

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Davaria Pty Limited (ACN 165 206 404)**

Applicant

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

Respondents

**Statement of Claim**

(Notes:

- 1. Terms defined in the standard form Franchise Agreements referred to in this 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" are to Articles 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).*

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## A. INTRODUCTION

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1. The 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 (**Franchisees**):
  - (a) who entered into one or more franchise agreements with the first respondent, 7-Eleven Stores Pty Ltd (**Franchisor**) each in the form of a standard form of franchise agreement (**Franchise Agreement**) as issued by the Franchisor from time to time; and
  - (b) who entered into a Franchise Agreement prior to the date of the commencement of this proceeding, and who are not statute-barred (**Relevant Period**);
  - (c) who have suffered loss and damage as a result of the conduct of either or both of the Franchisor and the third respondent, ANZ Banking Group Limited (**Bank**), alleged in this SOC; and
  - (d) who have not entered into a binding and enforceable release of all of their claims against both the Franchisor and the Bank, which are the subject of this proceeding.
  
2. The 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 the Franchisor on 19 September 2013, (**Campbelltown Store Franchise Agreement**) in relation to the 7-Eleven store identified in the Franchisor'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 the Franchisor on 27 May 2015 (**Northmead Store Franchise Agreement**) in relation to the 7-Eleven store identified in the Franchisor'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 (**First Loan**); and
    - (ii) a further loan agreement with the Bank on or about 12 June 2015 (**Second Loan**); and
  - (g) has, since about 22 August 2013, been a customer of the Bank.
3. The Franchisor (referred to in the Franchise Agreement as the Second Respondent's Area Licensee, for the territory of Australia):
- (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**

- A. *The 7-Eleven System is described and defined in Recital A of the Franchise Agreement.*
  - B. *The agreements between the Franchisor 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**));
  - (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**).

- (b) at all material times, supplied services or was engaged with the possible supply of services to the Applicant and each of the Franchisees in trade or commerce within the meaning of sections 2 and 21 of the ACL.

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 section 4 of the CCA (Cth);
- (c) is subject to section 23 of the ACL by reason of section 131 of the CCA;
- (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 the Franchisor and to enforce each obligation of the Franchisee under the Franchise Agreements.

**Particulars**

*Article 48 of the Franchise Agreement.*

5. The Bank is, and was at all material times throughout the 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 *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**).

**B. BACKGROUND**

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**B1. The 7-Eleven System**

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

- (a) there are approximately 670 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 the Franchisor or a related entity of the Franchisor (**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 in:
  - (i) the 7-Eleven Franchise System Manual, as current from time to time (**Manual**); and
  - (ii) the 7-Eleven Franchisee Training Participant Workbook,

as updated from time to time (together **Franchise Material**);

- (f) each Store is operated at a site (**Site**) in respect of which:
  - (i) the Franchisor is the lessor 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 the Franchisor is the lessor 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 Applicant entered into the Campbelltown Store Franchise Agreement (on 19 September 2013), the Franchisor'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 Applicant entered into the Northmead Store Franchise Agreement (on 5 June 2015), the Franchisor'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.*

- (iii) the Franchisor 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 the Franchisor for approval, and may be approved if the Franchisor 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 the Franchisor;
  - (c) each of the directors of a prospective Franchisee is required to execute a personal guarantee of the Franchisee's debts to the Franchisor 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 the Franchisor), determined by the Franchisor;

### ***Particulars***

*A Franchisee who purchased a new Store or a Franchisor Store from the Franchisor has been charged a higher Franchise Fee than for a Store purchased from an existing Franchisee. It may be inferred from this that the higher Franchise Fee for a new Store incorporates an amount for goodwill payable to the Franchisor.*

- (e) the prospective Franchisee is required to pay to the Franchisor an *Application/Training Fee*, a *Franchise Fee* and a cash *Investment*, 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 Applicant's Franchise Fee for the Campbelltown Store was \$98,670 (including GST).*
- (iv) *The Applicant's Franchise Fee for the Northmead Store was \$105,842 (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, \$1,000 in the Cash Register Fund and \$200 for payment of licences, permits and bonds.*
- (vi) *The Applicant made a Goodwill Payment*
  - A. *of \$390,000 for the Campbelltown Store, and*
  - B. *of \$880,000, for the Northmead Store.*

**B3. The Franchise Agreements**

8. The material terms of the Franchise Agreements between the Franchisor (on the one hand) and the Applicant 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 the Applicant and all of the Franchisees:

**Particulars**

- (i) *In the period from January 2004 to April 2009, the Franchisor's standard form of agreement was that identified internally as AS/01/04 (2004 Version).*

(ii) *In the period from April 2009 to at least 27 May 2015, the Franchisor's standard form of agreement was that identified internally as SA/04/09 (2009 Version).*

(iii) *The material terms of the Franchise Agreements of all Franchisees, as set out in Part B.4 of this SOC, and the defined terms used in the Franchise Agreements set out in Schedule A, are materially the same.*

(b) on and from in or about December 2015, in the case of the Applicant 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 Applicant were signed in or about December 2015, in respect of the Campbelltown Store and the Northmead 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 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 the Franchisor of its *Option to Purchase* under Article 27(d) of the Franchise Agreement [Article 24].

10. The Franchisee acknowledges that the Franchisor 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:

- (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 the Franchisor (**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) The Franchisor 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 (**Franchisor's Efficiency 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, the Franchisor 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**

- A. *The Applicant's Weekly Draw in relation to the Campbelltown Store is \$1500.00.*
- B. *The Applicant's Weekly Draw in relation to the Northmead Store is \$1500.00,*

and

- (ii) the amount by which the *Net Worth* exceeds total assets as reflected on the balance sheet provided by the Franchisor in each monthly *Accounting Period* (**Profit Draw**).

**Particulars**

- A. *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 the Franchisor.*
- B. *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 E, 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 the Franchisor 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 the Applicant 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 for Fuel Stores and \$340,000 for Convenience Stores.

