill Value Representation Franchisees**), including as follows:
- (i) In or about July 2005, Len Campbell (7-Eleven Franchise Development Manager) orally advised Devassia Joseph that “A general guideline to calculate the goodwill is 2.2 to 2.8 times the total retail income of the store”;
 - (ii) In or about February 2008, Len Campbell (7-Eleven Franchise Development Manager) orally advised Sai Rahman, in relation to the goodwill price for a Store: “It’s how much the Store is worth. We calculate it based on a formula. It is a figure which is usually between 2.2 to 2.8 multiplied by the Franchisee total retail income”;
 - (iii) In or about late March 2008, Brett Reading (7-Eleven Queensland Franchise Development Manager) orally informed Ambika Nand that Store goodwill was calculated by multiplying Franchisee retail income by 2;
 - (iv) In or about February 2011, Scott Buckman (7-Eleven Manager) orally informed Reddy Veldurthi, in relation to the possible sale of the Southport 7-Eleven fuel store in the future, “The value of the store will be calculated on a formula. We calculate the value of stores at 2.4 times the total retail income of the store”;
 - (v) In or about July 2011, Michael McNamara (7-Eleven Victorian Franchise Development Manager) informed Pawan Narang in writing, in respect of the goodwill figure for the 7-Eleven fuel store at Clinton Hill, that 2.6 was the “Market Value multiplier” (page 32

of Exhibit PN-2 to the Affidavit of Pawan Narang sworn 23 October 2020);

- (vi) On or about 7 July 2011, Peter O'Hara (7-Eleven Victorian Franchise Development Manager) orally informed Nanette Wang, in response to a query as to how Stores were valued as to goodwill, "We use a formula across all of our stores. It is the store's retail income times a multiple figure of between 2.2 and 2.5";
- (vii) In about August 2011, Michael McNamara (7-Eleven Victorian Franchise Development Manager) orally informed Kailas Pujar, in respect of how Store goodwill was calculated, "We use a formula. It is calculated at 2.3 to 2.8 times the gross income";
- (viii) On 30 August 2012, Brett Reading (7-Eleven Queensland Franchise Development Manager) informed Ambika Nand by email that Store goodwill was calculated by multiplying Franchisee total retail income by 1.8 or 2.2;
- (ix) On about 31 July 2013, Ash Bennett (7-Eleven employee) orally informed Paresh Davaria that goodwill for Stores was generally valued on 2.3 to 2.8 times the gross merchandise income of a Store;
- (x) On or about 6 March 2014, Brett Reading (7-Eleven Queensland Franchising Development Manager) orally informed Wen Li "The goodwill price and the franchise fee are related to the level of merchandise sales. The goodwill price is influenced by two things: the level of merchandise sales, and the remaining term of the lease".

40CB. Further, during the Goodwill Guidance Period:

- (a) the Bank was the provider of finance to most incoming Franchisees, to enable them to pay for the purchase of goodwill and other acquisition costs in relation to the Store franchises; and
- (b) 7-Eleven advised the Bank that the current average goodwill for Stores was 2.3 times total income and that Stores could be advertised with 7-Eleven at up to 2.7 times total annual franchisee income (**ANZ Goodwill Advice**).

Particulars

Email correspondence of 24 and 25 March 2015 between Shayne Boogaard (7-Eleven NSW Franchise Manager) and Ian Brady of ANZ Bank (SEV.0209.0040.7970; SEV.0017.0008.4567).

- 40D. At all material times during the Goodwill Guidance Period, 7-Eleven calculated, and sought to charge, a Franchise Fee for a Listed Store by reference to a percentage of the *Gross Profit* for the Listed Store for the most recent financial year (being a figure having direct correlation with *Gross Income* and Store IN).

Particulars

(i) Subclause (f) to clauses 13.3, 13.4 and 13.5 of the Franchising Code Disclosure, and clause 13.3(a) of the Oilcode Disclosure.
(ii) Internal 7-Eleven presentation titled "Franchising Fee & Goodwill Review" (SEV.0108.0062.2536).

- 40E. By reason of the matters pleaded in paragraphs 40A to 40D above, ~~throughout so much of the Relevant Period that coincided with the publication of Goodwill Prices in reference to information provided by 7-Eleven~~ during the Goodwill Guidance Period (~~Relevant Guidance Period~~), 7-Eleven:

- (a) exercised, by the Goodwill Price Advice, Goodwill Purchase Advice, ANZ Goodwill Advice and publication of Listed Stores Information, substantial influence and control over:
- (i) the Goodwill Price of Listed Stores; and
 - (ii) as a consequence, the Goodwill Price for all other Stores available for sale;

Particulars

During the Relevant Goodwill Guidance Period,

- (i) *The Franchise Opportunities Webpage contained and permitted the viewing of the single largest collection of Stores offered for sale, and the sole publicly available repository of Listed Stores Information;*

- (ii) *Most Outgoing Franchisees caused their Store to be listed on the Franchise Opportunities Webpage, or were included in Lists of Stores for Sale published by 7-Eleven.*
- (b) represented, by each of the Goodwill Price Advice, Goodwill Purchase Advice, ANZ Goodwill Advice and through information published on the Franchising Opportunities Webpage and in Lists of Stores for Sale published by 7-Eleven, that the true and reasonable value of the goodwill associated with Listed Stores:
- (i) was related to, and referable to, the Total Franchisee Retail Income (or Total Franchisee Income) for each Listed Store; and
- (ii) was not related to, affected by, or referable to, the Operating Expenses of Listed Stores;
- (iia) could be increased in value by an incoming Franchisee, by increasing the volume of sales from, and so the Store IN of, a Store;
- (iib) could be sold in due course by that incoming Franchisee to a later incoming Franchisee;
- (iic) was appropriately valued against, or having regard to, the matters in subparagraphs (i) to (iib) above; and
- (ii)(iii) was reflected in the Goodwill Prices published on the Franchising Opportunities Webpage and elsewhere as part of the Listed Stores Information,

(Goodwill Value Representation).

40EA. Further or alternatively, prior to entry into Franchise Agreements 7-Eleven represented to the Second Applicant, and to some (which persons are also herein described as “Goodwill Value Representation Franchisees”) or all of the other Franchisees (including the First Applicant), that an incoming franchisee would be able to increase the value of the goodwill in their Store and sell it during or after the term of their Franchise Agreement to an incoming franchisee who would receive:

- (a) a 10-year Franchise Agreement Term or, alternatively the balance of the term of the Lease for the relevant Store including any options to extend the Lease; and
- (b) that 7-Eleven would, if the trading performance of the Store did not diminish substantially;
- (i) seek to exercise any option to extend an existing Lease; and
- (ii) seek to enter into a new Lease, upon it expiring;
- in respect of any Listed Store (**Renewal Representation**).

Particulars

- (A) The Renewal Representation was made by the publication of the Listed Stores Information:
- (1) in the circumstances pleaded in paragraph 106 below; and
- (2) accordingly, in circumstances where 7-Eleven knew, or ought to have known, that an incoming franchisee could only recoup its payment of the Goodwill Price by being able to sell goodwill associated with the Store in due course at a price calculated substantially in accordance with the Goodwill Price Advice.
- (B) The Renewal Representation was also made to the Second Applicant, in meetings and correspondence between June and July 2013 between Jatinder Pal Singh on behalf of the Second Applicant, and Michael McNamara of 7-Eleven including by making statements to the effect:
- (1) "This is a goldmine. Everyone is looking to buy 7-Eleven franchises. Look at the goodwill of the stores. Have a look at the prices when 7-Eleven took over Mobil and look at the prices now. Its doubled."
- (2) "We are the no.1 franchise in Australia and that is why everyone wants to be a franchisee. You will have no trouble selling your store and the goodwill value will only go up. The average life of a franchisee is 6 to 8 years. If the store is doing well, most

franchisees cash in the increase in goodwill or buy a second store.”

(C) The Renewal Representation was also made to some of the other Franchisees, including the First Applicant, in meetings and correspondence with management personnel within 7-Eleven, during which those management personnel made statements to the effect that:

(I) 7-Eleven has a formula that it uses to calculate the value of the goodwill for Stores;

(II) Goodwill is calculated at 2.2 – 2.7 times gross income;

(III) Franchisees can grow the goodwill of their business by increasing merchandise sales; and

(IV) Franchisees can make money on their Store by selling it after increasing the merchandise sales of the Store; and, or alternatively,

(V) 7-Eleven will extend the lease of the Store, so that Franchisees can either renew or sell their Store.

(D) Further particulars of the making of the Renewal Representation by 7-Eleven employees or agents to Franchisees (or their principals) are as follows:

(I) In or about July 2005, Len Campbell (7-Eleven Franchise Development Manager) made the Renewal Representation by orally informing Devassia Joseph that “A general guideline to calculate the goodwill is 2.2 to 2.8 times the total retail income of the store... You can increase the goodwill of your store if you work hard and increase the store profit and sales”;

(II) In or about 2007, Paul Stevens (7-Eleven’s NSW State Manager) made the Renewal Representation by orally informing Amjad Butt “If you make a success of the operation, we will look after you and given you another ten (10) years. That is our policy”;

(III) In or about February 2008, Len Campbell (7-Eleven Victorian Franchise Development Manager) orally advised Saj Rahman “the current Franchise Agreement is for 10 years. However, after this term is up, we will renew the agreement if you pay the renewal fee”;

(IV) In or about May 2008, Len Campbell (7-Eleven Victorian Franchise Development Manager) orally advised Saj Rahman “Once the 10 years has finished, you have two options. You can pay the franchise fee again and renew your agreement, or you can sell the store”;

(V) In or about February 2011:

(a) Scott Buckman (7-Eleven Regional Manager in Queensland) orally informed Reddy Veldurthi, in relation to the possible sale of the Southport 7-Eleven fuel store in the future, “You can sell the store, the buyers will have to be approved by 7-Eleven. The value of the store will be calculated on a formula. We calculate the value of stores at 2.4 times the total retail income of the store. ... Your Franchise Agreement is for 10 years and the lease on the Southport store property is until 2033. After 10 years, if you are doing a good job, we will renew your agreement and you can continue running the store”; and

(b) Brett Reading (7-Eleven Queensland Franchising Development Manager) orally informed Reddy Veldurthi, in relation to the possible sale of the Southport 7-Eleven fuel store in the future, “Our franchise agreements are for 10 years, but if you want to renew it after the 10 years is up, you can. We have had franchisees in the system for decades”;

(VI) In or about April 2011, Brett Reading (7-Eleven Queensland Franchising Development Manager) orally informed Reddy Veldurthi, in relation to the operation of the Southport 7-Eleven fuel store in the future, “You can run it for 20 years.

... Your agreement will get renewed, you will just have to pay another fee”;

(VII) In about August 2011, Shayne Howarth (7-Eleven NSW Franchise Development Manager, later “Shayne Boogaard”) orally informed Bikram Singh “Provided you are willing to pay another franchise fee after 10 years, we will renew your lease”;

(VIII) In about August 2011, Michael McNamara (7-Eleven Victorian Franchise Development Manager) orally informed Kailas Pujar, “Franchise agreements are for 10 years. After that, you can renew or sell, it’s up to you”;

(IX) On or about 26 August 2011, Peter O’Hara (7-Eleven Victorian Franchise Development Manager) orally informed Nanette Wang “Once the 10 years is up on your Franchise Agreement, you can apply for renewal. You will just need to pay the franchise fee again”;

(X) On or about 17 July 2013, Ash Bennett (7-Eleven employee) orally informed Paresh Davaria, in response to a query as to what happens after the 10-year Franchise Agreement term, “You can either sell your store to another purchaser... or you can pay the franchise fee again and 7-Eleven will extend your Franchise Agreement for another 10 years”, and, in relation to an extension of the current lease beyond its expiry date in 2024, “You don’t have to worry about that. 7-Eleven is responsible for the lease and we will extend the lease”;

(XI) on or about 6 March 2014, Brett Reading (7-Eleven Queensland Franchising Development Manager) orally informed Wen Li “There are two types of franchisee. The first type buys a store and installs a manager to run it. Those franchisees didn’t make any money and usually sell the store after 2 to 3 years. The second type of franchisee runs the store themselves and is able to make money by two means: by building up the level of sales of merchandise in the store which results in more income for the franchisee, and by selling the store after about 5 to 6 years, when the

value of the goodwill increases from increased sales through the store. 7-Eleven has a formula for calculating the value of goodwill of a 7-Eleven store, which is related to the level of sales through the store”;

(XII) on or about 8 April 2014, Sarah Ford (7-Eleven Regional Manager in Queensland) orally informed Wen Li “There are a lot of franchisees [who] grow the goodwill of their business and then they can sell it for a higher price. We have a formula to calculate goodwill”.

and otherwise will be provided following the determination of the Applicants’ claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees.

40EB. By making the Renewal Representation, 7-Eleven:

(a) represented the matters pleaded in subparagraphs 40E(b)(iia) to 40E(b)(iii) above;

(b) thereby made and/or reiterated, the Goodwill Value Representation.

40F. The Goodwill Value Representation was :

(a) made in trade or commerce, within the meaning of section 52 of the TPA or section 18 of the ACL (as applicable); and

(b) a continuing representation, throughout the ~~Relevant Goodwill~~ Guidance Period and, or alternatively, a representation as to future matters, within the meaning of section 51A of the TPA or section 4 of the ACL (as applicable).

40G. Listed Stores Information:

(a) was reviewed and considered by the Second Applicant, between about May and July 2013, prior to, and for the purposes of making, its decision to purchase the South Melbourne Store; and

(b) was, during the ~~Relevant Goodwill Guidance~~ Period, also reviewed and considered by some (which persons are also herein described as “Goodwill Value Representation Franchisees”) or all of the Franchisees, including the

First Applicant, prior to, and for the purposes of making, their decision to purchase their respective Stores.

40H. The Goodwill Value Representation was, throughout the [Relevant Goodwill](#) Guidance Period, untrue, because:

- (a) the true value of the goodwill associated with the operation of an existing Store was a reflection of, or otherwise related to:
 - (i) the true profitability of the Store; and
 - (ii) accordingly, its Total Franchisee Income less its *Operating Expenses*;

and,

- (b) the actual *Operating Expenses*, including the true labour costs of operating Listed Stores, compared to the Total Franchisee Income of Listed Stores, caused the true value of the goodwill for each of the Listed Stores to be:
 - (i) worthless; or, alternatively,
 - (ii) far less than the Goodwill Price published by 7-Eleven on the Franchising Opportunities Webpage and elsewhere, as part of the Listed Stores Information.

Particulars

(A) *The true labour costs of operating Listed Stores were, at a minimum:*

- (1) *the award labour costs of employees operating the Store for, on average, [486.3205](#) hours per week, as stated in 7-Eleven's Training Workbook; or*
- (2) *alternatively, the award labour costs of operating the Store for, on average, [486.3205](#) hours per week, less the hours contributed by the principal(s) of the Franchisee that did not, actually or effectively, constitute hours worked as an employee of the Franchisee.*

(B) *In combination with other operating expenses, the true labour costs caused Listed Stores to:*

- (I) be unprofitable, or only minimally profitable;
- (II) have, accordingly, goodwill of nil or minimal value.

40I. Further, the Goodwill Value Representation was, throughout the Relevant Goodwill Guidance Period, and the remainder of the Relevant Period after the Goodwill Guidance Period ended, untrue, because it:

- (a) was predicated on:
 - (i) a 10-year Franchise Agreement Term; or, alternatively,
 - (ii) a Franchise Agreement Term for the balance of the existing term of the Lease for the relevant Store, plus any options to extend the Lease,

being made available to an incoming ~~f~~Franchisee; and
- (b) made no allowance for the fact that:
 - (i) the Lease to which a Store was subject, together with any options to extend the Lease, might be less than 10 years; and, or alternatively,
 - (ii) the Lease to which a Store was subject might not extend to a further 10-year period unless one or more options to extend the Lease were exercised by 7-Eleven; and
- (c) 7-Eleven reserved to itself the right to not exercise any option to extend a Lease.

Particulars

- (i) *Article 2(f) of the Franchise Agreement.*
- (ii) *The matters pleaded in paragraphs 92(e) and 94A to 94C below.*

40J. ~~Further or alternatively to the matters pleaded in paragraph 40I above, the Goodwill Value Representation was, throughout the Relevant Guidance Period, untrue, because prior to entry into Franchise Agreements 7-Eleven represented to the Second Applicant, to the Goodwill Value Representation Franchisees and to some or all of the other Franchisees (including the First Applicant), that an incoming franchisee would be able to increase the value of the goodwill in their~~

~~Store and sell it during or after the term of their Franchise Agreement to an incoming franchisee who would receive:~~

~~a 10-year Franchise Agreement Term or, alternatively the balance of the term of the Lease for the relevant Store including any options to extend the Lease; and~~

~~that 7-Eleven would, if the trading performance of the Store did not diminish substantially:~~

~~seek to exercise any option to extend an existing Lease; and~~

~~seek to enter into a new Lease, upon it expiring;~~

~~in respect of any Listed Store (**Renewal Representation**).~~

Particulars

~~The Renewal Representation was made by the publication of the Listed Stores Information:~~

~~in the circumstances pleaded in paragraph 106 below; and~~

~~accordingly, in circumstances where 7-Eleven knew, or ought to have known, that an incoming franchisee could only recoup its payment of the Goodwill Price by being able to sell goodwill associated with the Store in due course at a price calculated substantially in accordance with the Goodwill Price Advice.~~

~~The Renewal Representation was also made to the Second Applicant, in meetings and correspondence between June and July 2013 between Jatinder Pal Singh on behalf of the Second Applicant, and Michael McNamara of 7-Eleven including by making statements to the effect:~~

~~“This is a goldmine. Everyone is looking to buy 7-Eleven franchises. Look at the goodwill of the stores. Have a look at the prices when 7-Eleven took over Mobil and look at the prices now. Its doubled.”~~

~~“We are the no.1 franchise in Australia and that is why everyone wants to be a franchisee. You will have no trouble selling your store and the goodwill value will only go up. The average life of a franchisee is 6 to 8 years. If the store is doing well, most franchisees cash in the increase in goodwill or buy a second store.”~~

~~The Renewal Representation was also made to some of the other Franchisees, including the First Applicant, in meetings and correspondence with management personnel within 7-Eleven, during which those management personnel made statements to the effect that:~~

~~7-Eleven has a formula that it uses to calculate the value of the goodwill for Stores;~~

~~Goodwill is calculated at 2.2—2.7 times gross income;~~

~~Franchisees can grow the goodwill of their business by increasing merchandise sales; and~~

~~Franchisees can make money on their Store by selling it after increasing the merchandise sales of the Store.~~

~~Further particulars of the making of the Renewal Representation by 7-Eleven employees or agents to Franchisees will be provided following the determination of the Applicants' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees. [Deleted]~~

40K. In the premises of the matters pleaded in paragraphs 40H and 40I, ~~and, or alternatively, paragraphs 40H and 40J,~~ above, at all material times:

- (a) the Goodwill Value Representation was misleading or deceptive, or likely to mislead or deceive;
- (b) by making the Goodwill Value Representation, 7-Eleven engaged in conduct in contravention of:
 - (i) section 52 of the TPA; or
 - (ii) section 18 of the ACL,

(Goodwill Value Representation Contravention).

D1. 7-Eleven's pre-contractual statements and Disclosure

41. Prior to each of the Applicants and each other Franchisee entering a Franchise Agreement, 7-Eleven provided:

- (a) each of them with an "Introductory Pack" of information which included:

- (i) a brochure entitled "The 7-Eleven Franchise System" (**7-Eleven Brochure**) as updated from time to time;
 - (ii) spread-sheets containing:
 - (1) average financial information across all Stores (nationally) in the previous two financial years; and
 - (2) a spread-sheet containing average financial information across all Fuel Stores or Convenience Stores (as relevant to the Franchisee's prospective purchase) for the previous two financial years in the state in which the Franchisee proposed to operate,
 (separately and together, **Average Store Financials**); and
 - (iii) income and expense statements for the previous three financial years for the particular Convenience Store(s) or Fuel Store(s) which they had expressed an interest in purchasing (**Individual Store Financials**);
- (b) in the case of the First Applicant and each other Franchisee who purchased Convenience Stores, a document entitled "*7-Eleven Stores Pty Ltd Franchising Code Disclosure Document for Franchisee or Prospective Franchisee*" (**Franchising Code Disclosure**) as updated from time to time during the Relevant Period;
 - (c) in the case of the First Applicant and each other Franchisee who purchased a Fuel Store, a document entitled "*7-Eleven Stores Pty Ltd Oilcode Disclosure Document*" as updated from time to time during the Relevant Period (**Oilcode Disclosure**).

Particulars

Prior to the First Applicant entering into the Campbelltown Store Franchise Agreement, 7-Eleven provided it:

- (i) *by email from Ash Bennett (NSW District Manager) (Bennett) to Paresh Davaria dated 9 July 2013, the 7-Eleven Brochure in force as at that date;*
- (ii) *by email from Bennett to Paresh Davaria dated 10 July 2013, the Average Store Financials for the previous two financial years nationally and for NSW Convenience Stores, as well as a list of*

Stores for sale, entitled “Franchise Opportunities: NSW” and dated 3 July 2013;

- (iii) *by email from Bennett to Paresh Davaria on 17 July 2013, the Individual Store Financials for the Campbelltown Store for the previous three financial years (**Campbelltown Store Financials**).*

42. In each version of the 7-Eleven Brochure published during the Relevant Period, 7-Eleven stated (inter alia) that:

- (a) “A 7-Eleven Franchise is your opportunity of making dreams come true. It offers the chance to operate your own business, to be your own boss, and build something you can be proud of” (2013 Brochure, page 1);
- (b) “To become a 7-Eleven franchisee, you’ll need a willingness to work hard to enhance your 7-Eleven business” (2013 Brochure, page 1);
- (c) “In the convenience store industry, 7-Eleven is number one” (2013 Brochure, page 1);
- (d) “7-Eleven offers prospective Franchisees a business system and a ready to operate store that appreciates the needs of the customer”;
- (e) Under the heading “Business System”:
- (i) “The 7-Eleven business system provides a valuable trademark recognised worldwide, a proven system of operation, an established image and a well accepted franchise concept”;
- (ii) “The ongoing link between you and 7-Eleven will be your operations District Manager. Your District Manager will work with you to monitor and develop your individual business. Analysis of store trading performance, operating expenses, product ranging and merchandising, implementation of marketing and promotional programmes are just a few of the areas where support is provided”;
- (together and separately, **7-Eleven Business Opportunity Statements**);
- (f) “7-Eleven offers assistance in this area by preparing lists of recommended suppliers and merchandise together with recommended retail prices. From this extensive list, you may choose which lines you will range in your store” (**7-Eleven Supplier and Merchandise List Statement**).

43. In each version of the Franchising Code Disclosure published during the Relevant Period, 7-Eleven made the following statements:

- (a) “[7-Eleven] does not receive rebates from any supply of goods it makes to Franchisees of its branded or proprietary goods, unlike the rebates it receives on goods which are provided to Franchisees by suppliers and which are disclosed at paragraph 15 of this document.” [Clause 10.1(j)]
- (b) “Rebates paid to the Franchisee by third-party suppliers are applied entirely towards marketing and promotional expenses or are otherwise shared with Franchisees (as explained in 15.1 below).” [Clause 10.1(k)]
- (c) “The Franchisee is not required to make any periodic or other contributions to any marketing or other co-operative fund. [7-Eleven] collects and administers marketing funds paid to it by Vendors of goods or services to the 7-Eleven stores franchised network (which includes the fuel re-selling network). The value of such payments is mostly based on the volume of purchases of goods by Franchisees from the vendors for on-sale from the 7-Eleven Stores as part of their franchised business in accordance with the supply terms [7-Eleven] negotiates with the vendors in relation to their supply of goods and services to its franchise network. [7-Eleven] accounts for the money it so collects and applies that money, first for the production and supply of point of sale, advertising and promotional material based on its marketing spend for the appropriate financial year. Any remaining money is applied to reduce the cost of goods and shared as part of the Gross Profit in accordance with the Store Agreement. Where the cost of the marketing and promotional material exceeds in any year the amount collected by [7-Eleven] in the fund, [7-Eleven] Contributes that additional amount” [Clause 15.1(a)],
- (d) “The Franchisees do not have to directly contribute to the fund. The source of funding is as described in above item 15.1(a)” [Clause 15.1(b)],
- (e) “The fund was used in its entirety during the financial year for the payment of the costs of advertising and point of sale marketing material used in the 7-Eleven Stores” [Clause 15.1(g)],

(together and separately, “**Franchising Code Advertising Fund Disclosure Statements**”); and

- (f) “7-Eleven does not give earnings information about a 7-Eleven Store Franchise.