- (ii) Gross Profit is defined in Exhibit E of the Franchise Agreement to be the amount of Net Sales less the Cost of Goods Sold. 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, under the Franchise Agreement) 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 50-56% depending on the level of Gross Profit, subject to an adjustment under clause 28(d) if the Franchisee's Gross Profit (Merchandise) was less than either \$310,000 for Fuel Stores or \$340,000 pa for Convenience Stores.
- (f) On or after calculating the 7-Eleven Charge, the Franchisor 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 Applicant repeats 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:

- (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));

***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 the Franchisor, in its sole discretion (regardless of the classification thereof by the Franchisee or for income tax purposes), determines to be Operating Expenses.*

- (b) the Franchisor 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:
    - A. 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
    - B. 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 the Franchisor (**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) the Franchisor 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 the Franchisor over the *Opening Inventory*, 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 the Franchisor 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 the Franchisor [Article 8(f)].
13. In relation to the making of payments by the Franchisor to or on behalf of the Franchisee, the material express terms of the Franchise Agreements are:
- (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) the Franchisor 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 the Franchisor 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 the Franchisor 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* by the Franchisor for the Franchisee, the material express terms of the Franchise Agreements are:
- (a) the Franchisor 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 the Franchisor [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*, being the persons employed by the Franchisee in connection with the conduct of the business from the Store;
  - (iv) any additional reports as the Franchisor may require from time to time.
15. The Franchisor agrees 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:
- (a) the Franchisor 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)];
  - (c) the Franchisee must carry as part of its *Inventory* stock items, whether 7-Eleven branded or not, nominated by the Franchisor 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 the Franchisor [Article 15(g)];
  - (d) the Franchisee agrees to order, place and maintain in stock during any marketing campaign arranged by the Franchisor, 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 the Franchisor 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 the Franchisor deems to be part of its “Core Range” and “Recommended Range” at prices in excess of the prices recommended by the Franchisor;

**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 the Franchisor 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) the Franchisor will, at its own expense, periodically provide to the Franchisee lists of recommended maximum selling prices (inclusive of any GST applicable) recommended by the Franchisor 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 the Franchisor.*

**Acquisition of stock**

17. In relation to the acquisition of stock, the material express terms of the Franchise Agreements are:

- (a) the Franchisor agrees to periodically provide to the Franchisee, a list of merchandise vendors recommended by the Franchisor, and a list of merchandise items recommended by the Franchisor for purchase by the Franchisee, and may include in any such list merchandise vendors who are owned by or affiliated with the Franchisor [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 the Franchisor, only from sources authorised by the Franchisor [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 the Franchisor (**Recommended Suppliers**), however if the Franchisee purchases merchandise other than from Recommended Suppliers and the price of that merchandise exceeds the *Fair Wholesale Price* for that merchandise, the Franchisor 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 the Franchisor's stock ordering and receipt system, and if the Franchisee does not so comply, the Franchisor 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 payable in relation to stock purchased by a Franchisee, the material express terms of the Franchise Agreements are:
- (a) the Franchisee authorises the Franchisor to collect all discounts and allowances applicable to stock purchased by the Franchisee which were not deducted from the face of the Franchisee's receipts or invoices [Article 20(f)];
  - (b) the Franchisor will reduce the *Cost of Goods Sold* for stock purchased by the Franchisee by the amount of the discounts and allowances allowed to or reasonably traceable to *Purchases* or paid to the Franchisor by merchandise vendors, less the cost (**Franchisor's Advertising Rebate**) to the Franchisor of promotional materials, media advertising and other marketing costs;

- (c) the Franchisee will report to the Franchisor all discounts and allowances received by it and shall deposit into the Designated Account any discounts credits and rebates received directly by the Franchisee [Article 20(f)(ii), 20(f)(iii), 20(j)(i)(2)].

### ***Employees and Wages***

19. In relation to the engagement of employees, the express terms of the Franchise Agreement are (**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 the Franchisor from the *Open Account* upon the submission to the Franchisor 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 that
- (a) the Franchisee agrees to use the payroll services provided by the Franchisor, 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 the Franchisor with all information as and when required by the Franchisor to enable the Franchisor to provide or facilitate the provision of the Payroll Services [Article 19A(c), Variation Agreement].
- (c) the Franchisor 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 the Franchisor 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 an express term of the Franchise Agreement [Article 13(a)] that the Franchisor shall periodically:
- (a) provide the Franchisee with banners, signs and in-store advertising materials (including point of sale materials) developed by the Franchisor for use in the Stores or available from merchandise vendors for use in the Stores (**Franchisor 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 the Franchisor 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:
- (a) the Franchisor 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) the Franchisor 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 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 the Franchisor owed the following duties to the Franchisees (**Contractual Duties Term**):
- (a) a duty of cooperation to achieve the objects of the Franchise Agreement;
  - (b) a duty to act reasonably and in good faith towards the Franchisee;
  - (c) a duty to exercise any powers or discretions under the Franchise Agreement in good faith and reasonably and with reasonable cause.

***Particulars***

*The duties are 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 the Franchise Agreement relevant to the content of the duties in paragraph (a) to (c), include:
- (a) the opportunity for the Franchisee to earn profits and/or income by exploiting the right conferred by the Franchisor as the owner of the right, to use the trademark, design or other intellectual property of the Franchisor or the goodwill attached to it, being the *Trade Marks* and *7-Eleven System*, in connection with the supply of goods or services;

- (b) the opportunity for the Franchisee to achieve profits, income and/or commercial success from the Operation of the Store in the *7-Eleven System* referable to or derived from:
- (i) the prominence and reputation of 7-Eleven brand;
  - (ii) the skill, time, money and effort invested by the Franchisee in the acquisition and operation of the Store; and
  - (iii) the risks undertaken by the Franchisee in operating the business at the Store; and
- (c) the opportunity for the Franchisee to realise a capital gain on the sale of the Store by reason of the successful Operation of the Store by the Franchisee.

**Particulars**

- (i) *Each of the above objects can be inferred, inter alia, from the nature of the franchising relationship and the structure of the Franchising Agreement as a whole, including (inter alia):*
- A. *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 the Franchisor to the Applicant and each other Franchisee as set out in paragraphs 42 - 44 below.*
  - B. *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 [the Franchisor] 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]”;*

- C. *the fact that the Franchisee is required to invest significant funds to pay the Franchising Fee, in the Initial Investment and for any Goodwill Payment, and the reasonable expectation thereby created that the Franchisee would be able to on-sell the Store to a new franchisee and receive a Goodwill Payment on so doing;*
- D. *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. Franchisor’s inventory practices**

### **C-Store Practices**

25. At all material times during the Relevant Period, the Franchisor:
- (a) established a relationship 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 the majority of stock to its Franchisees;
  - (c) did not designate any alternative recommended merchandise vendors under Article 15(b) to generate price competition with C-Store in relation to the supply of stock 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 **Discounts**) to, for, or associated with, the supply of stock through C-Store to its Franchisees;
- (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 16(a) above);
  - (ii) only offering stock from C-Store on its in-store online portal (**Online Portal**) for most stock items;
  - (iii) requiring Franchisees who order stock other than from C-Store (as permitted pursuant to the conditions referred in paragraphs 17(d) and 17(e) above) to submit invoices to the Franchisor 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.

26. At all material times during the Relevant Period, the C-Store Prices agreed by the Franchisor with C-Store, and payable by or charged to the Applicant and each of the Franchisees for stock ordered by them from C-Store (**Franchisee Wholesale Prices**) exceeded:

- (a) the price or prices at which an independent retailer would have been able to purchase that stock in similar quantities on normal trade volumes (**Independent Fair Wholesale Price**); and/or
- (b) further and in the alternative, the lowest price or prices reasonably obtainable by the Franchisor using its best endeavours (**Best Endeavours Wholesale Price**),

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

### **Particulars**

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

27. Further, the aggregate difference between the Franchisee Wholesale Prices actually charged and paid by Franchisees, and the Independent Fair Wholesale Price or the Best Endeavours Wholesale Price for the equivalent goods, has exceeded, in each full calendar year of the Relevant Period, the amount of the Franchisor's Advertising Rebate reported for that year by a material amount.

**Particulars**

*Particulars will be provided on the service of the Applicant's expert evidence.*

**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 the Applicant and each other Franchisee into their Franchise Agreements, the Franchisor:
- (a) listed on its Online Portal the stock items to be purchased by each of the Franchisees (**Suggested Order**) and 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 quantity of stock on the Suggested Order, then delivered stock to the Store within 1-2 days;
  - (c) in the case of the Applicant and Franchisees who obtained working finance capital from the Franchisor 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;
  - (d) when stock was ordered by the Applicant or Franchisees from the Online Portal, debited the cost of ordered stock (at the time of delivery) to the respective outstanding balances of the *Open Account* of the Applicant 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 the Franchisees to alter those selling prices).

(Together or in combination, **Inventory Practices**).

## **BREACH OF CONTRACT CLAIMS**

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29. The conduct of the Franchisor referred to in subparagraphs 25(c) to 25(e) and paragraphs 26 and 27 above (alone and in combination, **Wholesale Pricing Conduct**) constituted, in breach of the Franchisor's Efficiency Obligation Term and/or in breach of the Contractual Duties Term:
- (a) a failure by the Franchisor to use its best endeavours to ensure that the business of the Applicant 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 the Franchisor to cooperate with the Applicant and each other Franchisee to achieve the objects of their respective Franchise Agreements;
  - (c) further and in the alternative, a failure by the Franchisor to act reasonably and in good faith towards the Applicant and each other Franchisee; and/or
  - (d) further and in the alternative, a failure by the Franchisor to exercise its powers or discretions under the Franchise Agreement in good faith and reasonably and with reasonable cause.

### ***Particulars***

- (i) *Throughout the Relevant Period, the effect of the Franchisor's Wholesale Pricing Conduct was to increase the Cost of Goods Sold, and reduce the income and/or profit margins, for the Applicant 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:*
  - A. *the prominence and reputation of 7-Eleven brand;*
  - B. *the skill, time, money and effort invested by the Franchisee in the acquisition and operation of the Store; and*

- C. *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, 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 the Franchisor, as disclosed by the Franchisor to the Franchisees in respect of each year in the Relevant Period. Accordingly, it is to be inferred that:*
- A. *the Franchisor agreed C-Store prices with Metcash that were by any reasonable and objective measure excessive for the goods supplied by Metcash to the Applicant and the Franchisees, to the detriment of the Franchisees as set out in (i) above;*
- B. *in negotiating the C-Store prices, the Franchisor 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 the objects of the Franchise Agreements; and*
- C. *in the premises, the Franchisor thereby failed to cooperate with the Franchisees to achieve the objects of the Franchise Agreements set out in paragraph 24 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 the Franchisor's Advertising Rebate throughout the Relevant Period, without any apparent legitimate contractual justification for such conduct, the Franchisor acted (and/or exercised its contractual powers under the Franchise Agreements) 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, the Franchisor 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 the Franchise Agreement set out in paragraph 24 above.*
- (v) *Further particulars will 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 the Inventory Practices referred to in paragraph 28 above, constituted, in breach of the Franchisor's Efficiency Obligation Term and/or the Contractual Duties Term:

- (a) a failure by the Franchisor to use its best endeavours to ensure that the business of the Applicant and each other Franchisee, being an undertaking, scheme or enterprise to which their respective Franchise Agreements relate, is carried on in a proper and efficient manner;
- (b) further and in the alternative, a failure by the Franchisor to cooperate with the Applicant and each other Franchisee to achieve the objects of their respective Franchise Agreements;
- (c) further and in the alternative, a failure by the Franchisor to act reasonably and in good faith towards the Applicant and each other Franchisee; and/or
- (d) further and in the alternative, a failure by the Franchisor 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 the Inventory Practices pleaded and particularised in subparagraphs 28(a) and 28(e) above, the Applicant and some or all of the Franchisees were unable (at all, or on a regular basis) to*

*purchase goods from alternative wholesalers (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 the Applicant and some or all of the Franchisees.*

- (iii) Further and in the alternative, due to the Inventory Practices pleaded and particularised in subparagraphs 28(b) and 28(d) above, the Applicant and some or all of the Franchisees incurred interest liabilities to the Franchisor on inflated wholesale prices from the date of ordering C-Store merchandise.*
- (iv) In the premises, by the Inventory Practices pleaded and particularised in subparagraphs 28(a) and 28(e) above, the Franchisor failed to cooperate with the Applicant and some or all of the Franchisees by preventing them from purchasing goods 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, the Franchisor prevented the Applicant 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 of their Franchise Agreements set out in paragraph 24 above.*
- (v) Further particulars will be provided on service of the Applicant's expert evidence.*

## **B7. Loss and Damage**

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

### ***Particulars***

- (a) The Applicant's loss 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) *the 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 the Franchisor.*
- (b) *Further particulars of the Applicant's loss and damage calculated on the above bases will 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 Statement of Claim; particulars in relation to the Franchisees' losses will be obtained (and particulars will be provided) following opt out, the determination of the 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.*

### **C. UNFAIR CONTRACT TERMS**

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32. The Franchise Agreements of the Applicant and:
- (a) some or all of the Franchisees, are small business contracts within the meaning of section 23 of the ACL;
  - (b) each of the Franchisees, are standard form contracts within the meaning of section 27 of the ACL.
33. The purpose and essence of a franchise relationship is an arrangement under which a franchisee earns profits or income, or has the opportunity to do so, by exploiting a right, conferred by the franchisor as owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services, including:
- (a) the franchisee has the opportunity to own and operate his, her or its own business within a system owned or controlled by the franchisor;
  - (b) the franchisor has the opportunity to build and grow its business utilising the capital, skill, time, money and effort of the franchisee.