Earnings may differ between store franchises.

[7-Eleven] cannot estimate earnings for a particular franchise.

However, [7-Eleven] has attached a statement of Average Earnings for the State within which your store will be situated (Refer to attachment C) and if your store is an existing Store, a copy of the income and expense statement and balance sheet for that Store for up to the last 3 financial years. It is important to note however that whilst [7-Eleven] is making available to you the existing financial information, such information is based on information provided to [7-Eleven] by its Franchisee and [7-Eleven] does not warrant its accuracy nor does it represent or warrant that the information accurately portrays the business performance of the Store”,

(Franchising Code Earnings Disclosure Statement).

44. In each version of the Oilcode Disclosure published during the Relevant Period, 7-Eleven stated:

- (a) “The Supplier [7-Eleven] does not receive rebates from any supply of goods it makes to Retailers [Franchisees] of its branded or proprietary goods, unlike the rebates it receives on goods which are provided to its Retailers by suppliers and which are disclosed at paragraph 12 of this document the benefit of which is shared with all Retailers in the form of funding of marketing promotions and initiatives.” [Clause 9.1(j)]
- (b) “The Supplier collects and administers marketing funds paid to it by suppliers of goods or services to the 7-Eleven stores franchised network. The value of such payments is mostly based on the volume of purchases of goods by Franchisees and Retailers from the vendors for on-sale by them from the 7-Eleven Stores as part of their Franchise or Fuel Re-selling Businesses in accordance with the supply terms the Supplier negotiates with the vendors in relation to their supply of goods and services to its franchise network. The Supplier accounts for the money it so collects and applies that money first for the production and supply of point of sale, advertising and promotional material based on its marketing spend for the appropriate financial year. Any remaining money is applied to reduce the cost of goods and shared as part of the Gross Profit in accordance with the

Store Agreement. Where the cost of the marketing and promotional material exceeds in any year the amount collected by the Supplier in the fund, the Supplier contributes that additional amount.” [Clause 12.1(a)],

- (c) “The Retailers do not have to directly contribute to the fund. Their only contribution is described in above paragraph 12.1(a)” [Clause 12.1(c)],
- (d) “The fund was used in its entirety during the financial year for the payment of the costs of advertising and point of sale marketing material used in the 7-Eleven Stores” [Clause 12.1(h)],

(together and separately, **Oilcode Advertising Fund Disclosure Statements**)

- (e) “The Supplier does not give earnings information about new 7-Eleven Store Fuel Re-selling Businesses.

Earnings may differ between Fuel Re-selling Businesses.

The Supplier cannot estimate earnings for a particular Fuel Re-selling Businesses.

However, [7-Eleven] has attached a statement of Average Earnings for the State within which your store will be situated (Refer to attachment C) and if your store is an existing Store, a copy of the income and expense statement and balance sheet for that Store for up to the last 3 financial years. It is important to note however that whilst the Supplier is making available to you the existing financial information, such information is based on information provided to the Supplier by its Retailer/s and the Supplier does not warrant its accuracy nor does it represent or warrant that the information accurately portrays the business performance of the Store”

(Oilcode Earnings Disclosure Statement).

45. The purpose of the Franchising Code Disclosure and the Oilcode Disclosure is **(Disclosure Purpose):**

- (a) In the case of the Franchising Codes:
 - (i) to give a prospective franchisee or a franchisee proposing to enter into, renew, extend or extend the scope of an existing franchise agreement, information from 7-Eleven to help the franchisee to make a reasonably informed decision about the franchise; and
 - (ii) to give a franchisee current information from 7-Eleven that is material to the running of the franchised business;

- (b) In the case of the Oilcode:
- (i) to allow a supplier (here, 7-Eleven) to give a person adequate information to help the retailer (here, the Franchisee) make a reasonably informed decision about an agreement (here the Franchise Agreement); and
 - (ii) to give a retailer (the Franchisee) current information that is relevant to the operation of the retailer's (Franchisee's) retail business.

D2. [NOT USED]

46. [NOT USED]

47. [NOT USED]

48. [NOT USED]

48A [NOT USED]

49. [NOT USED]

D3 [NOT USED]

50. [NOT USED]

51. [NOT USED]

D4 Average Store Financials Accuracy Representation Contravention

52. Further, and in the alternative, by providing Average Store Financials to the First Applicant and each other Franchisee, 7-Eleven represented to the First Applicant or Franchisee that:

- (a) 7-Eleven was not aware of any, or any substantial or material, inaccuracies in the figures in the Average Store Financials as provided to each of the Applicants or Franchisee that would render those Average Store Financials unreliable as an estimate of the costs and revenues involved in the operation of a Store as part of the *7-Eleven System*; and
- (b) 7-Eleven had taken all due skill and care to compile the information contained in the Average Store Financials for consideration by the recipient Franchisee and/or its advisers in relation to the entry into a Franchise Agreement by the Franchisee, subject to the limitation as to the reliability

of data provided by individual Store operators to 7-Eleven for the purpose of preparing that information;

(separately or together, in respect of each of the Applicants and each Franchisee, the **Average Store Financials Accuracy Representation**).

Particulars

The representation was implied from the terms of the Average Store Financials and the Franchise Agreement (and in particular Article 22 and Exhibit D), and the provision of those documents to the First Applicant and the Franchisees.

In the alternative, the representation was conveyed by silence, as the First Applicant did expect, and each other Franchisee would have reasonably expected, in the circumstances of a prospective entry into a Franchise Agreement, ~~reasonably have expected~~ 7-Eleven to:

- (i) *have sufficient familiarity with the financial operation of the 7-Eleven System to be in a position to readily discern any errors, omissions or discrepancies in the Average Store Financials which would render them unreliable; and*
- (ii) *disclose to them any aspect of the Average Store Financials figures of which it was aware which might render that information unreliable having regard to the following circumstances:*
 - (1) *the Average Store Financials document was provided to the First Applicant and each other Franchisee as prospective franchisees at the time each of them was contemplating entry into a Franchise Agreement, and for the purpose of assisting them to consider whether to purchase a Store, including seeking advice from their advisers based on that information in relation to that decision;*
 - (2) *it is to be reasonably inferred from the Franchising Code Earnings Disclosure Statement and/or the Oilcode Earnings Disclosure Statement that the Average Store Financials was provided to the First Applicant and each other Franchisee as a cross-check against potential inaccuracies in any individual Store financial information provided to them prior to their entry into their Franchise Agreements;*

- (3) *further and in the alternative, prior to 1 January 2015, 7-Eleven was under an obligation pursuant to section 6(2) and Clause 19 of Annexure 1 of the Franchising Code 2010 only to provide earnings information (which included information from which historical or future financial details of a franchise can be assessed) which was based on reasonable grounds, such that a person in the position of the First Applicant and each Franchisee could reasonably have expected that this was the case in the absence of a clear statement by 7-Eleven to the contrary;*
- (4) *further and in the alternative, after 1 January 2015, 7-Eleven had an express duty pursuant to section 6(2) of the Franchising Code 2014 to act towards a person who proposed to become a party to a franchise agreement in good faith in any dealing relating to ~~the~~ a proposed franchise agreement such that any such prospective franchisee would expect that any material inaccuracy in the Average Store Financials of which 7-Eleven was aware of would be disclosed to them;*
- (5) *further and in the alternative, 7-Eleven knew or ought to have known that prospective franchisees and their advisers would rely on the Average Store Financials in deciding whether to enter into franchise agreements with 7-Eleven, as that was the purpose for which the information was provided by 7-Eleven.*
53. The Average Store Financials Accuracy Representation was a continuing representation from the time it was made to the First Applicant and each Franchisee until about the time of the publication of the Media Investigative Reporting referred to in paragraphs 90 to 92 below (being 29 and 31 August 2015).
54. Each Average Store Financials Accuracy Representation was made in trade or commerce, within the meaning of section 18 of the ACL and /or section 52 of the TPA and/or section 12DA of the ASIC Act.
55. Each Average Store Financials Accuracy Representation was, throughout the Relevant Period, misleading or deceptive, or likely to mislead or deceive.

Particulars

- (a) *There were, and 7-Eleven knew or ought to have known* that there were, *substantial or material, inaccuracies in the figures provided in the Average Store Financials that would render those Financials unreliable as an estimate of the costs actually paid, or required to be paid, and revenues involved in the operation of a Store as part of the 7-Eleven System by reason of the matters pleaded and particularised in subparagraphs 106(a), 106(b), 106(c), 106(d), 106(g), 106(i), 106(j) and 106(k) below.*
- (b) *Further and in the alternative, 7-Eleven did not exercise all due care and skill and care to compile the information contained in the Average Store Financials for consideration by the Franchisee and its advisers in relation to the entry into a Franchise Agreement by the Franchisee, and/or was indifferent to whether or not the information contained in the Average Store Financials was reliable in relation to the labour costs required to be paid in respect of operating a Store as part of the 7-Eleven System, as:*
- (i) *7-Eleven knew or ought to have known of: (A) the hours of operation of each Store and the award rates applicable to each store (as pleaded and particularised in paragraphs 106(g) and 106(h) below) and (B) the actual wages information supplied to it by each Store; and*
- (ii) *from that information, 7-Eleven knew, and, or alternatively, was able to calculate the extent to which either:*
- (1) *each Store which provided financial information to it was underpaying or under-declaring to 7-Eleven the wages being paid or which were required to be paid to its workers; and/or*
- (2) *labour was being supplied to the Franchisee at each Store by the principals and/or their family members for nothing or at a rate below the award rate;*
- (iii) *in the premises, the methodology adopted by 7-Eleven for reviewing or appraising the operation of individual Stores did not determine the extent to which either:*

- (1) *the Store was underpaying or under-declaring to 7-Eleven the wages being paid or which were required to be paid to its workers; and/or*
- (2) *labour was being supplied to the Franchisee at that Store by its principals and/or their family members for nothing or at a rate below the award rate; and*
- (iv) *7-Eleven, in compiling and presenting the Average Store Financials to the First Applicant and each other Franchisee or their advisers, failed to disclose that the wages shown in the Average Store Financials were materially understated because the information failed to take account of:*
 - (1) *underpayment or under-declared wages of workers at the relevant Stores; and/or*
 - (2) *the supply of labour to the relevant Stores by the principals of the Franchisee or their family members for nothing or at a rate below the award rate;*

with the consequence that profitability of the Stores was materially overstated in the Average Store Financials.

- (c) *Further particulars may be provided on service of the Applicant's expert evidence and after discovery.*

56. In the premises, by making each Average Store Financials Accuracy Representation, 7-Eleven engaged in conduct in contravention of:

- (a) section 52 of the TPA; and/or
- (b) section 18 of the ACL.

(Average Store Financials Accuracy Representation Contravention).

D5. Future Average Payroll Cost Representation Contravention

57. Further, or in the alternative, by providing Average Store Financials to the First Applicant and each other Franchisee, 7-Eleven represented that the average Store shown therein:

- (a) could be operated in compliance with employment awards for a wages cost approximating that shown in the Average Store Financials; and/or

- (b) would not require the principals of the Franchisee or their family members to work for nothing or at rates below the award rates for labour, either at all or for an unreasonable or unsociable number of hours each week (separately or together the **Future Average Payroll Cost Representation**).

Particulars

- (c) *The Applicants repeat the matters pleaded and particularised in paragraph 52 above.*
58. Each Future Average Payroll Cost Representation was a continuing representation from the time it was made to the First Applicant and other Franchisees until the time of the publication of the Media Investigative Reporting referred to in paragraphs 90 to 92 below (being 29 and 31 August 2015).
59. Each Future Average Payroll Cost Representation was made in trade or commerce, within the meaning of section 52 of the TPA and/or section 18 of the ACL.
60. Insofar as each Future Average Payroll Cost Representation was a representation as to a future matter or future matters, the First Applicant relies on:
- (a) section 51A of the TPA; and/or
- (b) section 4 of the ACL.
61. Each Future Average Payroll Cost Representation was throughout the Relevant Period:
- (a) insofar as it was a representation as to a present matter or present matters, misleading or deceptive, or likely to mislead or deceive;
- (b) insofar as it was a representation as to a future matter or future matters, misleading or deceptive.

Particulars

The First Applicant relies on paragraph 60 above.

The First Applicant repeats the matters pleaded and particularised in relation to paragraph 55 above.

62. In the premises, by making each Future Average Payroll Cost Representation 7-Eleven engaged in conduct in contravention of:
- (a) section 52 of the TPA; and/or

- (b) section 18 of the Australian Consumer Law,
(**Future Average Payroll Cost Representation Contravention**).

D6. [not used]

63. [not used]

D7. Advertising Fund Representation Contraventions

Breach of the Franchising Codes and the Oilcode

64. It was a requirement of the Franchising Codes, and the Oilcode, that the disclosure documents as defined in each of those respective Codes include details of whether 7-Eleven (referred to as the “supplier” in the Oilcode) will receive a rebate or other financial benefit from the supply of goods or services to the Franchisee (referred to as the “retailer” in the Oilcode), and whether any rebate or financial benefit is shared, directly or indirectly, with the Franchisee [Franchising Codes, Annexure 1, clause 10.1(j); Oilcode, Annexure 1, clause 9.1(j)] (**Rebates and Other Benefits Disclosure Obligation**).
65. It was a requirement of the Franchising Codes, and the Oilcode, that the disclosure documents as defined in each of those respective Codes include the following information for each marketing or cooperative fund controlled or administered by 7-Eleven (referred to as the “supplier” in the Oilcode), to which a Franchisee (referred to as the “retailer” in the Oilcode) may be required to contribute, details to include the following:
- (a) how much the Franchisee must contribute to the fund [Franchising Codes, Annexure 1, clause 15.1(b); Oilcode, Annexure 1, clause 12.1(c)];
 - (b) the fund’s expenses for the last financial year, including the percentage spent on production, advertising, administration and other stated expenses [Franchising Codes, Annexure 1, clause 15.1(g); Oilcode, Annexure 1, clause 12.1(h)] (**Advertising Fund Disclosure Obligation**).
66. The Franchising Code Advertising Fund Disclosure Statements and/or the Oilcode Advertising Fund Disclosure Statements did not, and nor did the content of the Franchising Code Disclosure and/or the Oilcode Disclosure otherwise:
- (a) provide any details, or other information, about “other financial benefits” received by 7-Eleven from the supply of goods or services to the

Franchisee, in contravention of the Rebates and Other Benefits Disclosure Obligation;

- (b) provide any, or any sufficient, details about the “rebates” received by 7-Eleven from, or in relation to, the supply of goods or services to the Franchisee, including in particular the identity of the provider of each rebate and the basis upon which each rebate was calculated and paid to 7-Eleven, in contravention of the Rebates and Other Benefits Disclosure Obligation;
- (c) provide any, or any sufficient, details about the amount of money contributed by the Franchisees, [or required to be contributed by a prospective Franchisee](#), (by way of the direct, or indirect, contributions in the form of rebates received, as stated by 7-Eleven, or otherwise) to the Fund, including in particular the identity of the source and amount of each rebate so provided to the fund, in contravention of the Advertising Fund Disclosure Obligation;
- (d) provide any percentage breakdown of, or monetary figures showing, the amount spent on each items of production, advertising, administration and other stated expenses, in contravention of the Advertising Fund Disclosure Obligation.

67. By reason of paragraphs 64 to 66 above, 7-Eleven has, in contravention of section 51ACB of the CCA [and/or section 51AD of the TPA](#), contravened each of:

- (a) Clause 6 of the Franchising Code 2010;
- (b) Clause 8 of the Franchising Code 2014; and, further or alternatively
- (c) Clause 13 of the Oilcode;

(collectively the **Code Disclosure Contraventions**).

Misleading or Deceptive Conduct

68. By making the Franchising Code Advertising Fund Disclosure Statements and/or the Oilcode Advertising Fund Disclosure Statements to each of the Applicants and each other Franchisee, 7-Eleven represented that Franchisees would not be required to make any direct, periodic or other contributions to any marketing or other co-operative fund (**Advertising Fund Representation**).

Particulars

The representation was express and conveyed by the Franchising Code Advertising Fund Disclosure Statements and the Oilcode Advertising Fund Disclosure Statements.

69. The Advertising Fund Representation was:
- (a) a representation about a future matter; and
 - (b) a continuing representation throughout the Relevant Period.
70. The Advertising Fund Representation was made in trade or commerce, within the meaning of section 52 of the TPA or section 18 of the ACL (as applicable).
71. The Advertising Fund Representation was, throughout the Relevant Period, misleading or deceptive, or likely to mislead or deceive.

Particulars

Section 51A of the TPA; and/or section 4 of the ACL.

- (a) *The effect of 7-Eleven's failure to negotiate Franchisee Wholesale Prices with C-Store which did not exceed:*
 - (i) *the Independent Fair Wholesale Price; and/or*
 - (ii) *the Best Endeavours Wholesale Price;*

was:

 - (1) *the Metcash Shared Discount Arrangement; and*
 - (2) *that C-Store Discounts, plus any, or any other, Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments applicable or attributable to stock items purchased by Franchisees, were made available to 7-Eleven to fund 7-Eleven In-store Advertising and Institutional Advertising, that would otherwise have been applied in reduction of the Franchisee Wholesale Price; and*
- (aa) *further or alternatively:*
 - (i) *all Supplier Discounts arose entirely or substantially in consequence of Purchases made by Franchisees;*
 - (ii) *by Article 20(f) of the Franchise Agreement, each Franchisee appointed 7-Eleven as the Franchisee's agent to collect all*

discounts and allowances applicable to Purchases which are not deducted from the face of the Franchisee's receipts and invoices;

(iii) *by virtue of the matters in (i) and (ii) above, 7-Eleven was paid, or otherwise received, Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments; and*

(iv) *by Article 20(g) of the Franchise Agreement, 7-Eleven*

(A) *was entitled to apply Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments towards In-store Advertising and/or Institutional Advertising; and*

(B) *was otherwise obligated to credit Direct Purchase Discount Payments and Direct Miscellaneous Discount Payments against the Cost of Goods Sold;*

(b) *by reason of (a) and / or (aa) above, each of the Applicants and each other Franchisee was, contrary to the Advertising Fund Representation, required to contribute (directly or indirectly) to 7-Eleven In-store Advertising and Institutional Advertising.*

72. In the premises, by making the Advertising Fund Representation 7-Eleven engaged in conduct in contravention of:

(a) section 52 of the TPA; and/or

(b) section 18 of the ACL

(Advertising Fund Representation Contravention).

D8 7-Eleven Supplier Representation Contravention

73. By providing the 7-Eleven Brochure to each of the Applicants and some or all of the Franchisees, 7-Eleven represented to each of the Applicants and each other recipient Franchisee that it would provide them with an extensive list of suppliers and merchandise from which they could choose product lines to include in their Store (**7-Eleven Supplier Representation**).

Particulars

The representation was express and conveyed by the 7-Eleven Supplier and Merchandise List Statement.

74. The 7-Eleven Supplier Representation was a:

- (a) representation as to a future matter;
- (b) continuing representation throughout the Relevant Period.

75. By making the 7-Eleven Supplier Representation, 7-Eleven engaged in conduct in trade or commerce, within the meaning of section 18 of the ACL and/or section 52 of the TPA.

75A During the Relevant Period:

- (a) 7-Eleven provided each of the Applicants and each other Franchisee with:
 - (i) only one choice of supplier for the vast majority of stock items which might be, sold from Stores (being C-Store);
 - ~~(i)~~(ii) only one choice for the supply of all or most of the other goods through the Online Portal (namely Daily Fresh);
- (b) 7-Eleven chose product lines and the supplier of those product lines on the Franchisees' behalf and gave each of the Applicants and each other Franchisee only limited choice as to the product lines they could carry in their Store.

76. In the premises in the preceding paragraph, the 7-Eleven Supplier Representation was, throughout the Relevant Period, misleading or deceptive, or likely to mislead or deceive (**7-Eleven Supplier Representation Contravention**).

D9. 7- Eleven Volume Pricing Representation Contravention

77. By:

- (a) providing the 7-Eleven Brochure and the Franchise Agreement to each of the Applicants and some or all of the Franchisees; and, or alternatively,
- (b) oral representations made by 7-Eleven employees or agents to some or all of the Franchisees in the course of:
 - (i) meetings between 7-Eleven management personnel and the Second Applicant;
 - (ii) 7-Eleven Franchisee Training (SEFT) sessions attended by some of the Franchisees;

prior to execution of those Franchisees' respective Franchise Agreements (as 7-Eleven did), 7-Eleven made the Volume Pricing Representation.

Particulars

(1) On or about 18 June 2013, Michael McNamara (7-Eleven Victorian Franchise Development Manager) orally informed Jatinder Pal Singh of the Second Applicant: “We have identified suppliers and we have contracts with them and have negotiated the best prices with these suppliers. This is one of the advantages of being a 7-Eleven franchisee.”

(2) In the course of SEFT sessions preceding the execution by Franchisees of their respective Franchise Agreements, 7-Eleven training staff said words to the effect that 7-Eleven had negotiated the best prices and deals with 7-Eleven’s recommended suppliers.

77A. The Volume Pricing Representation was a:

- (a) representation as to a future matter; and
- (b) continuing representation throughout the Relevant Period.

77B. By making the Volume Pricing Representation, 7-Eleven engaged in conduct in trade or commerce, within the meaning of section 18 of the ACL and/or section 52 of the TPA.

77C. During the Relevant Period, the Volume Pricing Representation was false, for the reasons pleaded in paragraph 26 above.

77D. In the premises in the matters pleaded in paragraph 77C above, the Volume Pricing Representation was, throughout the Relevant Period, misleading or deceptive, or likely to mislead or deceive (**Volume Pricing Representation Contravention**).

D10. Campbelltown Store Financials Representation (First Applicant only)

78. By providing the Campbelltown Store Financials to the First Applicant, 7-Eleven represented that:

- (a) 7-Eleven was not aware of any, or any substantial or material, inaccuracies in the figures provided in the Campbelltown Store Financials that would render those Financials unreliable as an estimate of the costs and revenues involved in the operation of the Campbelltown Store; and

- (b) 7-Eleven had taken all due skill and care in presenting the information contained in the Campbelltown Store Financials for consideration by the First Applicant and its advisers in relation its proposed entry into the Campbelltown Store Franchise Agreement, subject to an express limitation as to the reliability of data provided by the previous Franchisee of the Campbelltown Store for the purpose of preparing that information;
- (separately or together, the **Campbelltown Store Financials Accuracy Representation**).

Particulars

The representation was implied from the content and terms of the Average Store Financials and the Franchise Agreement.

In the alternative, the representation was conveyed by silence, as the First Applicant did expect, in the circumstances of its prospective entry into the Campbelltown Store Franchise Agreement, 7-Eleven to:

- (i) *have sufficient familiarity with the financial operation of the 7-Eleven System to be in a position to readily discern any errors, omissions or discrepancies in the Average Store Financials or the Campbelltown Store Financials which would render them unreliable; and*
- (ii) *disclose to it any aspect of the Campbelltown Store Financials figures of which it was aware which might render that information unreliable having regard to the fact that the Campbelltown Store Financials document was provided to the First Applicant under cover of an email from Ash Bennett (then 7-Eleven's NSW Franchising Manager) dated 17 July 2013, prior to the First Applicant entering into the Campbelltown Store Franchising Agreement, in response to an enquiry from the First Applicant made in the context of its proposed application to purchase the Campbelltown Store and for the purpose of assisting the First Applicant to consider whether to purchase the Campbelltown Store, including seeking advice from its advisers based on that information in relation to the First Applicant's decision;*
- (iii) *further and in the alternative, 7-Eleven knew or ought to have known that the First Applicant and/or its advisers would rely on the*

Campbelltown Store Financials in deciding whether to enter into franchise agreements with 7-Eleven, as that was the purpose for which the information was provided by 7-Eleven.

79. The Campbelltown Store Financials Accuracy Representation was a continuing representation from 17 July 2013 until at least 19 September 2013 (on which date the First Applicant entered into the Campbelltown Store Franchise Agreement).
80. By making the Campbelltown Store Financials Accuracy Representation, 7-Eleven engaged in conduct in trade or commerce, within the meaning of section 4 of the ACL.
81. The Campbelltown Store Financials Accuracy Representation was misleading or deceptive, or likely to mislead or deceive.

Particulars

- (a) *7-Eleven was (i) aware, or ought to have been aware, of substantial or material inaccuracies in the figures provided in the Campbelltown Store Financials that would render those figures unreliable as an estimate of the costs and revenues involved in the operation of a Store as part of the 7-Eleven System; (ii) did not exercise all due care and skill and care in presenting the information contained in the Campbelltown Store Financials for consideration by the First Applicant and/or its advisers and/or (iii) was indifferent to whether or not the information contained in the Average Store Financials was reliable in relation to the labour costs of operating a Store as part of the 7-Eleven System, as:*
 - (i) *7-Eleven knew at all relevant times, that the Campbelltown Store (which was required to remain open for 24 hours a day, 7 days a week) required a minimum of 168 hours of labour per week to operate.*
 - (ii) *7-Eleven knew or ought to have known at all relevant times, the award wages payable for labour at the Campbelltown Store, by reason of which it could calculate the expected labour costs of operating at the Campbelltown Store.*
 - (iii) *7-Eleven was, by reason of (i) and (ii) above and the actual wages information supplied to it by the previous owner of the Campbelltown Store, able to calculate the extent to which either:*

- (1) *the Campbelltown Store had been underpaying, or under-declaring to 7-Eleven the wages being paid or which were required to be paid to its workers in the period of the Campbelltown Store Financials; and/or*
 - (2) *the extent to which labour was being supplied to the Franchisee at that Store by its principals and/or their family members for nothing or at a rate below the award rate;*
- (iv) *the methodology adopted by 7-Eleven for reviewing or appraising the operation of individual Stores did not place any or any reasonable priority upon determining the extent to which either:*
 - (1) *the Store was underpaying or under-declaring to 7-Eleven the wages being paid or which were required to be paid to its workers; or*
 - (2) *labour was being supplied to the Franchisee at that Store by its principals and/or their family members for nothing or at a rate below the award rate.*
- (b) *Based on the above, it was or ought to have been apparent to 7-Eleven that: (i) the minimum payroll expense for Campbelltown Store based on payment of award rates to at least 1 employee for 168 hours per week was approximately \$247,000 (including superannuation); and (ii) the yearly payroll expenses on the Campbelltown Store Financials (including superannuation) of \$71,566 (FY 2011), \$99,513 (FY 2012) and \$122,670 (FY 2013) could only have been achieved by the principals of the previous Franchisee working unreasonable and/or unsociable unpaid hours and/or by paying other employees to work in the Store for wages which were below their legal entitlements.*
- (c) *7-Eleven, in compiling and presenting to the First Applicant the Campbelltown Store Financials, failed to disclose that the payroll cost shown in that document was materially understated because the information failed to take account of:*
 - (i) *underpayment or under-declared wages of workers at the Campbelltown Store; and/or*

- (ii) *the supply of labour to the Campbelltown Store by the principals of the Franchisee or their family members for nothing or at a rate below the award rate;*

with the consequence that profitability of the Campbelltown Store was materially overstated in the Campbelltown Store Financials.

- (d) *Further particulars may be provided on service of the First Applicant's expert evidence and after discovery.*

82. In the premises, by making the Campbelltown Store Financials Accuracy Representation 7-Eleven engaged in conduct in contravention of section 18 of the ACL (**Campbelltown Store Financials Accuracy Contravention**).

D11. Campbelltown Store Future Payroll Cost Representation (First Applicant only)

83. Further, or in the alternative, by providing the Campbelltown Store Financials to the First Applicant, 7-Eleven represented that the Campbelltown Store:

- (a) could be operated in compliance with employment awards for a payroll cost approximating that shown in the Campbelltown Store Financials; and/or
- (b) would not require the principals of the Franchisee or its family members to work for nothing or at rates below the award rates for labour, either at all or for an unreasonable or unsociable number of hours each week

(separately or together the **Campbelltown Store Future Payroll Cost Representation**).

Particulars

- (i) *The First Applicant repeats the matters pleaded and particularised in paragraphs 52 and 78 above.*
- (ii) *Further or in the alternative, the representation arises by silence, by reason of the failure of 7-Eleven to explain or qualify the wages information shown in the Campbelltown Store Financials to indicate that the wages information shown therein could only be achieved by:*
 - (1) *underpaying or under-declaring the wages paid or required to be paid to workers at the Store; and/or*

- (2) *relying on labour being supplied by the principals of the First Applicant or their family members for nothing at or at a rate below the award rate, and for an unreasonable or unsociable number of hours.*

84. The Campbelltown Store Future Payroll Cost Representation was a continuing representation throughout the Relevant Period, [at least until the First Applicant entered into the Campbelltown Store Franchise Agreement](#).
85. By making the Campbelltown Store Future Payroll Cost Representation, 7-Eleven engaged in conduct in trade or commerce, within the meaning of section 4 of the ACL.
86. Insofar as the Campbelltown Store Future Payroll Cost Representation was a representation as to a future matter or future matters, the First Applicant relies on section 4 of the ACL.
87. The Campbelltown Store Future Payroll Cost Representation was throughout the Relevant Period, [at least until the First Applicant entered into the Campbelltown Store Franchise Agreement](#):
- (a) insofar as it was a representation as to a present matter or present matters, misleading or deceptive, or likely to mislead or deceive;
 - (b) insofar as it was a representation as to a future matter or future matters, made without a reasonable basis.

Particulars

The First Applicant repeats the matters pleaded and particularised in relation to paragraph 81 above.

88. In the premises, by making the Campbelltown Store Future Payroll Cost Representation 7-Eleven engaged in conduct in contravention of section 18 of the ACL (**Campbelltown Store Future Payroll Cost Representation Contravention**).

D12. Campbelltown Store Financials Conduct Contravention (First Applicant only)

89. Further and in the alternative to the matters pleaded and particularised in paragraphs 78 to 88 above, by providing the Campbelltown Store Financials to the First Applicant prior to its entry into the Campbelltown Store Franchise Agreement, 7-Eleven engaged in conduct:

- (a) in trade or commerce, within the meaning of section 4 of the ACL;
- (b) that, was misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL.

(Campbelltown Store Financials Conduct Contravention).

Particulars

The First Applicant repeats the particulars to paragraphs 81 and 87 above.

D13. Misleading or deceptive conduct – loss and damage caused to each of the Applicants and Franchisees

Applicants’ and Franchisees’ Losses caused by the Wage Representation Contraventions and Goodwill Value Representation Contravention

- 90. On 29 August 2015, Fairfax Media Limited published a series of articles over several days concerning widespread wage underpayment within the *7-Eleven System*.
- 91. On 31 August 2015, the ABC’s Four Corners program screened an episode entitled “*7-Eleven: The Price of Convenience*” also detailing widespread wage underpayment within the *7-Eleven System*.
- 92. After details of widespread wage underpayment within the *7-Eleven System* were revealed in the newspaper articles and television program referred to above **(Media Investigative Reporting)**,

- (a) 7-Eleven:

(ia) calculated (as it could and should have done previously, if it had not done so) the true labour costs associated with operating a franchised Store if the Franchisee (or its principal) worked 40 hours per week;

(ib) thereby ascertained (insofar as 7-Eleven was not already aware) that:

(1) the true payroll costs for operating an average franchised Store were approximately \$268,000 per annum (**True Payroll Costs**); and

(2) the True Payroll Costs, together with other usual operational costs for operating a franchised Store, were approximately \$311,000 per annum;

Particulars

(A) Email sent on 28 August 2015 by Craig Bannister, 7-Eleven Senior Analyst to Warren Wilmot (7-Eleven's CEO), Andrew Manning (7-Eleven's CFO) and Natalie Dalbo (7-Eleven's General Manager of Operations) (SEV.0101.0002.4652).

(B) 7-Eleven internal presentation prepared in about August / September 2015 "About Going Forward" (SEV.0108.0058.5128 - SEV.0108.0058.5150).

(C) Goodwill Analysis spreadsheet annexed to email of 2 December 2015 from Fiona McCahey to Craig Bannister (7-Eleven Senior Analyst) (SEV.0021.0025.0354).

(D) Board of Directors Report – September 2015 (SEV.0235.0006.5727).

(i) subsequently:

(A) in 2015, offered to enter into, and entered into, a variation of the Franchise Agreements that increased the minimum annual guaranteed *Total Gross Income* for the Store from \$120,000 (as specified at paragraph (j) of Exhibit D) to \$310,000 for Fuel Stores and \$340,000 for Non-Fuel Stores;

(B) acknowledged, in a further internal review that, as to the increased minimum annual guaranteed *Total Gross Income* referred to in subparagraph (A) above, "the majority of this should be attributed to increases in payroll expenses";

Particulars

7-Eleven Stores Pty Ltd Submission to the SLT (Senior Leadership Team) (SEV.0019.0001.0088).

(ii) thereby acknowledged, as was and had been the fact, that annual *Total Gross Income* for a Store of \$120,000 was manifestly

insufficient to enable a Franchisee to meet the minimum true labour costs for the operation of a Store;

- (b) 7-Eleven commenced providing to prospective purchases of a Store:
- (i) information outlining the applicable minimum wages for the Store;
 - (ii) the range of expected minimum hours to operate the Store;
 - (iii) detailed wage modelling outlining the range of expected minimum wage costs required to operate that type of Store;
 - (iv) details of the Store's income and expenditure data for the previous two years (where available) to enable assessment of the Store's profitability by reference to lawful wage costs;

Particulars

(1) Clause 13.1 of the Proactive Compliance Deed executed by 7-Eleven and the Fair Work Ombudsman on 6 December 2016.

(2) 7-Eleven Franchising Recruitment and Selection Process document (SEV.0017.0019.4805).

(3) Minutes of 7-Eleven Audit Committee meeting of 19 May 2016 (SEV.0235.0002.7286).

(ba) 7-Eleven commenced reviewing business plans provided by incoming Franchisees to ensure that "the financials and roster supplied are accurate and realistically achievable";

Particulars

Email of 13 October 2015 from Scott Buckman (7-Eleven National Franchise Manager) to Brett Reading, Michael McNamara, Peter O'Hara and Shayne Boogaard (7-Eleven's Franchise Development Managers) (SEV.0017.0060.4609).

(c) in respect of Franchisees who have sought to sell their Store:

(ia) upon internal review, 7-Eleven:

(1) identified that the Goodwill Formula equated to a multiple of between 7 and 10 times the earnings before income tax, depreciation and amortisation (EBITDA) of Franchisees;

- (2) determined that its (7-Eleven's) "internal acceptable range" for:
- (a) the goodwill of franchised Stores, was 3.5 to 5 times EBITDA; and
- (b) 7-Eleven goodwill / franchise fees for new Stores, was 4.5 to 5.5 times EBITDA;
- (3) valued all existing Franchise Agreements based on a discounted cashflow methodology against the amortised original purchase price, to assess whether the associated Store was "overvalued", "undervalued" or "marginal"; and
- (4) noted that the majority of non-fuel stores appeared to be "overvalued";

Particulars

- (a) 7-Eleven Stores Pty Ltd Submission to the SLT (Senior Leadership Team) (SEV.0019.0001.0088);
- (b) 7-Eleven Goodwill and Franchise Fee Calculator (SEV.0042.0001.0041).
- (c) Email correspondence between 21 October 2016 and 17 November 2016 between Lukas Michel (7-Eleven employee) and Scott Buckman (7-Eleven National Franchising Manager) (SEV.0206.0011.2430 to SEV.0206.0011.2432, SEV.0206.0011.1857).
- (d) 7-Eleven Stores Pty Ltd Submission to the Board of Directors (Meeting 366) (SEV.0031.0001.0055 - 0101);

- (i) 7-Eleven ceased to provide the Goodwill Price Advice;

Particulars

- (1) Email of 20 November 2015 from Scott Buckman (7-Eleven National Franchise Manager) to Brett Reading, Michael McNamara, Peter O'Hara and Shayne Boogaard (7-Eleven's Franchise Development Managers) advising that Braeden Lord (of 7-Eleven) had requested "to NOT supply

guidelines on Goodwill to Franchisees anymore” (SEV.0017.0012.5280).

(2) In about December 2018, Peter O’Hara (7-Eleven Victorian Franchise Development Manager) said, in an oral conversation with Devassia Joseph, in response the mention of a formula of 2.2 to 2.8 times gross profit for setting the goodwill price for a Store, “No we never had that formula... I have never been aware of such a formula. There is no formula. You will need to get an independent evaluation of the store”.

(3) 7-Eleven Stores Pty Ltd Submission to the Board of Directors (Meeting 366) (SEV.0031.0001.0055 - 0101).

(ii) 7-Eleven has, instead, stated to selling or potentially outgoing Franchisees that:

(1) the goodwill in relation to the Store must or should be valued by an external valuer (rather than by reference to the Goodwill Formula); and, or alternatively,

(2) the indicative value of the goodwill for a Store is, or is calculable or calculated by reference to, a multiple of up to 5 ~~3.5~~ times the net income (before income tax, depreciation and amortisation) for the Store (being Total Franchisee Income less *Operating Expenses*) in the most recent financial year;

Particulars

(A) In February 2017, Nigel Lush (7-Eleven NSW State Manager) said to Paresh Davaria: “Your Campbelltown Store has been listed for some time now. You should consider reducing its goodwill price. I suggest obtaining an independent valuation and once you have done that you discuss reducing your goodwill price with Shayne [Boogaard]”;

(B) Email sent on 13 July 2017 by Peter O’Hara, 7-Eleven Franchise Development Manager – Victoria,

to Pawan Narang (page 40 of Exhibit PN-1 to the Affidavit of Pawan Narang sworn 27 June 2019).

(C) Email sent on 18 January 2018 by Peter O'Hara (7-Eleven Victorian Franchise Development Manager) to Sai Rahman (pages 216 to 219 of Exhibit SR-2 to the Affidavit of Sai Rahman sworn 12 October 2020).

(D) In or about April 2018, Peter O'Hara (7-Eleven Victorian Franchise Development Manager) orally informed Sai Rahman, in relation to the Boronia Store, that "You need to get a proper business valuation done, we will take it down [from 7-Eleven's list of stores for sale] until you obtain a business valuation, then we will list it for sale. ... [b]ecause that is the usual course we follow. We will pay for the independent valuer";

(E) On or about 3 May 2018, Peter O'Hara (7-Eleven Victorian Franchise Development Manager) orally informed Sai Rahman, in relation to the Boronia Store, that "You need a proper valuation to know the value of the store. You need someone independent to do a proper valuation. Go to Rose Corporate, they do a lot of the valuations for 7-Eleven";

(F) On 30 May 2018, Brett Reading (7-Eleven Queensland Franchise Development Manager) orally informed Wen Li that 7-Eleven had undertaken an internal valuation of the Moorooka Store, and valued it at \$700,000.

(G) Email sent on 17 December 2018 by Tanya Robertson (7-Eleven National Franchising Manager) to Devassia Joseph of Teekay (pages 307-308 of Exhibit DTJ-3 to the Affidavit of Devassia Joseph sworn 2 October 2020).

(H) On or about 19 June 2019, Gavin Monaghan (7-Eleven Queensland State Manager) orally informed Reddy Veldurthi that he "should get an external

valuation done” in relation to setting a goodwill price for the Southport fuel store.

(I) On or about 26 June 2019, Gavin Monaghan (7-Eleven Queensland State Manager) informed Reddy Veldurthi by text message that “an indicative internal valuation (GW) of the store would sit between 700 & 750k. Please let me know when you have reached out for your own independent valuation of your business and speak to Brett [Reading] regarding the current listed price” (page 340 of Exhibit PRV-2 to the Affidavit of Reddy Veldurthi sworn 30 September 2020).

(J) Email sent on 4 May 2020 by Peter O’Hara (7-Eleven Victorian Franchise Development Manager) to Nanette Wang (page 225 of Exhibit NW-2 to the Affidavit of Nanette Wang sworn 8 October 2020).

(K) Submission to the Board of Directors of 7-Eleven (SEV.0166.0064.7675).

(L) 7-Eleven Stores Pty Ltd Submission to the SLT (Senior Leadership Team) (SEV.0019.0001.0088).

(M) Emails sent between 21 October 2016 and 17 November 2016 between Scott Buckman (7-Eleven’s National Franchising Manager) and Lukas Michel (SEV.0206.0011.2430 to SEV.0206.0011.2432; SEV.0206.0011.1857).

(N) Email sent on 12 October 2020 by Peter O’Hara (7-Eleven Victorian Franchise Development Manager) to Dahesh Jethani.

(O) 7-Eleven guide for selling Franchisees (SEV.0219.0053.77290).

(iii) 7-Eleven has informed Franchisees and prospective purchasers of the goodwill of Stores (that is, incoming Franchisees) that:

- (1) the goodwill price for a Store, and the overall price, needs to be approved by 7-Eleven, to ensure that there is a reasonable rate of return for the purchaser;

Particulars

(A) Email sent on 8 August 2017 by Peter O'Hara (7-Eleven Victorian Franchise Development Manager), to Pawan Narang (page 56 of Exhibit PN-1 to the Affidavit of Pawan Narang sworn 27 June 2019).

(B) Email sent on 30 October 2017 by Peter O'Hara (7-Eleven Victorian Franchise Development Manager) to Saj Rahman (pages 209 to 212 of Exhibit SR-2 to the Affidavit of Saj Rahman sworn 12 October 2020).

(C) Email sent on 18 January 2018 by Peter O'Hara (7-Eleven Victorian Franchise Development Manager) to Saj Rahman (pages 216 to 219 of Exhibit SR-2 to the Affidavit of Saj Rahman sworn 12 October 2020).

(D) Email dated 20 August 2018 from Brett Reading (7-Eleven Queensland Franchise Development Manager), to Martin Yuan (pages 305 to 306 of Exhibit GM-1 to the Affidavit of Gavin Monaghan sworn 19 August 2019).

(E) Email sent on 17 December 2018 by Tanya Robertson (7-Eleven National Franchising Manager) to Devassia Joseph of Teekay (pages 307 to 308 of Exhibit DTJ-3 to the Affidavit of Devassia Joseph sworn 2 October 2020).

(F) 7-Eleven Franchising Recruitment and Selection Process document (SEV.0017.0019.4805).

(G) 7-Eleven Stores Pty Ltd Submission to the SLT (Senior Leadership Team) (SEV.0019.0001.0088).

- (2) the prospective purchaser must prepare and provide to 7-Eleven a business plan in which all of the hours to be worked at the store is undertaken by paid employees;

Particulars

(A) Email dated 9 November 2018 from Brett Reading, (7-Eleven Queensland Franchise Development Manager), to Sandy Maulin (pages 181-182 of Exhibit GM-1 to the Affidavit of Gavin Monaghan sworn 19 August 2019).

(B) 7-Eleven Franchising Recruitment and Selection Process document (SEV.0017.0019.4805).

- (iv) 7-Eleven substantially decreased the Franchise Fee, or the upfront Franchise Fee, that it ~~has~~ sought to charge in respect of Listed Stores;
- (d) in the premises of subparagraphs (a), (b), (ba) and (c) above, 7-Eleven acknowledged, as had always been the fact, that the true value of the goodwill for Stores:
- (i) was referable to both income generated in the course of, and the expenses associated with, operating a Store; and
- (ii) must account for, or have regard to, the true labour costs of operating a Store;
- (iii) did not accord with the Goodwill Formula, the Goodwill Price Advice, the Goodwill Purchase Advice, or the ANZ Goodwill Advice;
- (da) 7-Eleven has applied more stringent criteria and, or alternatively, applied existing criteria more stringently, in respect of the approval of potential incoming Franchisees;

Particulars

(i) 7-Eleven Franchising Recruitment and Selection Process document (SEV.0017.0019.4805).

(ii) 7-Eleven Stores Pty Ltd Submission to the SLT (Senior Leadership Team) (SEV.0019.0001.0088).

(iii) Submission to the Board of Directors of 7-Eleven (SEV.0166.0064.7675), and all matters to be reasonably inferred from the content thereof.

(iv) 7-Eleven Stores Pty Ltd Submission to the Board of Directors (Meeting 366) (SEV.0031.0001.0055 - 0101), and all matters to be

reasonably inferred from the content thereof, including as to limitation of franchisee financing to 60% in relation to acquisition of a Store franchise without CEO approval.

(v) 7-Eleven Stores Pty Ltd Submission to the Board of Directors – FRANCHISEE SELECTION PROCESS (SEV.0166.0067.6198).

- (e) 7-Eleven began to refuse to, or stated that it would not, renew existing Franchise Agreements, or exercise options to extend, or seek renewal of, Leases of existing Stores, notwithstanding no significant decrease in merchandise sales or *Total Gross Income or Store IN* for those Stores;

Particulars

- (i) *In 2016 and 2017, 7-Eleven informed the First Applicant that it would not, or might not, exercise the option to renew its Lease of the Campbelltown Store beyond 2019 (as described further below);*
- (ii) *on 23 May 2018, 7-Eleven informed Subin Pty Ltd that it would not, or may not, exercise the option to extend the Lease of Subin Pty Ltd's Store;*
- (iii) *on 16 May 2016 7-Eleven informed Vedantha Enterprises Pty Ltd that it would not, or may not, exercise the option to extend the Lease of Vedantha's Store;*
- (iv) *on 21 May 2018, 7-Eleven informed Ansav Investments Pty Ltd that it would not renew the current Franchise Agreement;*
- (v) *on 2 March 2021, 7-Eleven informed D & W Group Pty Ltd that it would not renew its Franchise Agreement dated 11 November 2011, and that D & W Group was required to vacate 7-Eleven Store 1008U located at 396-398 Blackburn Road, Glen Waverley, by 13 December 2021;*

notwithstanding that there had been no diminution in trading performance of those Stores since they had been operated by those respective Franchisees;

(ea) 7-Eleven:

- (i) engaged in a program of acquiring existing Stores, and opening new Stores, for the purpose of operating them as "corporate stores"

(Corporate Stores) (ie, operated by 7-Eleven, rather than by Franchisees) (Corporate Store Program):

Particulars

(A) Submission to the Board of Directors of 7-Eleven (SEV.0166.0064.7675).

(B) Submission to the Board of Directors of 7-Eleven (SEV.0166.0064.7660).

(C) Minutes of National Franchising Meeting held on 5 and 6 April 2016 (SEV.0206.0013.1650).

(ii) has offered to purchase Stores from Franchisees at what 7-Eleven considers to be market valuation;

Particulars

Email sent on 19 June 2016 by Braeden Lord to Dahesh Jethani (page 424 of Exhibit DHJ-1 to the Affidavit of Dahesh Jethani sworn 7 October 2020).

(iii) has advertised and offered for sale, and sold, the goodwill (whether described as a “Franchise Fee” or otherwise) of Corporate Stores “based on its assessment of the market value”, being between 3.5 and 5.5 times EBITDA;

Particulars

(i) Emails between 21 October 2016 and 17 November 2016 passing Scott Buckman (7-Eleven’s National Franchising Manager) and Lukas Michel (SEV.0206.0011.2430 to SEV.0206.0011.2432; SEV.0206.0011.1857).

(ii) Email correspondence between 1 and 3 December 2017 between Marc Costabile (7-Eleven National Manager – Corporate Stores) and Tim McAlpine (SEV.0166.0021.2145 - 2147).