**Particulars**

*See the particulars to paragraph 24 above.*

34. The effect of the Franchise Agreement between the Franchisor and the Applicant and each other Franchisee, has been to impose such a high level of operational control over the conduct of the business at the Franchisee's Stores as to deny the Franchisees any effective ability, or alternatively, to substantially restrict their ability, to make their own decisions about how best to run their businesses and exploit the rights purportedly conferred on them by the Franchisor to earn profit or income, or to have the opportunity to do so, having regard to the investment of skill, time, money and effort by the Franchisee and its principals (**Franchisor's Operational Control**):
- (a) the Franchisee has no, or no effective, control over the supplier from whom it has purchased stock or the prices payable by the Franchisee to that supplier, C-Store, by reason of Articles 15(c), 15(f), 15(h), 16(a), 16(b), 17(a), 20(f) and 20(g) of the Franchise Agreement and the Franchisor's C-Store Practices thereunder;
  - (b) the Franchisee had no, or no effective control, over the retail sales prices which it could charge to customers either for regular stock or for marketing stock, by reason of Article 17(b) of the Franchise Agreement and the Maximum Price Control thereunder;
  - (c) the Franchisee had no, or no effective, control over the stock levels at the Store, by reason of Articles 13(c), 14(a), 15(a), 15(g) of the Franchise Agreement, and the Franchisor's Inventory Practices;
  - (d) further and alternatively to (c) above, the Franchisee was obliged to incur the costs of any stock losses, due to overstocking of the Store by holding levels of stock, as required by the Franchisor by reason of Article 12(a) of the Franchise Agreement, in excess of what the Franchisee reasonably required for sale prior to the expiry date of such stock;
  - (e) the Franchisee was obliged to operate the Store during the hours directed by the Franchisor, by reason of Article 1(k) and paragraph (b) of Exhibit D of the Franchise Agreement;
  - (f) the Franchisee was unable to pay any operational expenses, including wages, from their Open Account, if the Franchisee's Net Worth fell below the Minimum Net Worth stipulated in the Franchise Agreement, pursuant

to Article 8(a) of the Franchise Agreement and Article 19A of the Variation Agreement;

- (g) after December 2015, Franchisees were compelled to use the Franchisor's payroll services pursuant to Article 19A of the Variation Agreement;
- (h) the Franchisee's ability to maintain a Minimum Net Worth from time to time was dependent upon the profitability of the Store, which was impacted and substantially controlled by the Franchisor as set out in paragraphs 34(a) to (d) above;
- (i) the Applicant, and most if not all Franchisees, had no practical alternative to obtaining financing from the Franchisor on the Open Account, as:
  - (i) the *Open Account* was debited by the Franchisor with the unpaid balance of the Opening Stock and thereafter accrued interest on and from the commencement of the Franchise Agreement, by reason of Articles 7, 14(a) and paragraph (c) of Exhibit D to the Franchise Agreement;
  - (ii) at the time of executing the Franchise Agreement, the Franchisee granted a first ranking security interest to the Franchisor over all Current Assets of the Store (irrespective of whether there was a negative balance on the *Open Account*) and executed an indenture in the form of Exhibit G to the Franchise Agreement, charging such Current Assets, with the result that their ability to obtain working capital from another financier was significantly constrained in the absence of an agreement between any such alternative financier and the Franchisor;

#### ***Particulars***

*The Applicant repeats the matters pleaded in paragraphs 7(b) and 12(e) above.*

- (j) further and in the alternative, a Franchisee's entitlement to receive a Weekly Draw of anticipated profits from the Franchisor's *Open Account* was dependent upon the Franchisee maintaining a Minimum Net Worth as stipulated in the Franchise Agreement, and was also dependent in part upon the level of wages paid by the Franchisee, pursuant to Article 22 and Exhibit E, paragraph (h) of the Franchise Agreement;

- (k) a Franchisee was at risk of an immediate termination of the Franchise Agreement if the Franchisee failed to maintain the required Net Worth at any time, by reason of Articles 25(c), 25(e) and the definition of “Fraudulent Behaviour” in the Franchise Agreement;
  - (l) in the case of the Applicant and some of the Franchisees, pursuant to Articles 2(f) and 24(a)(i), the Franchisor was able to end their Franchise Agreement prior to the completion of the maximum 10-year term by refusing to exercise an option to renew the *Lease* of the site (at its sole and unconstrained discretion).
35. The Franchisor’s Operational Control (and each element of it as set out in subparagraphs 34(a) to 34(l) above, separately and in combination):
- (a) was inconsistent with the purpose and essence of a franchise agreement as set out in paragraph 33 above;
  - (b) is not presented clearly, legibly and in reasonably plain language from a reading of the Franchise Agreement as a whole or from a reading of any of the terms referred to in subparagraphs 34(a)-(l) above, for the purposes of section 24(4) of the ACL.
36. By reason of paragraphs 33 to 35 above, each of the following terms of the Franchise Agreement between the Franchisor and each of the Applicant and each other Franchisee (**Relevant Terms**), individually and in combination with each and all of the other Relevant Terms, cause a significant imbalance in the rights and obligations of the parties to the Franchise Agreement within the meaning of section 24(1)(a) of the ACL:
- (a) Articles 1(k) and paragraph (b) of Exhibit D in relation to the hours that the Store was required to remain open;
  - (b) Articles 7, 8, 14(a), 18, 20, 22 and paragraph (c) of Exhibit D and paragraph (h) of Exhibit E in relation to the establishment and operation of the *Open Account* by the Franchisor;
  - (c) Articles 12(a), 13(c), 15(a) and 15(g) in relation to the composition of inventory to be ordered at the direction of the Franchisor, including stock required for marketing campaigns;
  - (d) Article 14(a) in relation to the procurement by the Franchisor of the initial Inventory for the Store;

- (e) Articles 15(c), 15(f), 15(h), 16(a), 16(b) and 17(a), in relation to where and how the Franchisee must purchase stock;
  - (f) Article 17(b) in relation to the retail prices that may be charged by Franchisees;
  - (g) Articles 20(f) and 20(g) in relation to the collection and accounting treatment by the Franchisor or all discounts and allowances paid by merchandise vendors for stock purchased by a Franchisee;
  - (h) Articles 2(f) and 24(a)(i) in relation to the Franchisor's ability to reduce the term of the Franchise Agreement by declining (at its sole and unconstrained discretion) to renew its Lease of some of the Franchisees' Stores;
  - (i) from the date of execution of the Variation Agreement, Article 19A in relation to the Payroll Services provided by the Franchisor (see paragraph 20 above).
37. Further and in the alternative, by reason of paragraphs 33 to 35 above, each of the Relevant Terms, individually and in combination with the other Relevant Terms, is:
- (a) not reasonably necessary in order to protect the legitimate interests of the Franchisor, as the party advantaged by the term within the meaning of section 24(1)(b) of the ACL;
  - (b) is the cause of detriment to the Franchisee by reason of the application and reliance on such term by the Franchisor within the meaning of section 24(1)(c) of the ACL.
38. Further and in the alternative, by reason of paragraphs 33 to 35 above, each of the Relevant Terms, individually and in combination with the other Relevant Terms, is not transparent within the meaning of section 24(2) of the ACL.
39. By reason of paragraphs 32 to 38 above, each of the Relevant Terms is:
- (a) an unfair term within the meaning of section 24(1) of the ACL; and
  - (b) void by reason of section 23(1) of the ACL.
40. Further and in the alternative, to the extent that the Master Franchisor is granted rights under Article 48 of the Franchise Agreements of the Applicant and each other Franchisee to be a third-party beneficiary of any of the Relevant Terms with a right to exercise the rights of the Franchisor in relation to any of the Relevant

Terms (**Third Party Rights Term**), the Third Party Rights Term is, to that extent, also:

- (a) an unfair term within the meaning of section 24(1) of the ACL; and
- (b) void by reason of section 23(1) of the ACL.