(iii) Letter from 7-Eleven to Levitt Robinson dated 1 July 2019.

(f) consequently, the market prices for goodwill of 7-Eleven franchises, as reflected in the amount of the Goodwill Payments for the purchase of a Store, declined significantly.

93. ~~[not used]~~ Further, in the course of the Corporate Stores Program, 7-Eleven:
- (a) acquired existing Stores from Franchisees in a climate of:
- (i) a reduced pool of potential incoming Franchisees who were likely to be approved by 7-Eleven; and
- (ii) a reduction in the prices paid, or offered to be paid, for goodwill in respect of franchised Stores,
- as a consequence of the matters pleaded in paragraphs 92(b), 92(ba), 92(c), 92(da) and 92(e) above; and
- (b) sought, and in many instances obtained, releases from selling Franchisees, in the course of the acquisitions referred to in subparagraph (a) above.

Particulars

- (i) In about early July 2018, Mark Nance (7-Eleven Victorian State Manager) orally informed Dahesh Jethani that 7-Eleven would only buy back Rajmata Petroleum (Aussie) Pty Ltd's Store at Ferntree Gully "at the reasonable market price" if Dahesh Jethani would sign a Deed of Release.
- (ii) In about September 2017, Mark Nance (7-Eleven Victorian State Manager) orally informed Gurpreet Singh Sehgal that 7-Eleven would offer to buy back SHS Ventures Pty Ltd's Store at Clayton if Mr Sehgal would sign a Deed of Release, and subsequently purchased the goodwill of that Store for \$487,500.
- (iii) In December 2017, Gavin Monaghan (7-Eleven Queensland State Manager) offered to Dhaval Patel that 7-Eleven would purchase the goodwill of Jai Ambe Pty Ltd's Beenleigh Store for \$360,000 (plus GST), and subsequently \$400,000 (plus GST) on the condition of entry into a deed containing mutual releases.
94. During the Relevant Goodwill Guidance Period prior to publication of the Media Investigative Reporting, the Average Store Financials Accuracy Representation Contravention and the Future Average Payroll Cost Representation Contravention (or any of them) (**Wage Representation Contraventions**), and/or the Goodwill Value Representation Contraventions, caused the market price for the goodwill of and attaching to the Stores to be greater than:
- (a) the market price that would have prevailed if:

(i) accurate financial information had been provided by 7-Eleven to prospective franchisees and their advisers, being information:

(1) without the Wage Representation Contraventions, and which conveyed the True Payroll Costs;

(2) that did not include or convey the Goodwill Value Representation, but accurately conveyed and highlighted the actual or extent of the likelihood that an incoming Franchisee would be unable to on-sell the goodwill associated with the Store in due course;

and so conveyed, or made ascertainable:

(A) the true net income that was achieved and was achievable by operating the Store;

(B) the true value of the goodwill associated with the Store;

and/or,

(ii) 7-Eleven had published, or caused to be published, Listed Stores Information that was accurate in respect of the true value of goodwill for Stores;

and,

(b) their true value.

Additional breach of contract – First Applicant

94A. The First Applicant:

- (a) in about August 2015 advised 7-Eleven that the First Applicant sought to sell the Campbelltown store;
- (b) subsequently, in January 2016, requested that 7-Eleven list the Campbelltown Store for sale at a Goodwill Price of \$595,000; and
- (c) was informed, in response, that the price was too high and that there was not enough time for the First Applicant to sell it because (notwithstanding the matters pleaded in paragraph 138(b) below) the balance of the existing lease term was only a few years.

Particulars

- (i) *The First Applicant, by Paresh Davaria, informed Ashleigh Bennett of 7-Eleven in [about](#) August 2015 that the First Applicant sought to sell the Campbelltown Store.*
- (ii) *The First Applicant, by Paresh Davaria, asked Shayne Boogaard of 7-Eleven, [in January 2016](#) to list the Campbelltown Store for sale on the Website at a Goodwill Price of \$595,000.*
- (iii) *Shayne Boogaard of 7-Eleven advised Paresh Davaria of the matters in subparagraph 94A(c) above.*

94B. Subsequent to the matters pleaded in paragraph 94A above, in 2017 7-Eleven refused to [\(or elected not to\)](#) exercise its option to extend the Lease of the Campbelltown Store beyond its existing term that was due to expire in March 2019.

94C. 7-Eleven refusal [\(or election\)](#) in paragraph 94B above occurred notwithstanding that there had been an increase in merchandise sales for the Campbelltown Store after the First Applicant had commenced to operate it.

94D. By reason of the matters in paragraph 94B, the First Applicant:

- (a) was unable to sell the Campbelltown Store to a third-party buyer, as it would have; or alternatively,
- (b) lost the opportunity to sell the Campbelltown Store to a third-party buyer, such opportunity being not less than 90% in prospect having regard to the proposed purchaser;

for \$390,000.

Particulars

- (i) *The First Applicant had negotiated the sale price of \$390,000 with two separate buyers, one of whom was Khalid Somani, the other being Bhagya Lakshmi [Maddasani](#), who was the operator of a small business in the Campbelltown area and had funds to complete the purchase.*
- (ii) *No sale of the Campbelltown Store proceeded, by reason of the matters in paragraphs 94A and 94B above.*

94E. In the premises of the matters pleaded in paragraphs 94A to 94D above, 7-Eleven breached the Contractual Duties Term.

95. By reason of the matters pleaded in paragraphs 90 to ~~92, and~~ 94 (as to the First and Second Applicants) and, additionally as to the First Applicant, paragraphs 94A to 94E, each of the Applicants have suffered loss and damage.

Particulars

- (a) *The loss suffered by the First Applicant is calculated by reference to:*
- (i) *the difference between the price for goodwill at which it acquired the Campbelltown Store and the true value of its interest in that store at the time of purchase; or*
 - (ii) *the difference between the price for goodwill at which it acquired the Campbelltown Store and the market price that would have prevailed in the absence of the Wage Representation Contraventions and/or the Goodwill Value Representation Contravention; or*
 - (iii) *alternatively, the quantum of the fall in the price or value of the Campbelltown Store attributable to the Media Investigative Reporting and subsequent conduct referred to in paragraphs 90 to 93 and 94 above; or*
 - (iv) *alternatively, the sum of \$390,000 or \$351,000;*
- less the amount of any benefit received by the First Applicant as a result of payments made or indemnity provided by 7-Eleven to individual employees on account of any underpayment of wages consequent upon regulatory action being taken by the Fair Work Ombudsman against 7-Eleven in respect thereof.*
- (b) *Further particulars may be provided after service of the First Applicant's expert evidence.*
- (c) *The loss suffered by the Second Applicant is calculated by reference to:*
- (i) *the difference between the price for goodwill at which it acquired the South Melbourne Store and the true value of its interest in that store at the time of purchase; or*
 - (ii) *the difference between the price for goodwill at which it acquired the South Melbourne Store and the market price that would have prevailed in the absence of the Wage Representation*

Contraventions and/or the Goodwill Value Representation Contraventions; or

- (iii) *alternatively, the quantum of the fall in the price or value of the South Melbourne Store attributable to, or following, the Media Investigative Reporting [and subsequent conduct](#) referred to in paragraphs 90 to [92](#) above;*

less the amount of any benefit received by the Second Applicant as a result of payments made or indemnity provided by 7-Eleven to individual employees on account of any underpayment of wages consequent upon regulatory action being taken by the Fair Work Ombudsman against 7-Eleven in respect thereof.

- (d) *Further particulars may be provided after service of the Second Applicant's expert evidence.*

96. By reason of the matters pleaded in paragraphs 90 to ~~92 and~~ 94 some or all of the other Franchisees have suffered loss and damage.

Particulars

The loss suffered by Franchisees will also be calculated in accordance with the particulars (a)(i) – (a)(iii) and (c) in paragraph 95 above but are not particularised in this statement of claim; particulars in relation to Franchisee losses will be obtained (and particulars may be provided) following opt out, the determination of the Applicants' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees.

First Applicant – direct reliance

97. Further and in the alternative to the matters pleaded in paragraphs 90 to 96 above, in deciding to [acquire \(as it did\) the goodwill associated with the franchise of the Campbelltown Store , to enter into the Campbelltown Store Loan Contract \(as pleaded in paragraph 140 herein\) and borrow any other monies necessary to acquire the Franchise of the Campbelltown Store, and](#) to enter into Campbelltown Store Franchise Agreement, the First Applicant relied on (alone or in combination) each of the Goodwill Value Representation, [the Renewal Representation](#), the Average Store Financials Accuracy Representation, the Future Average Payroll Cost Representation, the content of the Average Store Financials, the Advertising

Fund Representation, the 7-Eleven Supplier Representation, the Volume Pricing Representation (individually and in combination, the **Misleading or Deceptive Conduct Representations**) and the Campbelltown Store Financials Accuracy Representation and the Campbelltown Store Future Payroll Cost Representation (**Campbelltown Representations**).

98. Further and in the alternative, if the Misleading or Deceptive Conduct Representations, the Code Disclosure Contraventions and the Campbelltown Representations (alone or in combination) had not occurred, the First Applicant would not have [acquired the goodwill associated with the franchise of the Campbelltown Store or](#) entered into the [Campbelltown Store Loan Contract or the Campbelltown Store Franchise Agreement](#).
99. Further and in the alternative, each of the Misleading or Deceptive Conduct Representations and the Campbelltown Representations (alone and in combination) materially contributed to the decision of the First Applicant to [acquire the goodwill associated with the franchise of the Campbelltown Store, and](#) enter into the [Campbelltown Store Loan Contract and the](#) Campbelltown Store Franchise Agreement.
100. Had the First Applicant not entered into the Campbelltown Store Franchise Agreement, it would not have:
 - (a) entered into the subsequent Northmead Store Franchise Agreement, [or a Heads of Agreement to purchase the goodwill in respect of the Northmead Store \(as it did\)](#); or
 - (b) obtained any loan from the Bank [or elsewhere \(including any vendor finance\)](#) for the purposes of acquiring the [franchise of the](#) Northmead Store.
101. In the premises, the First Applicant has suffered loss and damage by and resulting from any one or more of the Goodwill Value Representation Contravention, the Average Store Financials Accuracy Representation Contravention, the Future Average Payroll Cost Representation Contravention, the Advertising Fund Representation Contravention, the 7-Eleven Supplier Representation Contravention, the Volume Pricing Representation Contravention (collectively the **Misleading or Deceptive Conduct Contraventions**), the Campbelltown Store Financials Accuracy Representation Contravention, the Campbelltown Store Future Payroll Cost Representation Contravention and the Campbelltown Store Financials Conduct Contravention and/or the Code Disclosure Contraventions.

Particulars

- (a) *The First Applicant's loss and damage will be calculated by reference to the difference between the position that it is in now, and the position it would be in had it not entered into the Campbelltown Store Franchise Agreement or the Northmead Store Franchise Agreement, by reference to:*
- (i) *trading losses;*
 - (ii) *borrowing costs;*
 - (iii) *capital losses;*
 - (iv) *any outstanding liabilities to employees for underpayment of wages; and*
 - (v) *the value of the lost opportunity of entering into an alternative transaction.*
- (b) *Further particulars of loss may be provided on service of the First Applicant's expert evidence.*

Second Applicant – direct reliance

101A. Further and in the alternative to the matters pleaded in paragraphs 90 ~~to –92,~~ 94 and 95(c) above:

- (a) in deciding to enter into [each of the Heads of Agreement in relation to the purchase of the goodwill of the South Melbourne Store \(as pleaded at paragraph 106\(c\)\(iv\) herein \(South Melbourne Heads of Agreement\), the South Melbourne Store Loan Contract \(as pleaded in paragraph 145E herein\) and the](#) South Melbourne Store Franchise Agreement, the Second Applicant relied, save for the Average Store Financials Accuracy Representation and the Future Average Payroll Cost Representation, on (alone or in combination) each of the Misleading or Deceptive Conduct Representations;
- (b) each of the Misleading or Deceptive Conduct Representations referred to in subparagraph (a) above materially contributed to the decision of the Second Applicant to enter into [each of the South Melbourne Heads of Agreement, the South Melbourne Store Loan Contract and the](#) South Melbourne Store Franchise Agreement; and
- (c) if the Misleading or Deceptive Conduct Representations referred to in subparagraph (a) above or the Code Disclosure Contraventions (or any of

them) had not occurred, the Second Applicant would not have entered into the [South Melbourne Heads of Agreement, the South Melbourne Store Loan Contract or the](#) South Melbourne Store Franchise Agreement.

101B. In the premises, the Second Applicant has suffered loss and damage by and resulting from any one or more of the Misleading or Deceptive Conduct Contraventions referred to in subparagraph [101\(a\)](#) above and/or the Code Disclosure Contraventions.

Particulars

- (a) *The Second Applicant's loss and damage will be calculated by reference to the difference between the position that it is in now, and the position it would be in had it not entered into the South Melbourne Store Franchise Agreement by reference to:*
- (i) *trading losses;*
 - (ii) *borrowing costs;*
 - (iii) *capital losses;*
 - (iv) *any outstanding liabilities to employees for underpayment of wages; and*
 - (v) *the value of the lost opportunity of entering into an alternative transaction.*
- (b) *Further particulars of loss may be provided on service of the Second Applicant's expert evidence.*

Franchisees – direct reliance

102. In deciding to enter into each of their [respective Heads of Agreement for the purchase of \(or otherwise to acquire\) the goodwill of their Stores, loan agreements to defray the costs associated with the purchase of the goodwill of their Stores and any acquisition costs related to their Franchise Agreements, and](#) Franchise Agreements, some or all of the other Franchisees directly relied on one or more of the Misleading or Deceptive Conduct Representations (alone and in combination).

Particulars

The identity of all those Franchisees who relied directly on any or all of the Misleading or Deceptive Conduct Representations will be known (and particulars provided) following opt out, the determination of the Applicants'

claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees and any associated guarantors.

103. Further and in the alternative, if any of the Misleading or Deceptive Conduct Representations or the Code Disclosure Contraventions (alone or in combination) had not occurred, some or all of the Franchisees would not have entered into their respective:

(a) Heads of Agreement for the purchase of (or otherwise acquire) the goodwill of their Stores; or

(b) loan agreements to defray the costs associated with the purchase of the goodwill of their Stores and any costs payable under their Franchise Agreements or otherwise in relation to the acquisition of the franchise of their Store; or

(c) Franchise Agreements.

Particulars

The Applicants repeat the particulars to paragraph 102 above.

104. Further and in the alternative, one or more of the Misleading or Deceptive Conduct Representations materially contributed to the decision of some or all of the Franchisees to purchase the goodwill associated with their Stores at the prevailing market price during the Relevant Period, and if the Misleading or Deceptive Conduct Representations (alone or in combination) had not occurred some or all of the Franchisees would not have entered into their respective Heads of Agreement for the purchase of (or otherwise acquired) the goodwill of their Stores, loan agreements to defray the costs associated with the purchase of the goodwill of their Stores and any costs payable under their Franchise Agreements or otherwise in relation to the acquisition of the franchise of their Store, or Franchise Agreements.

Particulars

The Applicants repeats the particulars to paragraph 102 above.

105. In the premises of the matters pleaded and particularised in paragraphs 102 to 104 above, some Franchisees have suffered loss and damage by and resulting from any one or more of the Misleading or Deceptive Conduct Representations and/or the Code Disclosure Contraventions.

Particulars

The loss suffered by other Franchisees will also be calculated in accordance with the methodology stated in particulars to paragraph 101 and 101B above as applicable to the respective Stores of the Franchisees, but are not particularised in this statement of claim; particulars in relation to Franchisee losses will be obtained (and particulars may be provided) following opt out, the determination of the Applicants' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees.

E. UNCONSCIONABLE CONDUCT

E.1 Franchisor's actual and constructive knowledge

106. Before 7-Eleven entered into a Franchise Agreement with each of the Applicants and each Franchisee in relation to a Store:

- (a) 7-Eleven knew:
 - (i) the background information about the *7-Eleven System* set out in paragraphs 6 - 8 above;
 - (ii) the material express terms of the Franchise Agreements as pleaded in paragraphs 9 - 22 above;
 - (iii) the forecast sales and profit margins of that Store and any historical sales and profit margins of that Store;
 - (iiia) that:
 - (1) 7-Eleven had received the *7-Eleven Charge* in respect of historical sales of the Store, for any period during which the Store had been operated by a Franchisee; and
 - (2) for the Store to have operated profitably, that the Store's Franchisee would have had to have met the *Operating Expenses* of that Store from the Total Franchisee Income;
 - (iv) the forecast *Operating Expenses* of that Store and any historical Operating Expenses for that Store;

Particulars

- (1) *During the Relevant Period 7-Eleven required that prospective franchisees prepare a business plan in relation to the operation of the Store sought to be acquired by the prospective franchisee.*
- (2) *7-Eleven required the business plan to be submitted to 7-Eleven, as part of 7-Eleven's approval process in relation to a prospective franchisee.*
- (3) *For the purposes of preparing and providing a business plan, 7-Eleven provided, or offered to provide, to prospective franchisees, template documents for each of the following:*
 - I. *business plan (including Store sales, gross profit and expense budget); and*
 - II. *Store roster;*
- (4) *A business plan was prepared by each of the Applicants [\(as further particularised at paragraphs 139, 147, 148, and paragraph 145D and subparagraph \(i\)\(ii\)18, below\)](#), and each Franchisee, and submitted to 7-Eleven for its consideration, prior to entry into the Franchise Agreement.*
- (5) *The business plan included:*
 - I. *projected sales, Operating Expenses and profit margins for the Store;*
 - II. *a Store roster, including the total hours and proposed rates of pay for persons who would work in the Store;*
- (v) *the hours that that Store was required to be open, and the minimum staff levels required to operate the Store;*
- (vi) *that the only material Operating Expenses over which the Franchisees had any control was payroll costs;*
- (vii) *that 7-Eleven could terminate the Franchise Agreements in the event that a Franchisee's Net Worth fell below the Minimum Net Worth (with the result that the Franchisee would lose its Capital Investment while remaining liable for its Franchise Debt);*

- (viii) that each of the Applicants and each other Franchisee would be, and are, responsible for payroll expenses under their Franchise Agreements, and responsible to ensure that they have sufficient persons employed and rostered on for duty as are needed to operate the Stores at the times and in the manner provided by the Franchise Agreement;
- (b) 7-Eleven knew the amount of the *Franchise Fee, Application/Training Fee* and *Investment* payable in respect of that Franchise Agreement;

Particulars

7-Eleven knew of the amount of Franchise Fee, Application/Training Fee and Investment paid by each of the Applicants and each other Franchisee as those amounts were set by and paid to 7-Eleven.

- (c) 7-Eleven knew the amount of the Goodwill Payment, or alternatively, knew of the approximate amount of such payment, in respect of that Franchise Agreement;

Particulars

- (i) *7-Eleven knew of the amount of the Goodwill Payment of each of the Applicants and each other Franchisee, or alternatively, knew of the approximate amount of such payments, as 7-Eleven provided information as to available franchise opportunities to prospective franchisees which included the advertised goodwill price for each Store. 7-Eleven also advised Franchisees who were seeking to sell their franchise interests as to recommended asking prices for goodwill.*
- (ii) *The First Applicant forwarded "Heads of Agreement" regarding the proposed terms of acquisition of the Campbelltown Store and the Northmead Store to 7-Eleven prior to completing the purchase.*
- (iii) *Michael McNamara represented the appropriate price, or price range, for the purchase of the goodwill by the Second Applicant for the South Melbourne Store, in emails between 8 July and 2 August 2013 with Jatinder Pal Singh.*
- (iv) *The Second Applicant completed and forwarded to 7-Eleven a "Heads of Agreement" dated 6 August 2013 regarding the*

proposed terms of acquisition of the South Melbourne Store by the Second Applicant.

(v) 7-Eleven usually issued and executed the, or alternatively received a copy of the executed, Heads of Agreement for the purchase of goodwill associated with Stores by incoming Franchisees.

- (d) 7-Eleven knew, and it was the fact that, in order to become a franchisee in the 7-Eleven System, the prospective franchisee was required to invest significant capital in the acquisition of a Store and in entering into a Franchise Agreement (**Capital Investment**);

Particulars

- (i) *The Applicants repeat the matters pleaded in paragraphs 7(d), 7(f), 106(b) and 106(c) above.*
- (ii) *In the case of each of the Applicants and all other Franchisees, the Capital Investment included the initial Investment of \$45,000 (as referred to in paragraph 7(f), particular (v)) and the Application/Training Fee and Franchise Fee.*
- (iii) *In the case of the First Applicant, the Goodwill Payment was*
- (1) *\$390,000 in respect of the Campbelltown Store, and*
 - (2) *\$880,000 in respect of the Northmead Store.*
- (iiia) *In the case of the Second Applicant, the Goodwill Payment was \$550,000 in respect of the South Melbourne Store.*
- (iv) *In the case of other Franchisees, the investment included a substantial Goodwill Payment.*
- (v) *For most Franchisees, the total Capital Investment was in the range of \$300,000 to \$1,400,000.*
- (e) 7-Eleven knew, and it was the fact, that in order to make the Capital Investment, each of the Applicants and some or all of the other Franchisees borrowed large sums of money prior to entering in to the Franchise Agreement (**Franchise Debt**);

Particulars

- (ia) *The Applicants repeat the matters in paragraphs 106(a) to 106(c) above.*

- (i) *7-Eleven entered into a Tripartite Deed with each of the Applicants and each other Franchisee who took out a loan with the Bank.*
 - (ii) *Further and in the alternative, 7-Eleven had a close relationship with the Bank, as the predominant provider of finance to prospective franchisees, as recognised by the practice of 7-Eleven regularly entering into standard form Tripartite Deeds with the Bank, and pursuant to which information was able to be shared between 7-Eleven and the Bank about the performance of individual franchisees.*
- (f) 7-Eleven knew or ought to have known, and it was the fact, that, in addition to taking security over the assets of the Franchisee, it was, or was likely to be the practice of the Bank also to require the directors and principals of the Franchisee to provide personal guarantees to the Bank of their Franchise Debt and to take security, where available, over the family home or other assets of the directors;

Particulars

- (i) *The Applicants rely on the particulars to paragraphs 106(e) above and says that 7-Eleven was privy to the financial arrangements between each of the Applicants and the Bank.*
 - (ii) *It is the usual practice in the franchising sector for franchise agreements with major franchisors to be entered into with a corporate entity, which entity is also the borrower in relation to any finance facilities with a bank, and for the repayment of such facilities to be guaranteed by the directors of the corporation. It is to be inferred that 7-Eleven was aware at all relevant times that each of the Applicants and Franchisees provided such guarantees to the Bank, secured where available by the family home or other assets of the directors of the corporation, in accordance with this practice.*
- (g) 7-Eleven knew or ought to have known at all relevant times, that a Store open for 24 hours a day, 7 days a week, required a minimum of 168 hours of labour per week to operate;

Particulars

It is common knowledge that there are 168 hours in a week.

- (h) 7-Eleven knew the award rates payable for labour at the Stores;

Particulars

Award rates were incorporated into 7-Eleven's electronic payroll module and updated regularly by the consulting firm "ER Strategies".

- (i) in the premises of the matters pleaded and particularised in subparagraphs 106(a) to 106(h) above, prior to offering a Franchise Agreement for a Store, 7-Eleven knew or ought to have known, and it was the fact, that each of the Applicants and some or all of the other Franchisees would be unable to operate that Store profitably and maintain their Minimum Net Worth unless the principals (and/or their family members) of each of the Applicants and each of the Franchisees:
- (i) worked in that Store without pay for an unreasonable and unsociable number of hours each week and/or covered night and weekend shifts without pay (or engaged family members to do so); and/or
 - (ii) engaged employees to assist them to operate that Store, and paid or agreed to pay them at rates which were significantly below their award wage rates.

Particulars

- (1) *The Applicants repeat the matters pleaded in subparagraphs 106(a) to 106(h) above.*
- (2) [Email sent on 24 August 2015 by from Robert \(Bob\) Baily to Russell Withers, copied to Philip Gay and other members of 7-Eleven's board, as to the true wages costs compared to average franchisee annual profit \(SEV.0111.0001.4983\).](#)
- (3) [7-Eleven internal presentation prepared in about September 2015 "About Going Forward" \(SEV.0108.0058.5128 - SEV.0108.0058.5150\).](#)
- (4) [Email sent on 30 November 2015 from Peter Kleinschafer \(7-Eleven Queensland District Manager\) to Robert "Bob" Baily \(7-Eleven Interim CEO\) \(SEV.0110.0001.1304 - SEV.0110.0001.1305\), in which Mr Kleinschafer stated:](#)

“On numerous occasions I have brought to the attention of both my regional and state manager compelling evidence of endemic underpaying of staff in the business. On every single occasion it was either laughed off and made a joke of ,or even more disgusting I was berated for mentioning it to such an extent that I felt that my position was under threat if I continued to press the issue.

My question is two fold

1) When will individuals be held accountable for their complicity?

2) what will be put in place at a corporate level that will allow staff to escalate issues without fear of retribution ?”

Particulars in respect of First Applicant’s Stores

1. The First Applicant refers to and repeats the particulars to paragraphs 52 and 81 above.
2. 7-Eleven ought to have known the matters alleged in 1 above.
3. Further to 1 and 2 above, 7-Eleven ought to have known (and it was a fact) that the Training Workbook disclosed ([DPL.0001.0001.1359 at 1475 to 1477](#)) that:
 - a. An inexperienced franchisee required at least [205+99.5](#) staff hours per week to operate a Store; and
 - b. An experienced franchisee required at least 186.3 staff hours per week to operate a Store, and quite possibly more depending (inter alia) on the level of the Franchisee’s experience and size of the Store.
4. 7-Eleven ought to have known (and it was a fact) that, workers compensation expenses would be incurred at an approximate rate of 2% of wages and superannuation would be incurred at an approximate rate of 9% of wages.
5. 7-Eleven ought to have known (and it was a fact) that, across the 168 hours in a week:
 - a. the average award wage for a Convenience Store in NSW was ~~\$22.30~~ [\\$22.66](#) per hour (for a store operated for 168

employee hours) or \$22.18 per hour (for a store operated for 205 employee hours) from 1 July 2011 (being the rate applicable at the time the Campbelltown Loan Application was made), as calculated at Table 5 in the average rates report of Mr Chris Hart dated and filed 5 March 2021 (Average Rates Report) in accordance with the schedule to this letter);

- b. the average award wage for a Convenience Store in NSW was \$27.81 per hour from 1 July 2014 (being the rate applicable at the time the Northmead Loan Application was made, as calculated in accordance with the schedule to this letter);
- c. the average award wage for a Fuel Store in NSW was \$26.53–\$31.57 per hour (for a store operated for 168 employee hours) or \$30.93 (for a store operated for 205 employee hours) from 1 July 2014 (being the rate applicable at the time that the Northmead Loan Application was made), as calculated at Table 8 in the Average Rates Report.

Campbelltown Store – one staff member rostered across 168 hours per week

- 6. If the Campbelltown Store Financials for the financial year 2011-2012 were adjusted to include labour costs at the average award wage of \$22.~~3066~~ per hour with one staff member rostered over 168 hours per week:
 - a. The annual payroll cost would have amounted to \$199,077 (Table 5, Average Rates Report);
 - ~~a.b.~~ The Campbelltown Store Financials for the financial year 2011-2012 would have recorded a loss of \$45,011–\$47,914 in the “Net Income” line (Net Income);
 - ~~b.c.~~ The First Applicant would have incurred a net loss of \$88,255–\$91,166 per annum after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012

(being monthly repayments of \$3,604.30 or \$43,252 per year).

7. *If the Campbelltown Store Financials for the year 2011-2012 were adjusted to include labour costs at the average award wage of \$22.~~3066~~ per hour with one staff member rostered over 108 hours per week (if Mr Davaria worked in the Campbelltown Store for no wages over the remaining 60 hours):*
- a. The annual payroll cost would have amounted to \$127,978;
- a.b. The Campbelltown Store Financials would have recorded a profit of ~~\$32,219~~ \$23,185 in Net Income for the financial year 2011-2012;
- b.c. The First Applicant would have incurred a net loss of ~~\$11,025~~ \$20,067 after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012.
8. *In the premises of particular 7 above, the Campbelltown Store could not have generated sufficient profits to meet the loan repayments even if Mr Davaria worked in the Campbelltown Store for 60 hours per week for no wages and only one staff member was rostered at all other times.*

Campbelltown Store – ~~minimum~~ hours prescribed by the Training Workbook

9. *If the Campbelltown Store Financials for the financial year 2011-2012 (DPL.0001.0004.40687) were adjusted to include labour costs at the average award wage of \$22.~~3018~~ per hour over ~~199.5205~~ hours per week (if the Campbelltown Store operated according to the most optimistic minimum assumptions statements made in the Training Workbook for a new franchisee at 1475 to 1477 of DPL.0001.0001.1359):*
- a. The annual payroll cost would have amounted to \$237,730 (Table 5, Average Rates Report);
- a.b. The Campbelltown Store Financials would have recorded a loss of ~~\$85,556~~ \$86,567 in the Net Income, for the financial year 2011-2012;

- ~~b.c.~~ The First Applicant would have incurred a net loss of ~~\$128,800~~ \$129,819 per annum after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012.
10. If the Campbelltown Store Financials for the year 2011-2012 were adjusted to include labour costs at the average award wage of ~~\$22.30~~ \$21.98 per hour over ~~139.5~~ 145 hours per week (if Mr Davaria worked in the Campbelltown Store for no wages over the remaining 60 hours):
- a. The annual payroll cost would have amounted to \$166,632;
- a.b. The Campbelltown Store Financials would have recorded a loss of ~~\$8,327~~ \$15,469 in Net Income for the financial year 2011-2012;
- ~~b.c.~~ The First Applicant would have incurred a net loss of ~~\$51,571~~ \$58,720 per annum after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012.
11. In the premises of particular 10 above, ~~even~~ if the Campbelltown Store had been operated according to ~~the most optimistic staffing assumptions statements made in the Training Workbook~~, it could not have generated sufficient profits to meet the loan repayments if Mr Davaria worked in the Campbelltown Store for 60 hours for no wages.

Northmead Store – one staff member rostered across 168 hours per week

12. If the available Northmead Store financials for the first ~~10~~ 6 months of financial year 2014-2015 (DPL.0001.0002.3579) were annualised and adjusted to include labour costs of ~~\$26.53~~ \$31.57 per hour with one staff member rostered over 168 hours per week:
- a. The annual payroll cost would have amounted to \$276,547 (Table 8, Average Rates Report);

- ~~a.b.~~ The Northmead Store would have recorded a profit of ~~\$44,655~~ \$8,485 in Net Income for the financial year 2014-2015;
- ~~b.c.~~ The First Applicant would have incurred a net loss of ~~\$70,917~~ \$107,133 per annum after interest and principal repayments on the Northmead Loan, if the First Applicant had assumed the obligations of the Northmead Store Loan Contract during the financial year 2014-2015 (being monthly repayments of \$9,634.81 or \$115,618 per year).
13. 7-Eleven could not reasonably expect Mr Davaria to work in the Northmead Store for 60 hours at no cost because ex hypothesi he was already operating the Campbelltown Store.

Northmead Store – ~~minimum~~ hours prescribed by the Training Workbook

14. If the available Northmead Store financials for the first ~~10~~ 6 months of financial year 2014-2015 were annualised and then adjusted to include labour costs of \$26.53 per hour over ~~486.3~~ 205 hours (if the Northmead Store operated according to the ~~most optimistic~~ minimum assumptions statements made in the Training Workbook for an experienced franchisee):
- ~~a.~~ The annual payroll cost would have amounted to \$330,617 (Table 8, Average Rates Report);
- ~~a.b.~~ The Northmead Store would have recorded a ~~profit~~ loss of ~~\$16,632~~ \$45,585 in Net Income for the financial year 2014-2015;
- ~~b.c.~~ The First Applicant would have incurred a net loss of ~~\$98,940~~ \$161,203 per annum after interest and principal repayments on the Northmead Loan, if the First Applicant had assumed the obligations of the Northmead Store Loan Contract during the financial year 2014-2015.
15. 7-Eleven could not reasonably expect Mr Davaria to work in the Northmead Store for 60 hours at no cost because ex hypothesi he was already operating the Campbelltown Store.

Northmead Store – Mr Davaria working 60 hours a week and one staff member rostered across 108 hours per week; Campbelltown Store – Mr Davaria not working at Campbelltown

16. If the available Northmead Store financials for the first ~~10~~6 months of financial year 2014-2015 were annualised and then adjusted to include labour costs at the average award wage of ~~\$26.53~~\$31.57 per hour over 108 hours per week (on the basis that the Northmead Store operated with only one staff member rostered over 168 hours per week, of which, Mr Davaria worked for 60 hours per week for no wages) and the available Campbelltown Store Financials for the financial year 2014-2015 (DPL.0001.0023.0446) were adjusted to include labour costs of \$27.81 per hour over 168 hours (on the basis that the Campbelltown Store operated with only one staff member rostered over 168 hours per week and Mr Davaria did not work at the Campbelltown Store):

a. The annual payroll costs for the Campbelltown Store in financial year 2014-2015 would have amounted to \$243,616;

b. The annual payroll costs for the Northmead Store in financial year 2014-2015 would have amounted to \$177,780;

a.c. The Northmead Store financials would have recorded a profit of ~~\$136,534~~\$107,252 in Net Income for the financial year 2014-2015;

b.d. The First Applicant would have incurred a ~~profit~~loss of ~~\$20,962~~\$8,366 per annum after interest and principal repayments on the Northmead Loan, if the First Applicant had assumed the obligations of the Northmead Store Loan Contract during the financial year 2014-2015; ~~however and~~

c.e. The Campbelltown Store financials would have recorded a net loss of ~~\$45,855~~\$36,643 in Net Income for the financial year 2014-2015 and a net loss of ~~\$87,741~~\$79,894 after interest and principal repayments on the Campbelltown Loan;

~~d.f.~~ In the premises of a to e above, the First Applicant would have generated an overall net loss across both stores of ~~\$66,779~~ ~~\$88,260~~ even with Mr Davaria working 60 hours per week at no pay.

17. Further particulars may be provided after discovery, as information becomes available. It is neither required nor presently possible to provide corresponding calculations for each group member at this stage of the proceedings.

Particulars in respect of Second Applicant's Store

18. The Second Applicant's business plan provided that:
- a. only 168 hours per week would be worked in the South Melbourne Store;
 - b. each of Jatinder Pal Singh and his wife would work 48 hours per week and be paid a salary of \$18,192;
 - c. another family member would work 8 hours per week in the South Melbourne Store, for nothing;
 - d. the Second Applicant would obtain a loan to finance the purchase of the Store, and set out anticipated loan repayments in respect of the South Melbourne Store.
19. 7-Eleven ought to have known (and it was a fact) the Training Workbook disclosed ([DPL.0001.0001.1359 at 1475 to 1477](#)) that:
- a. An inexperienced franchisee required at least ~~205499.5~~ staff hours per week to operate a Store; and
 - b. An experienced franchisee required at least 186.3 staff hours per week to operate a store.
20. 7-Eleven ought to have known (and it was a fact) that, workers compensation expenses would be incurred at an approximate rate of 2% of wages and superannuation would be incurred at an approximate rate of 9% of wages.
21. ~~a.~~ 7-Eleven ought to have known (and it was a fact) that, across the 168 hours in a week, the average award wage for a Convenience Store in Victoria was:

a. \$24.98–\$23.68 per hour (for a store operated for 168 employee hours) or \$23.13 per hour (for a store operated for 205 employee hours) from July 2013¹ (being the rate applicable for financial year 2012¹-2013²) and

b. \$24.83 per hour (for a store operated for 168 employee hours) or \$24.14 per hour (for a store operated for 205 employee hours) from July 2012 (being the rate applicable for financial year 2012-2013),

as calculated in Table 5A of the Average Rates Report.

South Melbourne Store – one staff member rostered across 168 hours per week

21.22. If the financial statements for the South Melbourne Store provided on or about 169 July 2013 by Michael McNamara of 7-Eleven to Jatinder Pal Singh (**South Melbourne Store Financials** - JPS.0001.0001.0331) for the financial year 2012-2013 were adjusted to include labour costs at the average award wage of \$24.98–\$24.83 per hour with one staff member rostered over 168 hours per week:

a. The annual payroll cost would have amounted to \$217,550 (Table 5A, Average Rates Report);

a-b. The South Melbourne Store Financials for the financial year 2012-2013 would have recorded a loss of \$40,309–\$9,121 in Net Income;

b-c. The Second Applicant would have incurred a loss of \$100,201–\$69,013 per annum after interest and principal repayments on the South Melbourne Loan, if the second Applicant had assumed the obligations of the South Melbourne Store Loan Contract during the financial year 2012-2013 (being monthly repayments of \$4,991 or \$59,892 per year).

South Melbourne Store – ~~minimum~~ hours prescribed by the Training Workbook

22.23. If the South Melbourne Store Financials for the financial year 2012-2013 were adjusted to include labour costs at the average award

wage of ~~\$24.9883~~ per hour over ~~199.5205~~ hours per week (if the South Melbourne Store operated according to the ~~most optimistic minimum assumptions statements made~~ in the Training Workbook for a new franchisee ~~at 1475 to 1477 of DPL.0001.0001.1359~~):

a. The annual payroll cost would have amounted to \$258,077 (Table 5A, Average Rates Report):

a-b. The South Melbourne Store Financials would have recorded a loss of ~~\$85,727~~ \$49,648 in Net Income, for the financial year 2012-2013;

b-c. The Second Applicant would have incurred a loss of ~~\$145,619~~ \$109,540 per annum after interest and principal repayments on the South Melbourne Loan, during the financial year 2012-2013.

23-24. If the South Melbourne Store Financials for the year 2012-2013 were adjusted to include labour costs at the average award wage of ~~\$24.98~~ \$23.86 per hour over ~~139.5~~ 145 hours per week (if Mr Singh worked in the South Melbourne Store for no wages over the remaining 60 hours ~~(according to the statements made in the Training Workbook for a new franchisee)~~):

a. The annual payroll cost would have amounted to \$180,381;

a-b. The South Melbourne Store Financials would have recorded a ~~profit~~ loss of ~~\$784~~ \$28,048 in Net Income for the financial year 2012-2013;

b-c. The Second Applicant would have incurred a loss of ~~\$60,676~~ \$31,844 per annum after interest and principal repayments on the South Melbourne Loan, during the financial year 2012-2013.

24-25. In the premises, ~~even~~ if the South Melbourne Store operated according to the ~~most optimistic staffing assumptions statements made in the Training Workbook~~, it could not have generated sufficient profits to meet the loan repayments if Mr Singh worked in the South Melbourne Store for 60 hours for no wages.

- (j) 7-Eleven knew, and it was the fact that, in the event that a Franchisee was unable to maintain their Minimum Net Worth for that Store, 7-Eleven had

the right to immediately terminate their agreement and the Franchisee would be exposed to loss of the whole of their Capital Investment but would remain liable for the amount of the Franchise Debts;

Particulars

The Applicants repeat the matters pleaded and particularised in paragraph 22 above and says that 7-Eleven knew of this as it was a term of the Franchise Agreements throughout the Relevant Period.

- (k) in the premises of the matters pleaded and particularised in subparagraphs 106(a), 106(b), 106(c), 106(d), 106(e), 106(g), 106(h), 106(i) and 106(j) above, 7-Eleven knew or ought to have known, and it was the fact, that the financial information provided to each of the Applicants and each prospective franchisee in the Average Store Financials was misleading or deceptive as stated in paragraphs 55 and 61 above;

Particulars

- (1) *The Applicants repeat the matters pleaded and particularised in sub-paragraphs 106(a), 106(b), 106(c), 106(d), 106(e), 106(g), 106(h), 106(i) and 23 above.*
- (2) *Further, and in the alternative, since 2008 the Fair Work Ombudsman (FWO) has received regular reports alleging widespread minimum wage non-compliance issues across the 7-Eleven network, and in a media release dated 9 April 2016, the Fair Work Ombudsman announced that:*
 - I. *for more than 7 years, there had been persistent reports from 7-Eleven employees alleging significant underpayment of wages; and*
 - II. *it had significant engagement with 7-Eleven in the period from 2009 to 2014 in relation to wage underpayment issues but did not see any significant improvement in compliance with minimum wage standards, such that, at all material times during the Relevant Period 7-Eleven knew or ought to have known that the Average Store Financials were or were likely to be materially inaccurate and/or or should have*

investigated that possibility before providing the Average Store Financials to Franchisees who were considering whether to purchase a franchise business, [as detailed in a report dated 10 December 2015 from Deloitte to 7-Eleven \(SEV.0019.0001.0048 - SEV.0019.0001.0081\)](#).

- (3) Further, and in the alternative, 7-Eleven's own [reports](#), internal correspondence and memoranda;
- I. of 11 March 2010 (SEV.0025.0014.9423) from Sue Owen (7-Eleven's then National Operations Manager) to Nick Hughes, Paul Stevens and Gavin Monaghan (7-Eleven's Queensland State Manager for Queensland) and copied to (inter alia) Penny Cervetto (7-Eleven's then National HR Manager) and Calinda Lee (7-Eleven's then Operations Business Analyst); and
 - II. between 22 July 2010 and 14 October 2010 (SEV.0100.0030.5604), involving Penny Cervetto, Tracy Hammon (7-Eleven's then Public Affairs and Communications Manager), Sue Owen and Natalie Dalbo (7-Eleven's then General Manager Operations);
 - III. of 15 November 2010 (SEV.0105.0001.8433), concerning "WORKPLACE RELATIONS OBLIGATIONS";
 - IV. of 13 April 2011 from Penny Cervetto to Shane Radbone, Nick Hughes, Barry King, Gavin Monaghan, Paul Early (then 7-Eleven Human Resources Manager) and Paul Stevens (SEV.0113.0031.0470); and
 - [V.](#) of 26 to 30 January 2012 (SEV.0105.0015.4135), involving Shane Radbone, Penny Cervetto and Warren Wilmot (then 7-Eleven's Chief Executive Officer);

- VI. between Calinda Lee and Niki Kecheqias, between 25 and 28 March 2011 (SEV.0025.0014.8633);
- VII. contained in the Board of Directors Report – September 2015 (SEV.0101.0003.3276; SEV.0235.0006.5727); and
- VIII. contained in the report dated 10 December 2015 from Deloitte to 7-Eleven (SEV.0019.0001.0048 - SEV.0019.0001.0081),
- ~~V~~-IX. of 22 March 2012 from Peter O’Hara to Sue Owen, copied to Michael McNamara (SEV.0219.0053.7946), in which it was stated “Establish if the [franchisee] candidate is connected in anyway to any of our existing Franchisee’s, this may indicate that the candidate has been provided advice on how to avoid paying correctly under the award”.

indicates that 7-Eleven has been aware or, alternatively, that a high risk existed, since at least 2010, of widespread minimum wage non-compliance issues across the 7-Eleven network;

- (4) 7-Eleven has received, since at least 4 December 2012:
- I. email correspondence from 7-Eleven employees (including correspondence dated 13 October 2010 included in the chain of correspondence referred to in subparagraph (3)(II) above) and Michael Fraser (sent in or about December 2012 and 7 January 2013, addressed to Julie Booth (then 7-Eleven’s Communications Manager)), alleging widespread minimum wage non-compliance issues across the 7-Eleven network;
 - II. survey results (dated 3 April 2014; SEV.0100.0019.8783) from employees from Franchisees, in which a principal complaint of employees was that they had not been paid in accordance with lawful entitlements.

- (l) 7-Eleven knew, and it was the fact, that Mr Davaria (the sole director and principal of the First Applicant), Mr Singh (the sole director and principal of the Second Applicant), and the principals of some or all of the Franchisees were not provided with any training concerning their legal obligations concerning the payment of minimum wages and, or alternatively, what those minimum wages were and how they were calculated, until after:
- (ia) they had been provided with Average Store Financials and Individual Store Financials in relation to the Store in respect of which the Franchisee subsequently purchased the goodwill and entered into a Franchise Agreement; and
 - (ib) they had received from 7-Eleven the Goodwill Purchase Advice and, or alternatively, the Goodwill Value Representation and, or alternatively, the Renewal Representation;
 - (ic) they had received from 7-Eleven information and documents, including Average Store Financials, Individual Store Financials and template documents, from which they were requested or advised to prepare a business plan and employee roster for their chosen Store;
 - (id) they had prepared a business plan for their chosen Store based on the information referred to in subparagraph (ic) above and provided the business plan to 7-Eleven as part of and for the purposes of gaining approval from 7-Eleven to acquire a franchise;
 - (ie) they had been encouraged or advised by 7-Eleven to negotiate, and negotiated, the purchase price for the goodwill of the relevant Store; and
 - (if) they (or their associated corporate Franchisees) had entered into a Heads of Agreement for the purchase price for the goodwill of the relevant Store and paid a deposit under that agreement; and
 - (ig) they and, or alternatively, their associated corporate Franchisees, had:
 - (A) obtained any finance necessary to complete the purchase of the goodwill of the relevant Store; and

(B) provided, for the purposes of obtaining such finance, a copy of the Heads of Agreement and information from (or derived from) the business plan for their chosen Store;

and,

(ih) they and their associated corporate Franchisees had executed the Franchise Agreement; and

(i) they or their associated corporate Franchisees had paid the non-refundable *Franchise Fee* and the application or training fee for SEFT;

(ii) the 7-day cooling off period under their Franchise Agreement had expired;

Particulars

7-Eleven knew of this, as it:

(ia) mandated and controlled the order of the above steps for incoming Franchisees, including:

(1) the timing of provision to Franchisees of Average Store Financials and Individual Store Financials to prospective Franchisees, which were usually provided at or soon after an initial meeting in the approval process for incoming Franchisees (or their principals);

(2) the timing of approval of incoming Franchisees, including the submission of business plans by incoming Franchisees for that purpose, which usually occurred proximate to the time of execution of the Heads of Agreement and prior to the subsequent steps listed above;

(3) the issuing and execution of the Heads of Agreement, which usually occurred prior to SEFT;

(4) the timing of incoming Franchisees (or their principals) undertaking SEFT;

(5) the provision of Disclosure Documents and Franchise Agreements to incoming Franchisees, which were usually provided by 7-Eleven prior to or during the early stages of SEFT;

(6) the date of execution of Franchise Agreements by incoming Franchisees (and their principals), which was usually prior to the training module in SEFT at which incoming Franchisees (or their principals) were informed of the minimum wages for employees who worked in Stores and how to calculate those wages (Wages Training Module); and

(7) the order of training modules presented during SEFT, including the presentation of the Wages Training Module at or towards the end of SEFT, as shown in version 6.0 of the Franchise Systems Manual (SEV.0059.0005.2782);

- (i) provided the SEFT training, received executed copies of Franchise Agreements and was the recipient of the Franchise Fee;
 - (ii) received business plans from Franchisees, which provided for payment of wages below minimum wages mandated by relevant awards; and
 - (iii) did not inform Franchisees, prior to the Media Investigative Reporting, that:
 - (1) the obligation to pay minimum wages extended to family members; or
 - (2) they should prepare a business plan in which all of the hours to be worked by persons in order to operate the Store were recorded and paid at minimum lawful wage rates.
- (m) 7-Eleven knew, and it was the fact₁ that Mr Davaria, Mr Jatinder Pal Singh and some or all of the Franchisees or their principals had immigrated to Australia as adults and their second language was English and that they had: (i) limited business experience; and/or (ii) limited or no understanding of Australian labour and industrial laws.

Particulars

7-Eleven knew this because it approved each of the Applicants and each of the Franchisees as purchasers of the Stores and in doing so subjected each of them to numerous interviews and ascertained those matters in the course of those interviews.