## **D. FRANCHISOR DISCLOSURES – CODE BREACHES AND MISLEADING OR DECEPTIVE CONDUCT – APPLICANT AND FRANCHISEES**

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### **D1. The Franchisor’s pre-contractual statements and Disclosure**

41. Prior to the Applicant and each other Franchisee entering a Franchise Agreement, the Franchisor 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:
    - A. average financial information across all Stores (nationally) in the previous two financial years; and
    - B. a spread-sheet containing average financial information across all Fuel Stores or non-Fuel 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 or Fuel Store which they had expressed an interest in purchasing (**Individual Store Financials**);
- (b) in the case of the 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 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 Applicant entering into the Campbelltown Store Franchise Agreement, the Franchisor 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 (NSW District Manager) to Paresh Davaria dated 9 July 2013, the Average Store Financials for FY 2009-FY2012;*
- (iii) *by email from Bennett (NSW District Manager) to Paresh Davaria dated 17 July 2013, the “average store earnings” for the previous three financial years;*
- (iv) *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 7-Eleven Brochure published during the Relevant Period, the Franchisor 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, the Franchisor made the following statements:

- (a) *“The Franchisor 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. The Franchisor 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 the Franchisor negotiates with the*

vendors in relation to their supply of goods and services to its franchise network. The Franchisor 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 Franchisor in the fund, the Franchisor 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) "The Franchisor does not give earnings information about a 7-Eleven Store Franchise.

*Earnings may differ between store franchises.*

*The Franchisor cannot estimate earnings for a particular franchise.*

*However, the Franchisor 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 Franchisor is making available to you the existing financial information, such information is based on information provided to the Franchisor by its Franchisee and the Franchisor 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, the Franchisor stated:

- (a) *“The Supplier [Franchisor] 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, the Franchisor 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 2010 and 2014:
  - (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 the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and
  - (ii) to give a franchisee current information from the franchisor that is material to the running of the franchised business;
- (b) In the case of the *Competition and Consumer (Industry Codes –Oilcode) Regulation 2006* (Cth) and the *Competition and Consumer (Industry Codes–Oil) Regulations 2017* (Cth) (collectively, **Oilcode**):
  - (i) to allow a supplier (here, the Franchisor) to give a person adequate information to help the retailer (here, the Franchisee) 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. Business Opportunity Representation Contravention**

46. Prior to the Applicant and each other Franchisee entering into their Franchise Agreements, the Franchisor represented to each of them that entering into a 7-

Eleven franchise offered an opportunity to operate their own business from which they could earn profits and income 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 (**Business Opportunity Representation**).

**Particulars**

*The representation was conveyed by:*

- (a) *each of the 7-Eleven Business Opportunity Statements (separately and together); and/or*
- (b) *the statements in Recital E of the Franchise Agreement that the Franchisee: (i) “recognis[es] the advantages of the 7-Eleven System and the 7-Eleven Image”; and (ii) wants to acquire from [the Franchisor] 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]” (**Recital E Statements**); and/or*
- (c) *the ordinary meaning of the word “business” as used in the above contexts which (due to the absence of any qualification to the contrary) connoted the promise of financial reward on investment (of time, money and effort) based on individual enterprise and the application of business judgment and management skill.*

- 47. The Business Opportunity Representation was a continuing representation throughout the Relevant Period.
- 48. By making the Business Opportunity Representation, the Franchisor engaged in conduct in trade or commerce, within the meaning of section 52 of the TPA or section 4 of the ACL.
- 49. The Business Opportunity Representation was throughout the Relevant Period, misleading or deceptive, or likely to mislead or deceive.

**Particulars**

*Due to each element of the Franchisor’s Operational Control (separately and in combination) and the amount of the 7-Eleven Charge (both in the Franchise Agreement and the Variation Agreement), the Applicant and some or all Franchisees were denied the opportunity to:*

- (a) *make their own independent business decisions about how best to operate their Stores to earn profits and income having regard to market conditions;*
- (b) *make decisions about how best to contribute skill, time, money and effort, and exercise their own business judgment to operate their Stores to earn profits and income, and/or commercial success, having regard to market conditions;*
- (c) *earn profits and income, and/or commercial success, from their Store, which reflected the skill, time, money and effort contributed by them, the risks undertaken by them, or such business judgments as were made by them in the operation of their Stores.*

50. In the premises, by making the Business Opportunity Representation the Franchisor engaged in conduct in contravention of:

- (a) section 52 of the TPA; or
- (b) section 18 of the ACL,

**(Business Opportunity Representation Contravention).**

### **D3. Business Opportunity Statements Contravention**

51. Further, and in the alternative to the matters pleaded in paragraphs 46 to 50 above, by making each of the 7-Eleven Business Opportunity Statements (alone or in combination) and/or the Recital E Statements (alone or in combination) the Franchisor engaged in conduct:

- (a) in trade or commerce, within the meaning of section 52 of the TPA or section 4 of the ACL (as applicable);
- (b) that, throughout the Relevant Period, was misleading or deceptive, or likely to mislead or deceive, in contravention of:
  - (i) section 52 of the TPA; or
  - (ii) section 18 of the ACL,

**(Business Opportunity Statements Contravention).**

#### ***Particulars***

*The Applicant repeats the particulars to paragraph 49 above.*

**D4. Average Payroll Cost Accuracy Representation Contravention**

52. Further, and in the alternative, by providing the Average Store Financials to the Applicant and each other Franchisee, the Franchisor represented that:

- (a) the Franchisor was not aware of any, or any 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 and revenues involved in the operation of a Store as part of the *7-Eleven System*; and
- (b) the Franchisor had taken all due 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, subject to the limitation as to the reliability of data provided by individual Store operators to the Franchisor for the purpose of preparing that information;

(separately or together, the “**Average Store Financials Accuracy Representation**”).