E2. Franchisor's unconscionable conduct and its consequences

107. Further and in the alternative to the matters pleaded in paragraph 106 above, each of the Applicants refer to and repeats paragraphs [40A 44](#) to 76 above and say that, prior to each of the Applicants and each of the Franchisees entering into their Franchise Agreements, 7-Eleven conveyed the Misleading or Deceptive Conduct Representations (or some of them) to each of them.
108. By reason of the conduct of 7-Eleven in conveying the Misleading or Deceptive Conduct Representations (or some of them), and by making each of the statements pleaded in paragraphs 42 above, at the time of entering their respective Franchise Agreements, each of the Applicants and some or all of the Franchisees had and/or were entitled to hold a reasonable expectation that:
- (a) they were buying their own business;
 - (b) in running their Franchise they would "be their own boss";
 - (c) they would have the opportunity to own and run a business within a franchise system that had a well-known and established brand in Australia and around the world;
 - (d) they would have the opportunity to make reasonable profits over the term of their franchise agreements which, subject to market conditions, reflected their investment of skill, time, money and effort, and the exercise of their individual business judgment in operating their business within a trusted franchise system; and/or
 - (e) they would have the opportunity to make profits from the operation of their respective businesses which was not, or not necessarily, dependent upon their directors, principals or family members working unreasonable or unsociable hours or without any or any adequate wages or remuneration in those businesses; and/or
 - (f) there would be no or no reasonably foreseeable need to engage employees to work at the Store on terms of employment which did not accord with the minimum requirements of the law in order to generate income or profits and to avoid risk of termination of the Franchise Agreement and loss of their Capital Investment due to their *Net Worth* falling below the Minimum Net Worth; and/or
 - (g) each of them would have a reasonable opportunity to recoup their Capital Investment in the business, including loan funding and/or to earn a capital

gain from the sale of their respective businesses as a going concern to an incoming Franchisee.

109. Further and in the alternative to the matters pleaded in paragraphs 106, 107 and 108 above, contrary to the reasonable expectations of each of the Applicants and some or all of the other Franchisees as referred to in paragraph 108 above, by reason of the C-Store Practices and the Inventory Practices:

- (a) none of the Franchisees had any or any reasonable control over the profit margins which they could earn by selling merchandise at their Stores;
- (b) none of the Franchisees had the power, or any genuine ability or freedom, to alter selling prices of merchandise, either by increasing the price to earn more sales revenue per item, or decreasing the price to increase the number of items sold, to maximise the profit opportunities available to their Stores, either at all or at different times of the day, having regard to the Store's costs or market conditions;
- (c) none of the Franchisees had any or any reasonable ability to reduce their *Cost of Goods Sold* by acquiring merchandise from any supplier other than C-Store (in respect of most stock items sold at Stores), and at a price below the C-Store price;

Particulars (a)-(c)

The Applicants repeat the matters pleaded and particularised in paragraphs 11(a), 16(a), 16(b), 16(c), 16(d), 17(a), 17(b), 17(d), 17(e), 18(a), 18(c), 25, 26, 27 and 28 above, and say that the lack of effective control over the Franchisees margins was for reasons which include:

- (i) *the Franchise Agreements required them to operate the Stores in accordance with the 7-Eleven System and the Manual in a manner that enhances the 7-Eleven Image which imposed highly prescriptive operational requirements as set out in the Manual and other Franchise Material;*
- (ii) *7-Eleven procured the opening inventory for each of the Stores at C-Store pricing and effectively determined the ongoing inventory to be purchased by the Stores by its control of recommended orders on the Online Portal and/or by direction pursuant to its contractual right to nominate stock which the Franchisees were required to carry (and the quantities in which they are required to carry them)*

on the basis that such stock was deemed essential to the 7-Eleven System and 7-Eleven Image and/or pursuant to any marketing campaign requirements;

- (iii) 7-Eleven determined the maximum prices by which stock could be sold by its control of the pricing field in the Online Portal;
- (iv) 7-Eleven nominated C-Store as the only supplier of the goods that were supplied by C-Store and negotiated the C-Store pricing on the Franchisee's behalf;
- (v) at all material times during the Relevant Period, the C-Store pricing ~~es~~ resulted in Franchisee and each other Franchisee paying wholesale prices for stock which exceeded
 - (1) the Independent Fair Wholesale Price;
 - (2) the Best Endeavours Wholesale Price; and/or
- (vi) 7-Eleven prevented Franchisees from ordering stock items that were supplied by C-Store from alternative Bona Fide Suppliers (other than C-Store), at all, or on a regular basis by:
 - (1) only offering stock from C-Store on its Online Portal for ~~most~~ stock items that were supplied by C-Store;
 - (2) requiring Franchisees who had ordered stock items that were supplied by C-Store other than from C-Store to submit invoices to 7-Eleven prior to payment of the invoice from the Open Account (or reimbursement of the Franchisee for its direct payment to the supplier, as the case may be) via means outside of the Online Portal;
 - (3) enforcing the Stock Ordering Compliance Term (paragraph 17(e)) in relation to each invoice from an alternative Bona Fide Supplier ordered from outside the Online Portal by charging Franchisees a \$75 fee for each tax invoice processed in respect of such stock purchases outside the Online Portal;
 - (4) penalising Franchisees who have ordered from alternative suppliers, in performance reviews; and
 - (5) the matters pleaded in paragraph 25(e) above.

- (d) in the case of the First Applicant and some of the Franchisees, 7-Eleven was able to end their Franchise Agreement at will prior to the completion of a 10-year term by refusing to exercise an option to renew the Lease of the site and to use the threat of such a termination to control the actions of the Franchisee prior to the expiry of the primary term of their Store lease;
- (e) due to 7-Eleven's control over the *Open Account*, and Franchisees' obligation to maintain their *Minimum Net Worth*:
- (i) Franchisees were, prior to the Variation Agreement, forced to keep payroll costs below the True Payroll Costs applicable to their Store, or else:
- (1) receive no, or reduced, Weekly Draw; and,
- (2) accordingly, be significantly constrained in their ability to meet their financial obligations, including repayment of any funds borrowed for the purpose of acquiring the franchise associated with their Store;
- (ii) none of the Franchisees had any control over the cash inflows and outflows in relation to their Stores;

Particulars

The Applicants repeat the matters pleaded and particularised in paragraphs 11(c), 11(d), 11(f), 12, 13, 14, ~~and~~ 15, 19(c), 20(c) and 22 above.

- (f) none of the Franchisees had any power to alter the opening hours of their respective Stores to minimise wage and utility costs, where it was not reasonably necessary or cost effective for the Store to be open for all of the hours mandated by 7-Eleven.

Particulars

The Applicants repeat the matters pleaded in subparagraph 11(a) above and say that the Franchise Agreements required and requires them and some or all of the Franchisees to operate the Stores continuously throughout the term for 24 hours a day or 7 days per week (or for a small number of instances Stores, for restricted ~~extended~~ hours) which compels them to operate their Stores (and incur labour costs) in hours of low or no sales.

110. [Not used]
111. Further and in the alternative, contrary to the reasonable expectations of each of the Applicants and some or all of the Franchisees as referred to in paragraph 108 above, in entering into their Franchise Agreements:
- (a) each of the Applicants and each of the Franchisees were not afforded the opportunity to own and run their own business, but they were in substance no better placed than employees to make business decisions about the respective Stores nominally owned by them;
 - (b) each of the Applicants and some or all of the Franchisees were not afforded the opportunity to make reasonable profits or income which reflected, or enabled them to recoup, their Capital Investment, or the investment of skill, money, time and effort during the term of their respective Franchise Agreements;
 - (c) each of the Applicants and some or all of the Franchisees were only able to continue in business and/or have any opportunity to make a profit by relying upon the provision of unpaid labour from their respective principals and/or family members;
 - (d) each of the Applicants and some or all of the Franchisees were only able to continue in business by obtaining additional funding from external sources to meet labour and other costs, because the level of revenue available to them from the operation of the Stores was insufficient to meet those labour and other costs;
 - (e) each of the Applicants and some or all of the Franchisees were unable to continue in business without engaging in employment practices that did not meet the minimum requirements of the law.
112. Further and in the alternative, and contrary to the reasonable expectations of each of the Applicants and some or all of the other Franchisees referred to in subparagraph 108(g) above, Stores in the *7-Eleven System* were not reasonably capable of being sold for a Goodwill Payment that allowed ~~the~~ outgoing Franchisees to recoup ~~their~~ ~~its~~ Capital Investment and any associated loan financing unless:
- (a) 7-Eleven provided sales and financial information to prospective Franchisees which represented a level of profitability and/or goodwill value of Stores in the *7-Eleven System* which was not a true and fair view of the

actual profitability and/or goodwill value of those Stores by reason of its failure to include a proper allowance for:

- (i) the hours worked by the principals and/or family members associated with the Franchisee of each Store for unreasonable or unsociable hours for no remuneration or for remuneration that was paid below legal wage rates;
 - (ii) the time worked by employees that was not paid at the rates prescribed by law and/or the true labour costs involved in the operation of Stores;
- (b) 7-Eleven provided an assurance or some other form of comfort to the Bank, or some other financier, as to Bank's or that other financier's likely ability to be repaid any loan advanced to a prospective Franchisee to make that Goodwill Payment to the outgoing Franchisee, in addition to the Capital Investment required to be paid to 7-Eleven, notwithstanding the accuracy or otherwise of the sales and financial information provided by 7-Eleven to prospective Franchisees about the level of profitability and/or goodwill value of Stores in the *7-Eleven System*.
113. Further and in the alternative to the matters pleaded in paragraphs 106 to 112 above, by reason of the matters pleaded in paragraphs 108, 109, 111 and 112 above:
- (a) prospective Franchisees were enticed by 7-Eleven to invest in the promise of buying into a business;
 - (b) the Franchisees had no reasonable prospect of making a profit from the operation of the Store or to generate sufficient revenue from the Store to maintain that Store's operations and thereby avoid the risk of forfeiture of the Franchisee's investment in the Store;
 - (c) the principals and family members associated with the Franchisees were obliged to work unreasonable or unsociable hours either for nothing or for remuneration that was below the legal wage rate to enable the Store to remain in operation and thereby avoid the risk of forfeiture of the Franchisee's investment in the Store; and/or
 - (d) the Franchisees were compelled to engage employees to assist in complying in running the Stores for 24 hours per day and 7 days per week and, in order to avoid the risk of:

(i) termination of the Franchise Agreement on the grounds of breaching the Minimum Net Worth requirement; and, or alternatively,

(ii) not being able to generate income sufficient to enable Franchisees or their principals to meet essential financial obligations,

to pay them at below award rates; and/or

(e) the Franchisees were dependent upon a new prospective Franchisee purchasing the Store: (i) for a Goodwill Payment, the amount of which was based on incorrect financial information about profitability and/or goodwill value of the Store provided by 7-Eleven, to enable the outgoing Franchisee to recoup its Capital Investment in purchasing the Store including loan funding and/or to earn a capital gain from the sale of that Store; and (ii) loan funds being available from the Bank or other financier with whom 7-Eleven had reached an agreement or understanding, and to whom 7-Eleven had provided an assurance or comfort as to Bank's or that other financier's likely prospect of being repaid the loan notwithstanding the accuracy or otherwise of the financial information provided by 7-Eleven about the profitability and/or goodwill value of the Store, which assurance or comfort resulted in loan funding being made available to the prospective Franchisee to make that Goodwill Payment.

114. [NOT USED]

115. Further and in the alternative to paragraphs 106 to 113 above, the provision of financial information by 7-Eleven (including by publication of Listed Stores Information), prior to the entry by each of the Franchisees into their respective Franchise Agreements, purporting to show the profitability and/or goodwill value of Stores in the *7-Eleven System*, which was incorrect and incomplete, represented:

- (a) unfair tactics by 7-Eleven to encourage the entry into their Franchise Agreements;
- (b) a failure by 7-Eleven to disclose to each of them, as prospective Franchisees, of the risks to them of entry into the Franchise Agreements;
- (c) the failure of 7-Eleven to act in good faith as stated in section 22(1)(l) of the ACL and/or section 12CC(1)(l) of the ASIC Act, and/or in contravention of clause 6 of the Franchising Code 2014.

E3. Contravention of section 21 of the ACL [and/or section 51AC of the TPA](#) [and/or section 12CB of the ASIC Act](#)

116. By reason of the matters pleaded and particularised in each of paragraphs 106 to 115 above (separately or in any combination), 7-Eleven engaged in conduct that was, in all the circumstances, unconscionable:
- (a) in trade or commerce;
 - (b) in connection with the supply or possible supply of services to each of the Applicants within the meaning of section 21 of the ACL [and/or section 51AC of the TPA, and/or in connection with the supply or possible supply of financial services \(being the credit facility made available to Franchisees through the *Open Account*\) to each of the Applicants within the meaning of section 12CB of the ASIC Act](#);
 - (c) in contravention of section 21 of the ACL [and/or section 51AC of the TPA, and/or section 12CB of the ASIC Act](#) (**Unconscionable Conduct**).
117. As a result of the Unconscionable Conduct the Applicants have suffered loss and damage.

Particulars

The Applicants repeat the particulars to paragraphs 101 and 101B above.

118. Further, and in the alternative, the Unconscionable Conduct referred to in paragraphs 106 to 115 materially contributed to the decision of the First Applicant to enter into the Campbelltown Store Franchise Agreement, and to the decision of the Second Applicant to enter into the South Melbourne Franchise Store Agreement, and thereby caused each of the Applicants to suffer loss and damage.

Particulars

- (a) *At no time prior to the First Applicant's entry into the Campbelltown Store Franchise Agreement, or the Second Applicant's entry into the South Melbourne Store Franchise Agreement, did either of the Applicants, respectively, understand that:*
 - (i) *its reasonable expectations as stated in paragraph 108 were based on the Misleading or Deceptive Conduct Contraventions (or some of them) and each of the other contraventions of 7-Eleven referred to in paragraphs 101 and 101B above;*
 - (ii) [NOT USED]

- (iii) [NOT USED]
 - (iv) *the entry into the Franchise Agreement would have the consequences for them as stated in paragraph 111 above;*
 - (v) *the ability of them to sell the Store was dependent on the matters stated in paragraphs 112 and/or 113 above.*
- (b) *The Applicants repeat the particulars to paragraphs 101 and 101B above in relation to loss and damage.*
119. By reason of the matters pleaded in each of paragraphs 106 to 115 above (separately or in any combination), by entering into the Franchise Agreements of some or all of the Franchisees, 7-Eleven engaged in unconscionable conduct:
- (a) in trade or commerce;
 - (b) in connection with the supply or possible supply of services to those Franchisees within the meaning of section 21 of the ACL [and/or section 51AC of the TPA, and/or in connection with the supply or possible supply of financial services to those Franchisees within the meaning of section 12CB of the ASIC Act](#) **__(Unconscionable Conduct (Franchisees))**;
 - (c) in contravention of section 21 of the ACL [and/or section 51AC of the TPA, and/or section 12CB of the ASIC Act](#).
120. As a result of the Unconscionable Conduct (Franchisees), some or all of the Franchisees suffered loss and damage.

Particulars

The Applicants repeat the particulars to paragraph 105 above.

121. Further, and in the alternative, the Unconscionable Conduct (Franchisees) referred to in paragraphs 106 to 115 materially contributed to the decision of some or all of the Franchisee to enter into their respective Franchise Agreements and thereby caused them to suffer loss and damage.

Particulars

The decisions made by the Franchisees are not particularised in this statement of claim. Particulars in relation to the Franchisees will be obtained (and particulars may be provided) following opt out, the determination of the Applicants' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees.

F. **BANK EVENTSCLAIMS**

F1. **Relationship between the Bank and 7-Eleven**

122. In the period from at least the start of the Relevant Period to 19 February 2018 (**Second Relevant Period**), the Bank lent money to prospective franchisees of 7-Eleven, including the First Applicant and the Second Applicant, in order to assist them to purchase a Store, and was a provider of finance to the largest number of persons who wished to borrow, to participate in the *7-Eleven System*, among Australian banks.
123. Since at least 2007 7-Eleven and the Bank agreed on a standard form of deed for execution by:
- (a) prospective franchisees of 7-Eleven who were seeking finance from the Bank to purchase a Store;
 - (b) the Bank; and
 - (c) 7-Eleven,
- (Tripartite Deed).**
124. The First Applicant and each other of the Franchisees who purchased a Store using finance from the Bank in the Second Relevant Period (**Bank Franchisees**) executed a Tripartite Deed with the Bank and 7-Eleven.
125. The Terms of the Tripartite Deed were materially the same in the period from at least 2007 to the end of the Second Relevant Period and included the following express terms:
- (a) the Franchisee agreed that the Bank and 7-Eleven may discuss and exchange information and documents regarding the financial and overall performance of Franchisee (clause 2);
 - (b) 7-Eleven agreed to keep the Bank informed of the financial performance of the Franchisee (clause 2);
 - (c) that:
 - (i) for the first year of operation of the franchise, 7-Eleven agreed to provide the Bank with half yearly financial reports on the franchisee upon request by the Bank;

- (ii) for the second and subsequent years of the operation of the franchise, 7-Eleven agreed to report annually to the Bank upon request (clause 2);
- (d) the Bank agreed that the Bank's charge over the interest of the Franchisee in the Franchise Agreement or the Store would rank second behind 7-Eleven's charge (clause 4);
- (e) 7-Eleven consented to the Franchisee granting a fixed and floating charge or mortgage over the assets and undertakings of the Franchisee in favour of the Bank, and agreed that no event of default will occur under the Franchise Agreements when the Franchisee grants such security interests (clause 4);
- (f) 7-Eleven agreed to notify the Bank if it intended to assign its rights or obligations under the Franchise Agreement (clause 6).

126. During the Second Relevant Period:

- (a) the First Applicant and each of the Bank Franchisees ([including the Second Applicant](#));
 - (i) submitted applications for finance to the Bank which included as supporting materials, in some or all cases, the Individual Store Financials for the Stores which they proposed to purchase (**Bank Franchisee Loan Applications**); and
 - (ii) entered into loan agreements with the Bank for the purpose of obtaining finance to enter into the Franchise Agreements with 7-Eleven (**Bank Loan Contracts**); and
- (b) some or all of the principals of Bank Franchisees (which were corporate entities):
 - (i) provided personal guarantees to the Bank in relation to the amounts advanced pursuant to the Bank Loan Contracts (**Bank Franchisee Guarantees**); and/or
 - (ii) provided mortgages over real estate owned by them (including, in some cases, their homes) in favour of the Bank as security for those amounts (**Bank Franchisee Mortgages**).

Particulars

- (1) *As to the First Applicant's loan applications and agreements, see paragraphs 136-141 and 146-152 below.*
- (2) *Particulars of Bank Franchisee Loan Applications and agreements may be provided, if necessary, after the initial trial of the Applicants' claims.*

F2. ~~[Deleted]The Bank's actual or constructive knowledge of the 7-Eleven System~~

127. ~~[Deleted]At all material times from at least the start of the Second Relevant Period, before the Bank approved an application for finance for a Store, the Bank knew or ought to have known:~~
- ~~(a) the background information about the 7-Eleven System set out in paragraphs 6 - 8 above;~~
 - ~~(b) the material express terms of the Franchise Agreements as pleaded in paragraphs 9 - 22 above;~~
 - ~~(c) the forecast sales and profit margins of that Store and any historical sales and profit margins of that Store;~~
 - ~~(d) the forecast Operating Expenses of that Store and any historical Operating Expenses for that Store;~~
 - ~~(e) the hours that that Store was required to be open, and the minimum staff levels required to operate the Store;~~
 - ~~(f) the award rates payable for labour at that Store;~~
 - ~~(g) that the First Applicant and each other Bank Franchisee are responsible for payroll expenses under their Franchise Agreements and are responsible to ensure that they have sufficient persons employed and rostered on for duty as are needed to operate the Stores at the times and in the manner provided by the Franchise Agreement;~~
 - ~~(h) that the only material Operating Expenses over which the Franchisees had any control was payroll costs;~~
 - ~~(i) that 7-Eleven could terminate the Franchise Agreements in the event that a Franchisee's Not Worth fell below the Minimum Net Worth (with the result~~

that the Franchisee would lose its Capital Investment while remaining liable for its Franchise Debt);

- ~~(j) — that, in the premises of the matters referred to in (a)-(i) above:~~
- ~~(i) — that Store would not be financially viable without the employees working at that Store being underpaid and/or the principals of the Franchisees and their family members being required to work unreasonable or unsociable hours for nothing or at rates below award rates; and~~
- ~~(ii) — the Individual Store Financials provided to prospective franchisees in relation to that Store was likely unreliable, by reason of the matters stated in (c) to (g) and (j)(i) above;~~
- ~~(k) — that many Stores are operated from a Site of which 7-Eleven: (i) is the head lessee of the Site for an initial term of less than 10 years with one or more options to renew for less than 10 years; and (ii) retained an absolute right not to exercise the option to renew the Lease at the end of the initial term;~~
- ~~(l) — that Mr Davaria and some or all of the Franchisees or their principals had immigrated to Australia as adults and their second language was English and that they had: (i) limited business experience; and/or (ii) limited or no understanding of Australian labour and industrial laws.~~

~~Particulars of (a)-(l)~~

- ~~(i) — It is to be reasonably inferred that the Bank had knowledge of the terms of the Franchise Agreements and the forecast profit margins and forecast Operating Expenses of the Bank Franchisees as well as any historical profit margins and historical Operating Expenses given that:~~
- ~~(1) — in the period from no later than about 2007 the Bank lent money to 7-Eleven's prospective Franchisees and received Individual Store Financials in relation to the Stores which they proposed to purchase as part of some or all of their loan applications; and/or~~
- ~~(2) — it agreed the terms of the Tripartite Deed with 7-Eleven;~~

- ~~(3) — the terms of the Tripartite Deed gave the Bank access to detailed information concerning the financial performance of each of the Bank Franchisees.~~
- ~~(ii) — Further and in the alternative, the Bank ought to have known of the material terms of the Franchise Agreements as, had the Bank acted in compliance with the following of its duties under the Code of Banking Practice (2004) (**2004 Banking Code**) and the Code of Banking Practice 2013 (**2013 Banking Code**) (together **Banking Code**) as required by the Banking Code Application Term of its loan agreements as described in paragraph 131 below, it would have become familiar with the terms of the Franchise Agreements:~~
- ~~(1) — the duty to have regard to its prudential obligations when meeting its key commitments (which included the assessment of credit applications); and/or~~
- ~~(2) — the duty to exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of its small business customers to repay the Bank before it offered such customers a credit facility.~~
- ~~(iii) — The Bank ought reasonably to have known the matters referred to in paragraphs 127(a) to (l) by reason of its large volume of commercial lending and the financial information, including Individual Store Financials that it would have been provided with, and would have considered, as part of that loan application.~~

~~Particulars in respect of First Applicant's Stores~~

- ~~1. — The First Applicant refers to and repeats the particulars to paragraphs 142(d) and 150(e).~~
- ~~2. — The Bank ought to have known the matters alleged in 1 above.~~
- ~~3. — Further to 1 and 2 above, the Bank ought to have known (and it was a fact) that the Training Workbook disclosed that:~~

- a. ~~An inexperienced franchisee required at least 199.5 staff hours per week to operate a Store; and~~
 - b. ~~An experienced franchisee required at least 186.3 staff hours per week to operate a Store.~~
4. ~~The Bank ought to have known (and it was a fact) that, workers compensation expenses would be incurred at an approximate rate of 2% of wages and superannuation would be incurred at an approximate rate of 9% of wages.~~
5. ~~The Bank ought to have known (and it was a fact) that, across the 168 hours in a week:~~
- a. ~~the average award wage for a Convenience Store in NSW was \$22.30 per hour from 1 July 2011 (being the rate applicable at the time the Campbelltown Loan Application was made, as calculated in accordance with the schedule to this letter);~~
 - b. ~~the average award wage for a Convenience Store in NSW was \$27.81 per hour from 1 July 2014 (being the rate applicable at the time the Northmead Loan Application was made, as calculated in accordance with the schedule to this letter);~~
 - c. ~~the average award wage for a Fuel Store in NSW was \$26.53 per hour from 1 July 2014 (being the rate applicable at the time that the Northmead Loan Application was made).~~

Campbelltown Store — one staff member rostered across 168 hours per week

6. ~~If the Campbelltown Store Financials for the financial year 2011-2012 were adjusted to include labour costs at the average award wage of \$22.30 per hour with one staff member rostered over 168 hours per week:~~

- a. ~~The Campbelltown Store Financials for the financial year 2011-2012 would have recorded a loss of \$45,011 in Net Income;~~
- b. ~~The First Applicant would have incurred a net loss of \$88,255 per annum after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012.~~
7. ~~If the Campbelltown Store Financials for the year 2011-2012 were adjusted to include labour costs at the average award wage of \$22.30 per hour with one staff member rostered over 108 hours per week (if Mr Davaria worked in the Campbelltown Store for no wages over the remaining 60 hours):~~
- a. ~~The Campbelltown Store Financials would have recorded a profit of \$32,219 in Net Income for the financial year 2011-2012;~~
- b. ~~The First Applicant would have incurred a net loss of \$11,025 after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012.~~
8. ~~In the premises of particular 7 above, the Campbelltown Store could not have generated sufficient profits to meet the loan repayments even if Mr Davaria worked in the Campbelltown Store for 60 hours per week for no wages and only one staff member was rostered at all other times.~~
- Campbelltown Store – minimum hours prescribed by the Training Workbook
9. ~~If the Campbelltown Store Financials for the financial year 2011-2012 were adjusted to include labour costs at the~~

~~average award wage of \$22.30 per hour over 199.5 hours per week (if the Campbelltown Store operated according to the most optimistic minimum assumptions in the Training Workbook for a new franchisee):~~

~~a. — The Campbelltown Store Financials would have recorded a loss of \$85,556 in the Net Income, for the financial year 2011-2012;~~

~~b. — The First Applicant would have incurred a net loss of \$128,800 per annum after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012.~~

~~10. — If the Campbelltown Store Financials for the year 2011-2012 were adjusted to include labour costs at the average award wage of \$22.30 per hour over 139.5 hours per week (if Mr Davaria worked in the Campbelltown Store for no wages over the remaining 60 hours):~~

~~a. — The Campbelltown Store Financials would have recorded a loss of \$8,327 in Net Income for the financial year 2011-2012;~~

~~b. — The First Applicant would have incurred a net loss of \$51,571 per annum after interest and principal repayments on the Campbelltown Loan, if the First Applicant had assumed the obligations of the Campbelltown Store Loan Contract during the financial year 2011-2012.~~

~~11. — In the premises of particular 10 above, even if the Campbelltown Store operated according to the most optimistic staffing assumptions, it could not have generated sufficient profits to meet the loan repayments if Mr Davaria~~

~~worked in the Campbelltown Store for 60 hours for no wages.~~

~~Northmead Store — one staff member rostered across 168 hours per week~~

~~12. — If the available Northmead Store financials for the first 10 months of financial year 2014-2015 were annualised and adjusted to include labour costs of \$26.53 per hour with one staff member rostered over 168 hours per week:~~

~~a. — The Northmead Store would have recorded a profit of \$44,655 in Net Income for the financial year 2014-2015;~~

~~b. — The First Applicant would have incurred a net loss of \$70,917 per annum after interest and principal repayments on the Northmead Loan, if the First Applicant had assumed the obligations of the Northmead Store Loan Contract during the financial year 2014-2015.~~

~~13. — The Bank could not reasonably expect Mr Davaria to work in the Northmead Store for 60 hours at no cost because ex hypothesi he was already operating the Campbelltown Store.~~

~~Northmead Store — minimum hours prescribed by the Training Workbook~~

~~14. — If the available Northmead Store financials for the first 10 months of financial year 2014-2015 were annualised and then adjusted to include labour costs of \$26.53 per hour over 186.3 hours (if the Northmead Store operated according to the most optimistic minimum assumptions in the Training Workbook for an experienced franchisee):~~

~~a. — The Northmead Store would have recorded a profit of \$16,632 in Net Income for the financial year 2014-2015;~~

~~b. — The First Applicant would have incurred a net loss of \$98,940 per annum after interest and principal repayments on the Northmead Loan, if the First Applicant had assumed the obligations of the Northmead Store Loan Contract during the financial year 2014-2015.~~

~~15. — The Bank could not reasonably expect Mr Davaria to work in the Northmead Store for 60 hours at no cost because ex hypothesi he was already operating the Campbelltown Store.~~

Northmead Store — Mr Davaria working 60 hours a week and one staff member rostered across 108 hours per week; Campbelltown Store — Mr Davaria not working at Campbelltown

~~16. — If the available Northmead Store financials for the first 10 months of financial year 2014-2015 were annualised and then adjusted to include labour costs at the average Award Wage of \$26.53 per hour over 108 hours per week (on the basis that the Northmead Store operated with only one staff member rostered over 168 hours per week, of which, Mr Davaria worked for 60 hours per week for no wages) and the available Campbelltown Store Financials for the financial year 2014-2015 were adjusted to include labour costs of \$27.81 per hour over 168 hours (on the basis that the Campbelltown Store operated with only one staff member rostered over 168 hours per week and Mr Davaria did not work at the Campbelltown Store):~~

~~a. — The Northmead Store financials would have recorded a profit of \$136,534 in Net Income for the financial year 2014-2015;~~

~~b. — The First Applicant would have a profit of \$20,962 per annum after interest and principal repayments on the Northmead Loan, if the First Applicant had assumed~~

~~the obligations of the Northmead Store Loan Contract during the financial year 2014-2015; however~~

- ~~c. — The Campbelltown Store financials would have recorded net loss of \$45,855 in Net Income for the financial year 2014-2015 and a net loss of \$87,741 after interest and principal repayments on the Campbelltown Loan;~~
- ~~d. — In the premises of a to c above, the First Applicant would have generated an overall net loss across both stores of \$66,779 even with Mr Davaria working 60 hours per week at no pay.~~

~~17. — Further particulars may be provided after discovery, as information becomes available. It is neither required nor presently possible to provide corresponding calculations for each group member at this stage of the proceedings.~~

128. ~~[Deleted] Further and in the alternative to the matters pleaded in paragraph 127 above, by reason of the relationship between 7-Eleven and the Bank and/or as a consequence of the Bank's position as the main provider of loan funds to Franchisees in the 7-Eleven System:~~

- ~~(a) — the Bank had a superior means of knowledge about the way in which the 7-Eleven System operated and how individual Stores in the 7-Eleven System were conducted, to that of any individual Franchisee or prospective franchisee; and~~
- ~~(b) — the Bank had superior access to information from 7-Eleven about the 7-Eleven System and how individual Stores in the 7-Eleven System operated, to that of any individual franchisee or prospective franchisee.~~

Particulars

- ~~(i) — The First Applicant repeats the matters pleaded and particularised in relation to paragraph 127 above.~~
- ~~(ii) — The Bank's knowledge may also be inferred from a condition which appeared in its letters of offer to the First Applicant and each other Franchisee that the Facilities available under the Bank Loan~~

~~Contracts were subject to review if a 'Change in control' were to occur in relation to 7-Eleven.~~

129. ~~[Deleted] Further or in the alternative, by reason of the matters pleaded in paragraphs 127 and 128, by no later than 2007, the Bank knew or ought to have known that the provision of loan finance by it to prospective franchisees wishing to acquire a Store in the System had the effect of:~~
- ~~(a) — creating a market for the buying and selling of Stores with prices for goodwill that depended upon profit figures that failed to reflect the true wage costs of operating a Store and/or had been inflated by a culture of underpayment of wages; and~~
 - ~~(b) — causing franchisees to be dependent upon selling their Stores for a goodwill price determined by that market to be able to repay the loans advanced by the Bank.~~

F3. Contractual provisions – banking agreements

130. The material terms of the Bank Loan Contracts of, and the Bank Franchisee Guarantees relating to, the First Applicant and each of the Franchisees were the same from in or about 2004 to the end of the Second Relevant Period.
131. ~~[Deleted] From in or about 2004 to the end of the Second Relevant Period, the material terms of each of the Bank Loan Contracts and the Bank Franchisee Guarantees included an express term that the Bank was bound by the Banking Code in the provision of the products and services to: (i) recipients of the Bank's products and services who were using those products and services in connection with a small business within the meaning of the Banking Code; and (ii) their guarantors (**Banking Code Application Term**).~~

Particulars

- ~~(a) — ANZ Banking Finance Conditions of Use, August 2011, clause 37.~~
 - ~~(b) — ANZ Banking Finance Conditions of Use, September 2017, clause 39.~~
132. ~~[Deleted] Further and in the alternative, from about 2004 to the end of the Second Relevant Period, the material terms of the Bank Loan Contracts of, and the Bank Franchisee Guarantees relating to, the First Applicant and each of the Franchisees included an express term that the Bank agreed to act fairly and reasonably towards its small business customers and guarantors in a consistent and ethical manner (**Fair and Reasonable Conduct Term**).~~

Particulars

- ~~(a) — The obligation was express, in writing and contained in:~~
- ~~(i) — the 2004 Banking Code, clause 2.2; and~~
 - ~~(ii) — the 2013 Banking Code, clause 3.2.~~
- ~~(b) — The First Applicant repeats the matters pleaded and particularised in subparagraph 131 above and says that, by virtue of the Banking Code Application Term, the above provisions of the Banking Code were expressly incorporated into each of the Banking Agreements.~~

133. ~~[Deleted] Further and in the alternative, from about 2004 to the end of the Second Relevant Period, the material terms of the Bank Loan Contracts of, and the Bank Franchisee Guarantees relating to, the First Applicant and each of the Franchisees included an express term that the Bank agreed that in meeting its key commitments, it would have regard to its prudential obligations within the meaning of the Banking Code (**Prudential Obligations Term**).~~

Particulars

- ~~(a) — The obligations was express, in writing and contained in:~~
- ~~(i) — 2004 Banking Code, clause 2.3; and~~
 - ~~(ii) — 2013 Banking Code, clause 3.3.~~
- ~~(b) — The First Applicant repeats the matters pleaded and particularised in subparagraph 131 above and says that, by virtue of the Banking Code Application Term, the above provisions of the Banking Code were expressly incorporated into each of the Banking Agreements.~~

134. ~~[Deleted] Further and in the alternative, from about 2004 to the end of the Second Relevant Period, the material terms of the Bank Loan Contracts of, and the Bank Franchisee Guarantees relating to, the First Applicant and each of the Franchisees included an express term (**Prudent Banker Term**) that the Bank agreed that before it offered or gave its small business customers a credit facility it would exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the small customer to repay the Bank.~~

Particulars

- ~~(a) — The obligations was express, in writing and contained in:~~

~~(i) — 2004 Banking Code, clause 25.1;~~

~~(ii) — 2013 Banking Code, clause 27.~~

~~(b) — The First Applicant repeats the matters pleaded and particularised in paragraph 131 above and says that, by virtue of the Banking Code Application Term, the above provisions of the Banking Code were expressly incorporated into each of the Bank Loan Contracts.~~

135. ~~[Deleted]The First Applicant and each other Bank Franchisee entered into their Bank Loan Contracts in connection with a “small business” within the meaning of the Banking Code such that the Banking Code Application Term, Fair and Reasonable Conduct Term, Prudential Obligations Term, and the Prudent Banker Term (separately and together, “**Banking Code Terms**”), separately and in combination, applied to their Bank Loan Contracts.~~

Particulars

~~(a) — In the 2004 Banking Code, and the 2013 Banking Code, a “small business” includes a business having:~~

~~(i) — less than 100 full time (or equivalent) people if the business is or includes the manufacture of goods; or~~

~~(ii) — in any other case, less than 20 full time (or equivalent) people.~~

~~(b) — The First Applicant and each other Bank Franchisee entered into their Bank Loan Contracts in connection with the purchase of a Store which employed less than 20 full time or equivalent people.~~

F4. [Deleted]Bank’s breaches of Contract – First Applicant

Campbelltown Store Loan Contract and approval process

136. On or about 7 August 2013 the First Applicant submitted an application for business finance to the Bank for the purpose of funding part of its Capital Investment required in order to enter into the Campbelltown Store Franchise Agreement (**Campbelltown Loan Application**).

137. The Campbelltown Loan Application included the following documents:

- (a) a draft copy of the Campbelltown Store Franchise Agreement including (in Exhibit A) 7-Eleven’s lease over the Store (**Campbelltown Store Lease**);
- (b) Campbelltown Store Financials for FY 2011 to FY 2012; and

- (c) a business plan for the Store (**Campbelltown Store Business Plan**).
138. The Campbelltown Store Lease:
- (a) was for an initial term which was due to expire on 31 March 2014;
 - (b) included an option to renew for two further 5-year terms ending on 31 March 2019 and 31 March 2024 respectively.
139. The Campbelltown Store Business Plan:
- (a) stated that Mr Davaria's wife, Khushbu Davaria, would run the Store 6 days per week while Mr Davaria would run the Store one day per week;
 - (b) included cash flow projections which:
 - (i) modelled payroll costs based on wage rates of \$15 per hour;
 - (ii) included rostered hours for two employees of the Store and a proposal that those employees would work 68 hours between them per week at a rate of \$15 per hour;
 - (iii) stated that the Franchise Agreement had a "long lease" and that the lease was "expiring in 2024";
 - (iv) included a "family income" spread sheet which projected income based on the assumption that the Mr Davaria would maintain his existing job as a pharmacist's assistant whilst managing the Campbelltown Store one day per week.
140. On or about 22 August 2013, the First Applicant accepted an offer of finance from the Bank and entered into a loan agreement to assist it with the financing of its purchase of the [goodwill of the Campbelltown Store and associated franchise acquisition costs](#) (**Campbelltown Store Loan Contract**), pursuant to which the Bank provided the First Applicant with the following credit facilities:
- (a) ANZ business loan of \$291,360.00;
 - (b) Overdraft facility in the amount of \$9,510.00.

Particulars

Letter of offer from the Bank to the First Applicant dated 22 August 2013 which the First Applicant executed and returned to the Bank (thereby accepting the offer) shortly thereafter.

141. Repayment of the funds advanced pursuant to the Campbelltown Store Loan Contract was secured by:

- (a) an “Individual Guarantee and Indemnity” from Mr Davaria in favour of the Bank (**Campbelltown Guarantee**); and
- (b) a “General Security Agreement” given by the First Applicant over all present and after-acquired property.

142. ~~[Deleted]At the time of receiving the Campbelltown Loan Application and prior to approving the loan under the Campbelltown Store Loan Contract the Bank knew or ought to have known, and it was the fact, that:~~

- ~~(a) — The First Applicant would not be likely to repay or continue to service the loan over 10 years in accordance with the terms of the loan agreement in the event that 7-Eleven failed to: (i) renew the lease at the end of the current term which was due to finish on 31 March 2014; or (ii) exercise its option to renew the lease over the Store Site after the first 5 year term of the Lease, due to finish on 31 March 2014;~~

~~**Particulars to 142(a)**~~

~~*The First Applicant repeats the matters pleaded and particularised in paragraphs 125 and 138 above.*~~

- ~~(b) — the Campbelltown Store Business Plan and cash flow projections were based on wage costs projections which were based on an hourly rate of \$15 per hour which was significantly below award rates;~~
- ~~(c) — on a proper analysis, the Campbelltown Store Financials indicated that the First Applicant would not be able to meet its loan repayments whilst it (in accordance with the Campbelltown Store Business Plan):~~
 - ~~(i) — employed two employees working for a total of 68 hours per week between them;~~
 - ~~(ii) — paid those employees their minimum legal entitlements;~~
 - ~~(iii) — limited the hours worked in the Store by Mr Davaria to one day per week;~~
 - ~~(iv) — limited the hours worked in the Store by Mrs Davaria to six days per week;~~
- ~~(d) — further and in the alternative, on a proper analysis, the Campbelltown Store Financials indicated that the First Applicant would not be able to meet its loan repayments in the event that it paid any proposed employees of the Franchise their minimum legal entitlements.~~

Particulars (142(c) and 142(d))

- ~~(i) Had the Bank (in compliance with the Banking Code Terms):~~
- ~~(1) had due regard to its prudential obligations when meeting its key commitments (including its assessment of the credit applications of the First Applicant); and/or~~
 - ~~(2) exercised the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the First Applicant to repay the Bank;~~

~~*it would have determined that:*~~

- ~~I. the minimum payroll expense for Campbelltown Store based on payment of award rates to at least 1 employee for 168 hours per week was approximately \$247,000 (including superannuation);~~
- ~~II. the yearly payroll expenses on the Campbelltown Store Financials (including superannuation) of \$71,566 (FY 2011), \$99,513 (FY 2012) and \$122,670 (FY 2013) could only have been achieved by the principals of the previous Franchisee working unreasonable and/or unsociable unpaid hours and/or by paying other employees to work in the Store for wages which were below their legal entitlements;~~
- ~~III. the only reliable source of funds available to the First Applicant for servicing its obligations to the Bank in these circumstances was the minimum Total Gross Income [Exhibit D, paragraph (j); Exhibit E] of \$120,000 for which provision was made in Article 23(b) of the Franchise Agreement;~~
- ~~IV. continued reliance on minimum Total Gross Income provision by the Franchisee in order to~~

~~service the loan would result in it breaching the Minimum Net Worth requirement in the Franchise Agreement such that 7-Eleven would be entitled to terminate the agreement with the result that the Franchisee would lose its Capital Investment.~~

~~(ii) Further particulars may be provided on service of expert evidence.~~

~~Breach of Contract – Campbelltown Store Loan Contract~~

143. ~~[Deleted]By reason of paragraphs 127, 129, 137, 138, 140 and 142 above, by approving the Campbelltown Loan Application:~~

~~(a) in breach of the Banking Code Application Term, the Bank failed to comply with the Banking Code in the provision of services to the First Applicant in relation to the Campbelltown Store Loan Contract;~~

~~(b) further and in the alternative, in breach of the Fair and Reasonable Conduct Term, the Bank failed to act fairly and reasonably towards the First Applicant in its pre-contractual dealings with the First Applicant;~~

~~(c) further and in the alternative, in breach of the Prudential Obligations Term, the Bank failed to have regard to its prudential obligations in assessing its application for credit in relation to the Campbelltown Store;~~

~~(d) further and in the alternative, in breach of the Prudent Banker Term, failed to exercise the care and skill or a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the First Applicant to repay the loan sum to the Bank.~~

~~Particulars of (a), (b), (c) and (d)~~

~~(i) By reason of the terms pleaded in (a), (b), (c) and (d) above, the Bank was required to, among other things:~~

~~(1) take into account the number of labour hours (whatever they may be) required by the First Applicant to operate the Campbelltown Store.~~

~~(2) take into account the award rates (whatever they may be) payable for labour by the First Applicant to operate the Campbelltown Store.~~

- ~~(3) form an opinion about the accuracy, or have sufficient regard to the unreliability, of the historical or forecasted payroll expenses that would be incurred by the First Applicant to operate the Campbelltown Store.~~
- ~~(ii) The Bank failed to do the matters in particular (i) for the Campbelltown Store Loan Contract in breach of the terms pleaded in (a), (b), (c) and (d) above.~~
- ~~(iii) The First Applicant also repeats the particulars to paragraphs 142(e) and 142(d).~~
- ~~(iv) Further particulars may be provided following discovery and on service of expert evidence.~~
144. ~~[Deleted]If the Bank had complied with its contractual obligations towards the First Applicant:~~
- ~~(a) it would not have advanced loan funds to the First Applicant for the purchase of the Campbelltown Store; and~~
- ~~(b) the First Applicant would not have entered into the Campbelltown Store Franchise Agreement as it would not have had the funds to do so.~~
145. ~~[Deleted]By reason of the matters pleaded in paragraphs 143 and 144 above, the First Applicant suffered loss and damage.~~

Particulars

~~*The First Applicant repeats the matters particularised in relation to paragraph 101 above.*~~

South Melbourne Store Loan Contract and approval process

145A. From on about 8 July 2013, the Second Applicant caused to be submitted an application for business finance to the Bank for the purpose of funding part of the Second Applicant's Capital Investment required in order to purchase the South Melbourne Store (South Melbourne Loan Application).

145B. The South Melbourne Loan Application included the following documents:

- (a) the South Melbourne Store Financials for FYE 2011, 2012 and 2013;
- (b) a draft copy of the South Melbourne Store Franchise Agreement, including the reference schedule for the lease of the South Melbourne Store (Exhibit C);

(c) a business plan for the South Melbourne Store (**South Melbourne Store Business Plan**), attaching a proposed roster for the South Melbourne Store (**South Melbourne Store Roster**) and a cash flow document for the South Melbourne Store (**South Melbourne Store Cashflow**), each prepared by, or on behalf of, the Second Applicant.

145C. The reference schedule for the lease of the South Melbourne Store provided that the Lease was for an initial term which had expired on 4 January 2009, with three options to renew, each for a period of 5 years.

145D. The South Melbourne Store Business Plan:

- (a) provided that Mr Singh and Mrs Singh would each work 48 hours per week and draw a salary of \$18,192;
- (b) provided that another family member would work 8 hours per week for no money; and
- (c) made allowance for only 168 hours per week to operate the Store.

145E. On or about 20 September 2013, the Second Applicant accepted an offer of finance from the Bank and entered into a loan agreement to assist the Second Applicant with the financing of its purchase of the goodwill of the South Melbourne Store and associated franchise acquisition costs, (**South Melbourne Store Loan Contract**), pursuant to which the Bank provided the Second Applicant with the following credit facilities:

- (a) ANZ business loan of \$414,763;
- (b) Overdraft facility in the amount of \$9,600.

Particulars

Letter of offer from the Bank to the Second Applicant dated 20 September 2013 which the Second Applicant executed and returned to the Bank (thereby accepting the offer) shortly thereafter.

145F. Repayment of the funds advanced pursuant to the South Melbourne Loan was secured by:

- (a) an “Individual Guarantee and Indemnity” from Mr Singh in favour of the Bank (**South Melbourne Guarantee**); and
- (b) a “General Security Agreement” given by the Second Applicant over all present and after-acquired property.

Northmead Store Loan Contract and loan approval process

146. In or about April 2015 the First Applicant submitted a further application for business finance to the Bank for the purpose of funding part of its Capital Investment required in order to enter into the Northmead Store Franchise Agreement (**Northmead Loan Application**).
147. The Northmead Loan Application included:
- (a) a business plan for the Store (Northmead Store Business Plan); and
 - (b) a financial forecast for the Store for the remainder of FY 2016 (**Northmead Store Financial Forecast**).
148. The Northmead Store Business Plan stated (inter alia) that ~~the~~ Mr and Mrs Davaria both planned to run the Northmead Store by each working 7 days per week.
149. ~~[Deleted]The Northmead Store Financial Forecast projected: (a) wage costs for the Northmead Store of \$157,968 for FY 2016 (including superannuation); and (b) that the Northmead Store's Net Income for FY 2016 would be \$146,121.~~
150. ~~[Deleted]At the time of receiving the Northmead Loan Application the Bank knew or ought to have known, and it was the fact, that:~~
- ~~(a) the First Applicant owned the Campbelltown Store and the Northmead Store would be its second Store;~~
 - ~~(b) Mr and Mrs Davaria could not work in the Northmead Store for 7 days per week each at the same time as working in the Campbelltown Store with the consequence that, in the likely event that they were working in the Campbelltown Store without drawing a wage (or their full wage entitlement) for their labour, their payroll commitments at the Campbelltown Store would increase, and would be prohibitive if they paid their employees at that Store their full legal entitlements;~~
 - ~~(c) the Northmead Store (being a Fuel Store) operating 24 hours a day 7 days a week could not sustain its operations without engaging outside labour;~~
 - ~~(d) the Northmead Store Business Plan and Northmead Store Financial Forecast were based on wage costs projections which were significantly below award rates;~~
 - ~~(e) the Northmead Store Business Plan and Northmead Store Financial Forecast indicated that the First Applicant could not sustain the Northmead Store and service the proposed loan:~~

- ~~(i) without engaging outside labour at the Northmead Store and/or the Campbelltown Store;~~
- ~~(ii) without the principals of the Store working unreasonable and unsoiciable unpaid hours; and~~
- ~~(iii) whilst paying such employees their minimum legal entitlements.~~

Particulars

- ~~(1) Had the Bank (in compliance with the Banking Code Terms):~~
 - ~~I. had due regard to its prudential obligations when meeting its key commitments (including its assessment of the credit applications of the First Applicant); and/or~~
 - ~~II. exercised the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the First Applicant to repay the loan;~~
- ~~(2) it would have determined that: (i) the minimum payroll cost for the Northmead Store if all employees were paid their minimum legal entitlements would significantly exceed the amount payable to one employee for 168 hours (being \$257,260 including superannuation) due to the operational requirements of running a Fuel Store; (ii) the First Applicant could not run the Northmead Store and the Campbelltown Store together whilst generating sufficient profit to enable the Franchisee to provide its principals with sufficient income to meet their loan repayments and living expenses, unless Mr and Mrs Davaria provided excessive and unreasonable unpaid labour to the Store and/or paid external employees less than their award entitlements; (iii) the only reliable source of funds available to the First Applicant for servicing its obligations to the Bank in these circumstances was the minimum Total Gross Income of \$120,000 for which provision was made in Article 23(b) of~~

~~the Franchise Agreement; (iv) continued reliance on minimum Total Gross Income provision by the Franchisee in order to service the loan would result in it breaching the Minimum Net Worth requirement in the Franchise Agreement such that 7-Eleven would be entitled to terminate the agreement with the result that the Franchisee would lose its Capital Investment. Further particulars may be provided on service of the First Applicant's expert evidence.~~

151. On or about 12 June 2015 the Bank approved the Northmead Loan Application and the First Applicant entered into a Bank Loan Contract with the Bank for the purpose of obtaining finance for the purchase of the goodwill and for meeting the costs associated with the entry into a Franchise Agreement for that Store with 7-Eleven (**Northmead Store Loan Contract**), pursuant to which the Bank provided the First Applicant with a further business loan facility in the amount of \$819,000.