***Particulars***

*The representation was implied and/or conveyed by silence as a reasonable person in the position of the Applicant and each other Franchisee would, in the circumstances of a prospective entry into a Franchise Agreement, reasonably have expected the Franchisor 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:*
  - A. *the Average Store Financials document was provided to the 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;*

- B. 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 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;*
- C. further and in the alternative, prior to 1 January 2015, the Franchisor 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 Applicant and each Franchisee could reasonably have expected that this was the case in the absence of a clear statement by the Franchisor to the contrary;*
- D. further and in the alternative, after 1 January 2015, the Franchisor 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 the Franchisor was aware of would be disclosed to them;*
- E. further and in the alternative, the Franchisor 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 the Franchisor, as that was the purpose for which the information was provided by the Franchisor.*

53. The Average Store Financials Accuracy Representation was a continuing representation from the commencement of the Relevant Period to the time of the publication of the Media Investigative Reporting referred to in paragraphs 90 to 92 below (on 29 and 31 August 2015).
54. By making the Average Store Financials Accuracy Representation, the Franchisor engaged in conduct in trade or commerce, within the meaning of section 4 of the ACL and /or section 52 of the TPA.
55. The Average Store Financials Accuracy Representation was throughout the Relevant Period, misleading or deceptive, or likely to mislead or deceive.

### ***Particulars***

- (a) *The Franchisor knew 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 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(f), 106(g), 106(h), 106(i), 106(j) and 106(j) below.*
- (b) *Further and in the alternative, the Franchisor 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 of operating a Store as part of the 7-Eleven System, as:*
- (i) *the Franchisor 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(f) and 106(g) below) and (B) the actual wages information supplied to it by each Store; and*
- (ii) *from that information, was able to calculate the extent to which either:*
- A. *each Store which provided financial information to it was underpaying or underdeclaring to the Franchisor the wages being paid to its workers; or*

- B. *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 the Franchisor for reviewing or appraising the operation of individual Stores did not place any or any reasonable priority upon determining the extent to which either:*
- A. *the Store was underpaying or under-declaring to the Franchisor the wages being paid to its workers; or*
  - B. *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) *the Franchisor, in compiling and presenting the Average Store Financials to the 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:*
- A. *underpayment or underdeclared wages of workers at the relevant Stores; and/or*
  - B. *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 will be provided on service of the Applicant's expert evidence and after discovery.*
56. In the premises, by making the Average Payroll Cost Accuracy Representation the Franchisor 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 the Average Store Financials to the Applicant and each other Franchisee, the Franchisor 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***

(i) *The Applicant repeats the matters pleaded and particularised in paragraph 52 above.*

(ii) *Further or in the alternative, the representation arises by silence, by reason of the failure of the Franchisor to explain or qualify the wages information shown in the Average Store Financials to indicate that the wages information shown therein could only be achieved by:*

A. *underpaying or underdeclaring the wages paid to workers at the Store; and/or*

B. *relying on labour being supplied by the principals of the Franchisee or their family members for nothing at or at a rate below the award rate, and for an unreasonable or unsociable number of hours.*

58. The Average Store Financials Accuracy Representation was a continuing representation from the commencement of the Relevant Period to the time of the publication of the Media Investigative Reporting referred to in paragraphs 90 to 92 below (on 29 and 31 August 2015).

59. By making the Future Average Payroll Cost Representation, the Franchisor engaged in conduct in trade or commerce, within the meaning of section 52 of the TPA and/or section 4 of the ACL.

60. Insofar as the Future Average Payroll Cost Representation was a representation as to a future matter or future matters, the Applicant relies on:

- (a) section 51A of the TPA; and/or
- (b) section 4 of the ACL.

61. The 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, made without a reasonable basis.

***Particulars***

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

62. In the premises, by making the Future Average Payroll Cost Representation the Franchisor 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. Average Store Financials Conduct Contravention**

63. Further and in the alternative to the matters pleaded in paragraphs 52 to 62 above, by providing the Average Store Financials to each of the Franchisees prior to their entry into their Franchise Agreements, the Franchisor engaged in conduct:

- (a) in trade or commerce, within the meaning of section 52 of the TPA or section 4 of the ACL;
- (b) that, from the commencement of the Relevant Period to the time of the publication of the Media Investigative Reporting referred to in paragraphs 90 to 92 below (on 29 and 31 August 2015), was misleading or deceptive, or likely to mislead or deceive, in contravention of:

- (i) section 52 of the TPA; or
- (ii) section 18 of the ACL,

**(Average Store Financials Conduct Contravention).**

**Particulars**

*The Applicant repeats the particulars to paragraphs 55 and 60 above.*

**D7. Advertising Fund Representation Contraventions****Breach of the Franchising Codes 2010 and 2014 and the Oilcode**

64. It was a requirement of the Franchising Codes 2010 and 2014, and the Oilcode, that the Disclosure Documents under each of those respective Codes include details of whether the Franchisor (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 2010 and 2014, and the Oilcode, that the Disclosure Documents under each of those respective Codes include the following information for each marketing or cooperative fund controlled or administered by the Franchisor (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:
- (a) provide any details or other information about “other financial benefits” received by the Franchisor 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 the Franchisor from 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 the Franchisor, 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 (by way of the indirect contributions in the form of rebates as stated by the Franchisor) 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 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, the Franchisor has, in contravention of section 51ACB of the CCA, contravened each of:
- (a) Clause 6 of the Franchising Code 2010;
  - (b) Clause 8 of the Franchising Code 2014;
  - (c) Clause 13 of the Oilcode (collectively the **Code Disclosure Contraventions**).

*Misleading and Deceptive Conduct*

68. By making the Franchising Code Advertising Fund Disclosure Statements and/or the Oilcode Advertising Fund Disclosure Statements to the Applicant and each other Franchisee, the Franchisor represented that Franchisees were not 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 continuing representation throughout the Relevant Period.
70. By making the Advertising Fund Representation, the Franchisor engaged in conduct in trade or commerce, within the meaning of section 52 of the TPA or section 4 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**

- (a) *The effect of the Franchisor'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; and/or*

*was that Discounts were available to the Franchisor to fund the Franchisor's and In-store Advertising and Institutional Advertising, that would otherwise have been applied in reduction of the Franchisee Wholesale Price; and*

- (b) *by reason of (a) above, the Applicant and each other Franchisee was required to contribute directly to the Franchisor's In-store Advertising and Institutional Advertising by foregoing the value of those Discounts in determining the Franchisee Wholesale Price.*

72. In the premises, by making the Advertising Fund Representation the Franchisor 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 the Applicant and some or all of the Franchisees, the Franchisor represented to the Applicant and each other 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 continuing representation throughout the Relevant Period.

75. By making the 7-Eleven Supplier Representation, the Franchisor engaged in conduct in trade or commerce, within the meaning of section 4 of the ACL and/or section 52 of the TPA.
76. The 7-Eleven Supplier Representation was, throughout the Relevant Period, misleading or deceptive, or likely to mislead or deceive (**7-Eleven Supplier Representation Contravention**).

**Particulars**

*The Applicant repeats the matters pleaded and particularised in paragraphs 25 and 28 above and says that, during the Relevant Period:*

- (a) *the Franchisor provided the Applicant and each other Franchisee with only one choice of supplier for the vast majority of stock (being C-Store);*
- (b) *the Franchisor gave the Applicant and each other Franchisee limited choice as to the product lines they could carry in their Store, but rather, chose product lines and the supplier of those product lines on the Franchisees behalf.*

**D9. 7-Eleven Supplier and Merchandise List Statement Contravention**

77. Further and in the alternative to the matters pleaded and particularised in paragraphs 73 to 76 above, by making the 7-Eleven Supplier and Merchandise List Statement to the Applicant and each of the Franchisees, the Franchisor engaged in conduct:
- (a) in trade or commerce, within the meaning of section 52 of the TPA or section 4 of the ACL (as applicable);
- (b) that, throughout the Relevant Period, was misleading or deceptive, or likely to mislead or deceive, in contravention of:
- (i) section 52 of the TPA; or
- (ii) section 18 of the ACL
- (7-Eleven Supplier and Merchandise List Statement Contravention).**

**Particulars**

*The Applicant repeats the particulars provided in relation to paragraph 76 above.*

**D10. Campbelltown Store Financials Representation (Applicant only)**

78. By providing the Campbelltown Store Financials to the Applicant, the Franchisor represented that:

- (a) the Franchisor 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) the Franchisor had taken all due skill and care in presenting the information contained in the Campbelltown Store Financials for consideration by the 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 and/or conveyed by silence as a reasonable person in the position of the Applicant would, in the circumstances of its prospective entry into the Campbelltown Store Franchise Agreement, reasonably have expected the Franchisor 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 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 Applicant under cover of an email from Ash Bennett (then the Franchisor's NSW Franchising Manager) dated 17 July 2013, prior to the Applicant entering into the Campbelltown Store Franchising Agreement, in response to an enquiry from the Applicant made in the context of its proposed application to purchase the Campbelltown Store and*

*for the purpose of assisting the Applicant to consider whether to purchase the Campbelltown Store, including seeking advice from its advisers based on that information in relation to the Applicant's decision;*

*(iii) further and in the alternative, the Franchisor knew or ought to have known that the Applicant and/or its advisers would rely on the Campbelltown Store Financials in deciding whether to enter into franchise agreements with the Franchisor, as that was the purpose for which the information was provided by the Franchisor.*

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 Applicant entered into the Campbelltown Store Franchise Agreement).
80. By making the Campbelltown Store Financials Accuracy Representation, the Franchisor 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) The Franchisor was (i) 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 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) the Franchisor 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) the Franchisor 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) *the Franchisor 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:*
- A. *the Campbelltown Store had been underpaying or underdeclaring to the Franchisor the wages being paid to its workers in the period of the Campbelltown Store Financials; and/or*
- B. *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 the Franchisor for reviewing or appraising the operation of individual Stores did not place any or any reasonable priority upon determining the extent to which either:*
- A. *the Store was underpaying or underdeclaring to the Franchisor the wages being paid to its workers; or*
- B. *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 the Franchisor 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) *The Franchisor, in compiling and presenting to the 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 underdeclared 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 will be provided on service of the Applicant's expert evidence and after discovery.*

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

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

83. Further, or in the alternative, by providing the Campbelltown Store Financials to the Applicant, the Franchisor 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 Applicant repeats the matters pleaded and particularised in paragraph 52 above.*
- (ii) Further or in the alternative, the representation arises by silence, by reason of the failure of the Franchisor 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:*

- A. *underpaying or underdeclaring the wages paid to workers at the Store; and/or*
  - B. *relying on labour being supplied by the principals of the 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.
85. By making the Campbelltown Store Future Payroll Cost Representation, the Franchisor 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 Applicant relies on section 4 of the ACL.
87. The Campbelltown Store Future 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, made without a reasonable basis.

#### ***Particulars***

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

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

#### **D12. Campbelltown Store Financials Conduct Contravention (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 Applicant prior to its entry into the Campbelltown Store Franchise Agreement, the Franchisor 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 Applicant repeats the particulars to paragraphs 81 and 87 above.*

**D13. Misleading or deceptive conduct – loss and damage caused to the Applicant and Franchisees**

***Applicant and Franchisees – indirect reliance or “market causation” losses arising from Wage Representation Contraventions***

- 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**), 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. During the Relevant Period, the Applicant and each other Franchisee acquired their interests in the *7-Eleven System*:
  - (a) in a market regulated by, inter alia, sections 52 of the TPA or section 18 of the ACL;
  - (b) in a market where the price or value of 7-Eleven franchises would reasonably be expected to have been informed or affected by the conduct of the Franchisor in: (i) making the Average Payroll Cost Accuracy Representation Contravention and/or the Future Average Payroll Cost

Representation Contravention to participants in the market for 7-Eleven franchises; and/or (ii) engaging in the Average Store Financials Conduct, in contravention of section 52 of the TPA or section 18 of the ACL;

- (c) in a market in which a reasonable person would expect the Average Payroll Cost Accuracy Representation Contravention, the Future Average Payroll Cost Representation Contravention and/or the Average Store Financials Conduct Contravention to have had a material effect on the goodwill price of 7-Eleven Franchises;
- (d) in which falls in the price of the goodwill for Stores on and after the publication of the Media Investigative Reporting referred to in paragraphs 90 and 91 above were a result of the publication of information that revealed that the Average Payroll Cost Accuracy Representation Contravention, the Future Average Payroll Cost Representation Contravention and the Average Store Financials Conduct (or any of them) involved conduct that was misleading and deceptive in contravention of section 52 of the TPA or section 18 of the ACL (**Wage Representation Contraventions**).

94. During the Relevant Period prior to publication of the Media Investigative Reporting, the Wage Representation Contraventions (or any of them) 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 accurate financial information had been provided by the Franchisor to prospective franchisees and their advisers (being information without the Wage Representation Contraventions); and/or
- (b) their true value.

95. By reason of the matters pleaded in paragraphs 90 to 94 the Applicant has suffered loss and damage.

#### **Particulars**

- (a) *The loss suffered by the 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; or*
- (iii) *alternatively, the quantum of the fall in the price or value of the Campbelltown Store attributable to the Media Investigative Reporting referred to in paragraphs 90 and 91 above;*

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

- (b) *Further particulars will be provided after service of the Applicant's expert evidence.*

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

#### **Particulars**

*The loss suffered by Franchisees will also be calculated in accordance with the particular (a) in paragraph 95 above but are not particularised in this statement of claim; particulars in relation to Franchisee losses will be obtained (and particulars will be provided) following opt out, the determination of the 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.*

#### **Applicant – direct reliance**

97. Further and in the alternative to the matters pleaded in paragraphs 90 to 96 above, in deciding to enter into the Campbelltown Store Franchise Agreement, the Applicant relied on (alone or in combination) each of the Business Opportunity Representation, the 7-Eleven Business Opportunity Statements, 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, (individually and in combination, the **Misleading or Deceptive Conduct**

**Representations**) and the Campbelltown Store Financials Accuracy Representation, the Campbelltown Store Future Payroll Cost Representation and the Campbelltown Store Financials Conduct Representation (**Campbelltown Representations**).