Particulars

Letter of offer from the Bank dated 12 June 2015 which the First Applicant executed and returned to the Bank (thereby accepting the offer) shortly thereafter.

152. As a condition of the Bank providing credit pursuant to the Northmead Store Loan Contract, Mr and Mrs Davaria signed a guarantee and indemnity in favour of the bank (**Northmead Guarantee**) and granted a mortgage to the Bank over their family home at 1/32 Alfred Street Granville, which was executed on or about 10 February 2015 (**Northmead Mortgage**).

153. – 170. [Deleted]

~~153. Prior to the Mr and Mrs Davaria granting the Northmead Mortgage, the Bank did not ensure that any of its personnel:~~

- ~~(a) spoke to either of them to confirm that they understood the import of each of them executing that document; or~~
- ~~(b) advised each or either of them to obtain legal advice concerning the Northmead Mortgage or required them to obtain such advice prior to entering into the Northmead Mortgage.~~

~~Breach of contract—Northmead Store Loan Contract~~

~~154.—By reason of the matters pleaded and particularised in paragraphs 127, 129, 138, 146, 147, 148, 150, 151, 152 and 152 above, by approving the Northmead Loan Application:~~

- ~~(a) — in breach of the Banking Code Application Term, the Bank failed to comply with the Banking Code in the provision of services to the First Applicant in relation to the Northmead Store Loan Contract;~~
- ~~(b) — in breach of the Fair and Reasonable Conduct Term, the Bank failed to act fairly and reasonably towards the First Applicant in its pre-contractual dealings with it;~~
- ~~(c) — in breach of the Prudential Obligations Term, the Bank failed to have regard to its prudential obligations in assessing the First Applicant's application for credit in relation to the Northmead Store;~~
- ~~(d) — in breach of the Prudent Banker Term, the Bank failed to exercise the care and skill or a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the First Applicant to repay the loan sum to the Bank.~~

~~Particulars of (a), (b), (c) and (d)~~

- ~~(i) — By reason of the terms pleaded in (a), (b), (c) and (d) above, the Bank was required to, among other things:~~
 - ~~(1) — take into account the number of labour hours (whatever they may be) required by the First Applicant to operate the Northmead Store.~~
 - ~~(2) — take into account the award rates (whatever they may be) payable for labour by the First Applicant to operate the Northmead Store.~~
 - ~~(3) — form an opinion about the accuracy, or have sufficient regard to the unreliability, of the historical or forecasted payroll expenses that would be incurred by the First Applicant to operate the Northmead Store.~~
- ~~(ii) — The Bank failed to do the matters in particular (i) for the Northmead Store Loan Contract in breach of the terms pleaded in (a), (b), (c) and (d) above.~~

~~(iii) — The First Applicant also repeats the particulars to paragraphs 150(e).~~

~~(iv) — Further particulars may be provided following discovery and on service of expert evidence.~~

~~155. — If the Bank had complied with its contractual obligations towards the Applicant:~~

~~(a) — it would not have advanced loan funds for the purchase of the Northmead Store; and~~

~~(b) — the First Applicant would not have entered into the Northmead Store Franchise Agreement, as it would not have had the funds to do so.~~

~~156. — By reason of the matters pleaded in paragraphs 143 and 0 above, the First Applicant suffered loss and damage.~~

Particulars

~~The First Applicant repeats the matters particularised in relation to paragraph 101 above.~~

F5. — Bank's breaches of Contract — Bank Franchisees

~~157. — By reason of matters including some or all of those pleaded and particularised in paragraphs 122, 123, 124, 125, 126, 127, 128, 129, 131, 132, 133, and/or 134 above, by approving some or all of the Bank Franchisees Loan Applications, the Bank:~~

~~(a) — in breach of the Banking Code Application Term, failed to comply with the Banking Code in the provision of services to some or all of the Bank Franchisees in relation to their Bank Loan Contracts;~~

~~(b) — further and in the alternative, in breach of the Fair and Reasonable Conduct Term, failed to act fairly and reasonably towards some or all of the Bank Franchisees in their pre-contractual dealings with it;~~

~~(c) — further and in the alternative, in breach of the Prudential Obligations Term, failed to have regard to its prudential obligations in assessing some or all of the Bank Franchisees' applications for credit;~~

~~(d) — further and in the alternative, in breach of the Prudent Banker Term, failed to exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion~~

~~about the ability of some or all of the Bank Franchisees to service and repay their loans.~~

~~Particulars of (a), (b), (c) and (d)~~

~~(i) — By reason of the terms pleaded in (a), (b), (c) and (d) above, the Bank was required to, among other things:~~

~~(1) — take into account the number of labour hours (whatever they may be) required by the Bank Franchisee to operate the Store.~~

~~(2) — take into account the award rates (whatever they may be) payable for labour by the Bank Franchisee to operate the Store.~~

~~(3) — form an opinion about the accuracy, or have sufficient regard to the unreliability, of the historical or forecasted payroll expenses that would be incurred by the Bank Franchisee to operate the Store.~~

~~(ii) — The Bank failed to do the matters in particular (i) for some or all of the Bank Loan Contracts in breach of the terms pleaded in (a), (b), (c) and (d) above.~~

~~158. — If the Bank had complied with its contractual obligations towards some or all of the Bank Franchisees:~~

~~(a) — it would not have advanced loan funds to them for the purchase of their Stores; and~~

~~(b) — some or all of them would not have entered into their Franchise Agreements, as they would not have the funds to do so.~~

~~159. — By reason of the matters pleaded in paragraphs 157 and 158 above, some or all of the Bank Franchisees have suffered loss and damage.~~

~~Particulars~~

~~The losses suffered by Franchisees will also be calculated in accordance with the particulars to paragraphs 101, 105, 145 and 156 above but are not particularised in this SOC; particulars in relation to Franchisees losses will be obtained (and particulars may be provided) following opt out, the determination of the First Applicant's claim and identified common issues~~

~~at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees.~~

~~F6. Bank's Unconscionable Conduct – First Applicant~~

~~Campbelltown Loan Application (Campbelltown Store)~~

~~160. Further and in the alternative to the matters pleaded and particularised in paragraphs 143 and 154 above, by approving the Campbelltown Loan Application the Bank engaged in conduct in trade or commerce, in connection with the supply or possible supply of financial services to the First Applicant and/or Mr Davaria as guarantor of the loans advanced by the Bank to the First Applicant that was unconscionable within the meaning of s 12CB of the ASIC Act.~~

~~Particulars~~

~~(a) The First Applicant repeats the matters pleaded and particularised in paragraphs 122-143 above and say that:~~

~~(i) by reason of the Bank's actual or constructive knowledge of the matters pleaded and particularised in paragraphs 127(a) to 127(j) and 128, it knew or ought to have known that there was a significant risk that the Campbelltown Store Financials did not accurately represent the true payroll costs of that Store;~~

~~(ii) by reason of the Bank's actual or constructive knowledge of the matters pleaded and particularised in subparagraphs 127(k) and 138 above, it knew or ought to have known that 7-Eleven had a right not to renew the lease of the Campbelltown Store Site after the expiry of the initial term on 31 March 2014 and (in the event that it did renew that lease) to exercise its options to extend the lease for two further terms of 5 years, with the result that:~~

~~(1) the Campbelltown Store Franchise Agreement could terminate on 31 March 2014 or, if it was renewed at that point, on 31 March 2019;~~

~~(2) if that occurred the First Applicant would lose the means of servicing and repaying the loans used to finance the Campbelltown Store over a 10-year term as provided in the Campbelltown Store Loan Contract;~~

- ~~(3) — the ability of the First Applicant to recoup its Franchise Debt in relation to the Campbelltown Store would be affected adversely by a reduction in the goodwill price for the Store obtainable in the market;~~
- ~~(4) — Mr Davaria would be at risk of personal liability for all or part of the principal amount due under the Campbelltown Store Bank Loan Contract;~~
- ~~(iii) — Further and in the alternative, the First Applicant repeats the matters pleaded and particularised in paragraphs 142 above and say that, by reason of the Bank's receipt of: (A) the draft Campbelltown Store Franchise Agreement; (B) the Campbelltown Store Financials for FY 2011 to FY 2012; and (C) the Campbelltown Store Business Plan, it knew or ought to have known that:~~
- ~~(1) — the Campbelltown Store Business Plan and cash flow projections were based on wage costs projections which were based on an hourly rate of \$15 per hour which was significantly below award rates;~~
- ~~(2) — the First Applicant's business plan, if followed, would not enable it to repay the loan according to its terms from the proceeds of the Store business;~~
- ~~(3) — on proper analysis, the Campbelltown Store Financials indicated that Mr Davaria would not be able to meet its loan repayments whilst the Franchisee (in accordance with the Campbelltown Store Business Plan) (a) employed two employees working for a total of 68 hours per week between them; (b) paid those employees their minimum legal entitlements; (c) limited the hours worked in the Store by the Mr Davaria to one day per week; and/or (d) limited the hours worked in the Store by Mrs Davaria to six days per week;~~
- ~~(iv) — Further and in the alternative, on proper analysis, the Campbelltown Store Financials indicated that the First Applicant would not be able to meet its loan repayments in the event that it paid any proposed employees of the Franchise their minimum legal entitlements;~~

- ~~(v) — Further and in the alternative, the Bank entered into the Campbelltown Store Loan Contract with the First Applicant in circumstances in which it knew or ought to have known that its provision of loan finance to prospective Franchisees had the effect of:~~
- ~~(1) — creating a market for the buying and selling of Stores with prices for goodwill that was inflated by a practice of underpayment of wages within the 7-Eleven System and in which the price of the Campbelltown Store was likely inflated;~~
 - ~~(2) — causing the First Applicant and other Franchisees to be dependent upon selling their Stores for a goodwill price determined by that market to be able to repay the loans advanced by the Bank;~~
- ~~(vi) — Further and in the alternative, it may be inferred from the terms of the Campbelltown Store Loan Contract and the Northmead Store Loan Contract, that the facilities advanced by the Bank were subject to a review if a 'Change of control' were to occur in relation to 7-Eleven, that a material factor affecting the lending decisions by the Bank was its reliance upon the relationship that it had with 7-Eleven, and the knowledge of the 7-Eleven System which it had gained as a consequence of that relationship, as set out in paragraphs 123 to 129 above.~~
- ~~(vii) — In the premises, the Bank entered into the Campbelltown Store Loan Contract with the First Applicant in circumstances in which it:~~
- ~~(1) — was in a superior bargaining position to the First Applicant due to its superior knowledge of the 7-Eleven System;~~
 - ~~(2) — failed to comply with the terms of the Banking Code which required it to: (i) act fairly and reasonably towards its small business customers and guarantors in a consistent and ethical manner; (ii) have regard to its prudential obligations; and (iii) exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the small customer to repay the Bank;~~

~~(3) engaged in a form of asset lending, in which the only realistic prospect the Bank had of receiving repayment of its loan would be:~~

~~I. from the proceeds of sale of the Campbelltown Store to an incoming franchisee who agreed to pay an amount for goodwill; or~~

~~II. by exercising its rights pursuant to the personal guarantee signed by Mr Davaria and/or the "General Security Agreement" executed by the First Applicant;~~

~~(4) failed to warn Mr Davaria of the risks arising from its failure to comply with the Banking Code and its asset based lending practices as outlined in (C) above;~~

~~(5) failed to advise Mr Davaria to obtain legal advice in relation to the Franchise Agreement;~~

~~(6) failed to meet with Mr Davaria to ensure that they understand the import of the transactions they were entering into;~~

~~(7) failed to act in good faith towards the First Applicant and Mr Davaria.~~

~~161. By reason of the Bank's unconscionable conduct in approving the Campbelltown Loan Application and entering into the Campbelltown Store Loan Contract, the First Applicant was able to enter into the Campbelltown Store Agreement and thereby suffered loss and damage.~~

~~162. Had the First Applicant not entered into the Campbelltown Store Franchise Agreement it would not have entered into the subsequent Northmead Store Franchise Agreement or provided the Northmead Guarantee of Mr Davaria.~~

~~163. In the premises of the matters pleaded in paragraphs 160 to 162, the First Applicant has suffered loss and damage.~~

Particulars

~~The First Applicant repeats the matters particularised in relation to paragraph 101 above.~~

~~164. Further and in the alternative to paragraph 163 above, in the premises of the matters pleaded in paragraphs 160 to 162, the Campbelltown Store Loan Contract should be varied or set aside pursuant to section 12GM of the ASIC Act.~~

~~**Northmead Loan Application (Northmead Store)**~~

~~165. Further and in the alternative to the matters pleaded and particularised in paragraphs 143, 154, 160, 161, 162 and 163 above, by approving the Northmead Loan Application the Bank engaged in conduct in connection with the supply or possible supply of financial services to the First Applicant and/or Mr and Mrs Davaria that was unconscionable within the meaning of 12CB of the ASIC Act.~~

~~**Particulars**~~

- ~~(a) The First Applicant repeats the particulars to paragraph 160 above.~~
- ~~(b) Further and in the alternative, by reason of the Bank's actual or constructive knowledge of the matters pleaded and particularised in paragraphs 127(a) to 127(j) and 128, it knew or ought to have known that:~~
- ~~(i) there was a significant risk that the Northmead Store Financial Forecast understated the Store's true payroll costs;~~
 - ~~(ii) on proper analysis, the Northmead Store Financial Forecast indicated that the First Applicant would not be able to meet its loan repayments in the event that it paid any proposed employees of the Franchise their minimum legal entitlements;~~
- ~~(c) In the premises, the Bank entered into the Northmead Store Loan Contract with the First Applicant in circumstances in which it:~~
- ~~(i) failed to comply with the terms of the Banking Code which required it to: (i) act fairly and reasonably towards its small business customers and guarantors in a consistent and ethical manner; (ii) have regard to its prudential obligations; and (iii) exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the small customer to repay the Bank;~~
 - ~~(ii) engaged in a form of asset lending, in which the only realistic prospect the Bank had of receiving repayment of its loan would be:~~

- ~~(1) — from the proceeds of sale of the Northmead Store to an incoming franchisee who agreed to pay an amount for goodwill; or~~
 - ~~(2) — by exercising its rights pursuant to the personal guarantees signed by Mr & Mrs Davaria and/or the “General Security Agreement” executed by the First Applicant;~~
 - ~~(iii) — failed to warn Mr & Mrs Davaria of the risks arising from its failure to comply with the Banking Code and its asset based lending practices as outlined in (ii) above;~~
 - ~~(iv) — failed to meet with Mr & Mrs Davaria (or either of them) to ensure that they understand the import of the transactions they were entering into;~~
 - ~~(v) — failed to act in good faith towards the First Applicant and/or Mr & Mrs Davaria.~~
- ~~(d) — Further, the unconscionable conduct of the Bank in entering into the Northmead Store Bank Loan Contract was exacerbated by the fact that:~~
- ~~(i) — the repayment of funds advanced pursuant to the Northmead Store Loan Contract had been secured by a mortgage over the home of the Guarantors;~~
 - ~~(ii) — the Bank knew that: (I) the Northmead Store was the First Applicant’s second Store; (II) the Guarantors each planned to work in the Northmead Store 7 days per week and could not work in that Store and in the Campbelltown Store at the same time; and (III) as a result, the payroll costs in the Campbelltown Store would increase substantially.~~

~~166. — By reason of the Bank’s unconscionable conduct in approving the Northmead Loan Application and entering into the Northmead Store Loan Contract, the First Applicant was able to enter into the Northmead Store Franchise Agreement and thereby suffered loss and damage.~~

Particulars

~~*The First Applicant repeats the particulars to paragraph 101 above.*~~

~~167. — Further and in the alternative to paragraph 166 above, reason of the Bank’s unconscionable conduct in approving the Northmead Loan Application and~~

~~entering into the Northmead Store Loan Contract, the Northmead Store Loan Contract should be varied or set aside.~~

~~**F7. Bank's unconscionable conduct – Franchisees**~~

~~167A By reason of the Bank's actual or constructive knowledge of the matters pleaded and particularised in paragraphs 127(a) to 127(j) and 128, it knew or ought to have known that there was a significant risk that the Individual Store Financials included in some or all of the Bank Franchisee Loan Applications did not accurately represent the true payroll costs of their prospective Stores.~~

~~167B By reason of the Bank's actual or constructive knowledge of the matters pleaded and particularised in subparagraphs 127(a) and 127(k), it knew or ought to have known that 7-Eleven had a right not to renew the Lease of some of the Sites to be purchased by the Bank Franchisees after the initial term of 5 years with the result that:~~

- ~~(a) their Franchise Agreements would terminate after 5 years;~~
- ~~(b) the Bank Franchisees would lose the means of repaying the loans used to finance the purchase of their Stores over a 10-year term as provided in their Bank Loan Contracts;~~
- ~~(c) the ability of the Bank Franchisees to recoup their Franchise Debts would be affected adversely by a reduction in the goodwill price for the Store obtainable in the market;~~
- ~~(d) the principals of the corporate Bank Franchisees would be at risk of personal liability for all or part of the principal amount due under their Franchise Agreements and/or risked the loss of their homes or other property provided as security for their loan agreements;~~
- ~~(e) further and in the alternative, by reason of the Bank's knowledge of the material terms of the Franchise Agreements and its receipt of each Bank Franchisee's Individual Store Financials as part of each of the Bank Franchisees' applications for finance, it knew or ought to have known that the some or all of the Stores to be purchased by the Bank Franchisees using loan funds advanced by the Bank were unlikely to generate sufficient profit to allow them to service repay their loans according to their terms without the principals of their business having to work unreasonable;~~

~~excessive and/or unsoiciable unpaid hours and/or the Franchisee paying its employees below award wages.~~

~~167C Further and in the alternative, the Bank entered into the Bank Loan Contracts with each of the Bank Franchisees in circumstances in which it knew or ought to have known that, its provision of loan finance to prospective franchisees had the effect of:~~

- ~~(a) creating a market for the buying and selling of Stores with prices for goodwill that bore no relationship to the profit figures that reflected the true wage costs of operating the Stores in question and in which the price of that Store was likely inflated;~~
- ~~(b) causing Bank Franchisees to be dependent upon selling their Stores for a goodwill price determined by that market to be able to repay the loans advanced by the Bank;~~
- ~~(c) further and in the alternative, it may be inferred from the terms of the Bank Loan Contracts, that the facilities advanced by the Bank were subject to a review if a 'Change of control' occurs in relation to 7-Eleven, that a material factor affecting the lending decisions by the Bank was its reliance upon the relationship that it had with 7-Eleven, and the knowledge of the 7-Eleven System which it had gained as a consequence of that relationship, as set out in paragraphs 123 to 129 above.~~

~~167D In the premises of 167A to 167C, the Bank entered into the some or all of the Bank Loan Contracts in circumstances in which it:~~

- ~~(d) was in a superior bargaining position to some or all of the Bank Franchisees due to its superior knowledge of the 7-Eleven System;~~
- ~~(e) knew that the principals of many of the Bank Franchisees had immigrated to Australia as adults with limited experience in running their own business;~~
- ~~(f) failed to comply with the terms of the Banking Code in relation to some or all of the Bank Franchisee Loan Applications which required it to: (i) act fairly and reasonably towards its small business customers and guarantors in a consistent and ethical manner; (ii) have regard to its prudential obligations; and (iii) exercise the care and skill of a diligent and prudent banker in selecting and applying its credit assessment methods and in forming its opinion about the ability of the small customer to repay the Bank;~~

~~(g) — engaged in a form of asset lending, in which the only realistic prospect the Bank had of receiving repayment of its loans to some or all of the Bank Franchisees would be:~~

~~(i) — from the proceeds of sale of their Stores to incoming franchisees who agreed to pay an amount for goodwill that discharged the principal of the loan; or~~

~~(ii) — by exercising its rights pursuant to the personal guarantees and/or security agreements signed by the principals of the Bank Franchisees;~~

~~(h) — failed to warn some or all of the Bank Franchisees of the risks arising from its failure to comply with the Banking Code and its asset based lending practices as outlined in (D) above;~~

~~(i) — failed to advise some or all of the Bank Franchisees to obtain legal advice in relation to the Franchise Agreement;~~

~~(j) — failed to meet with some or all of the Bank Franchisees to ensure that they understand the import of the transactions they were entering into;~~

~~(k) — failed to act in good faith towards some or all of the Bank Franchisees.~~

~~168. — By approving some or all of the Bank Franchisee Loan Applications and entering into some or all of the Bank Loan Contracts, the Bank engaged in conduct in trade or commerce in connection with the supply or possible supply of financial services to the Bank Franchisees and/or their principals that was unconscionable within the meaning of 12CB of the ASIC Act.~~

Particulars

~~(bb) — The First Applicant repeats the matters pleaded and particularised in paragraphs 122–135 and the matters pleaded in paragraphs 167A to 167D.~~

~~169. — By reason of the Bank's unconscionable conduct as pleaded in paragraph 168 above, some or all of the Bank Franchisees suffered loss and damage.~~

Particulars

~~The loss suffered by Franchisees will also be calculated in accordance with the particulars to paragraph 101 above but are not particularised in this statement of claim; particulars in relation to Franchisees losses will be obtained (and particulars may be provided) following opt out, the determination of the First Applicant's claim and identified common issues~~

~~at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Franchisees.~~

~~170. Further and in the alternative to the matters pleaded in paragraph 168 above, by reason of the Bank's unconscionable conduct as pleaded in paragraph 168 above, the Bank Loan Contracts of some or all of the Bank Franchisees should be varied or set aside.~~

Date: 15/3/2021



Stewart A Levitt

Levitt Robinson

Solicitor for the Applicants

This amended pleading was prepared by Levitt Robinson and Philip Tucker.

Certificate of lawyer

I, Stewart A Levitt, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 15/3/2021



Stewart A Levitt

Levitt Robinson

Solicitor for the Applicants

SCHEDULE

No: VID180/2018

Federal Court of Australia

District Registry: Victoria

Division: General

Applicants

Second Applicant: KAIZENWORLD PTY LTD (ACN 163 833 565)

Respondents

Second Respondent: 7-ELEVEN INC (A TEXAS CORPORATION)

~~Third Respondent: AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED~~**DEFINED TERMS**

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