98. Further and in the alternative, if the Misleading or Deceptive Representations and the Campbelltown Representations (alone or in combination) had not occurred, the Applicant would not have entered into 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 Applicant to enter into the Campbelltown Store Franchise Agreement.
100. Had the Applicant not entered into the Campbelltown Store Franchise Agreement it would not have entered into the subsequent Northmead Store Franchise Agreement.
101. In the premises, the Applicant has suffered loss and damage by and resulting from any one or more of the Business Opportunity Representation Contravention, the Business Opportunity Statements Contravention, the Average Store Financials Accuracy Representation Contravention, the Future Average Payroll Cost Representation Contravention, the Average Store Financials Conduct Contravention, the Advertising Fund Representation Contravention, the 7-Eleven Supplier 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 Representation Contravention and/or the Code Disclosure Contraventions.

#### **Particulars**

- (a) *The 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; and*
  - (iv) *any outstanding liabilities to employees for underpayment of wages.*
- (b) *Further particulars of loss will be provided on service of the Applicant's expert evidence.*

**Franchisees - direct reliance**

102. In deciding to enter into each of the 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 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 and any associated guarantors.*

103. Further and in the alternative, if the Misleading or Deceptive Representations (alone or in combination) had not occurred, some or all of the Franchisees would not have entered into their respective Franchise Agreements.

**Particulars**

*The Applicant repeats 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 their Stores at the prevailing market price during the Relevant Period, and if the Misleading or Deceptive Representations (alone or in combination) had not occurred some or all of the Franchisees would not have entered into their respective Franchise Agreements.

**Particulars**

*The Applicant repeats the particulars to paragraph 102 above.*

105. In the premises of the matters pleaded and particularised in paragraphs 102 and 103 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 Franchisees will also be calculated in accordance with the methodology stated in particulars to paragraph 101 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 will be provided) following opt out, the determination of the 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.*

**E. UNCONSCIONABLE CONDUCT**

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**E1. Franchisor's actual and constructive knowledge**

106. At all material times during the Relevant Period:

- (a) the Franchisor knew of the amount of Franchise Fee, Application/Training Fee and Investment paid by the Applicant and each other Franchisee in order to enter into each of their Franchise Agreements;

***Particulars***

*The Franchisor knew of the amount of Franchise Fee, Application/Training Fee and Investment paid by the Applicant and each other Franchisee as those amounts were set by and paid to the Franchisor.*

- (b) the Franchisor knew of the amount of the Goodwill Payment of the Applicant and each other Franchisee, or alternatively, knew of the approximate amount of such payments;

***Particulars***

- (i) *The Franchisor knew of the amount of the Goodwill Payment of the Applicant and each other Franchisee, or alternatively, knew of the approximate amount of such payments, as the Franchisor provided information as to available franchise opportunities to prospective franchisees which included the advertised goodwill*

*price for each Store. The Franchisor also advised Franchisees who were seeking to sell their franchise interests as to recommended asking prices for goodwill.*

- (ii) *The Applicant forwarded Heads of Agreement regarding the proposed terms of acquisition of the Campbelltown Store and the Northmead Store to the Franchisor prior to completing the purchase.*
- (c) the Franchisor knew, and it was the fact that, in order to become a franchisee in the *7-Eleven System*, prospective franchisees (including the Applicant and each other Franchisee) were required to invest significant capital in the acquisition of a Store and in entering into a Franchise Agreement (**Capital Investment**);

**Particulars**

- (i) *The Applicant repeats the matters pleaded in paragraphs 7(d), 7(e), 106(a) and 106(b) above.*
- (ii) *In the case of the Applicant and all other Franchisees, the Capital Investment included the initial investment in the Inventory (**Inventory Investment**) of \$45,000 and the Application/Training Fee and Franchise Fee (defined above as the “Franchisor Payments”).*
- (iii) *In the case of the Applicant, the Goodwill Payment was*
  - A. *\$390,000 in respect of the Campbelltown Store, and*
  - B. *\$880,000 in respect of the Northmead 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 \$400,000 to \$1,000,000.*
- (d) the Franchisor knew, and it was the fact, that in order to make the Capital Investment, the Applicant and some or all of the other Franchisees borrowed large sums of money (**Franchise Debt**);

**Particulars**

- (i) *The Franchisor entered into a Tripartite Deed with the Applicant and each other Franchisee who took out at a loan with the Bank, as described in paragraph 123 to 125 below.*
  - (ii) *Further and in the alternative, the Franchisor had a close relationship with the Bank, as the predominant provider of finance to prospective franchisees, as recognised by the practice of the Franchisor regularly entering into standard form Tripartite Deeds with the Bank, and pursuant to which information was able to be shared between the Franchisor and the Bank about the performance of individual franchisees.*
- (e) the Franchisor 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 Applicant relies on the particulars to paragraphs 106(d) above and says that the Franchisor was privy to the financial arrangements between the Applicant 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 the Franchisor was aware at all relevant times that the Applicant 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.*
- (f) the Franchisor 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.*

- (g) the Franchisor knew at all relevant times, the award wages payable for labour at each of the Stores;

**Particulars**

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

- (h) in the premises of the matters pleaded and particularised in subparagraphs 106(a) to 106(g) above, the Franchisor knew or ought to have known, and it was the fact that the Applicant and some or all of the other Franchisees would be unable to operate their Stores profitably and maintain their Minimum Net Worth unless the principals of the Applicant and each of the Franchisees:

- (i) worked in their Stores 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 the Stores, and paid or agreed to pay them at rates which were significantly below their award wage entitlements.

**Particulars**

- A. *The Applicant repeats the matters pleaded in subparagraphs 106(a) to 106(g) above.*
- B. *A basic analysis of the Average Store Financials and the individual store financials of the Applicant and some or all of the Franchisees, applying award rates and reasonable assumptions as to labour requirements, supports the pleaded conclusion.*
- C. *Further particulars will be provided on service of the Applicant's expert evidence.*

- (i) the Franchisor knew, and it was the fact that, in the event that a Franchisee was unable to maintain their Minimum Net Worth, the Franchisor 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 Applicant repeats the matters pleaded and particularised in paragraph 22 above and says that the Franchisor knew of this as it was a term of the Franchise Agreements throughout the Relevant Period.*

- (j) the Franchisor knew or ought to have known, and it was the fact, that by reason of the matters referred to in 106(a) to 106(i) above, most or all of the Franchisees were faced with the choice of underpaying wages to their employees and/or causing their principals and family members to perform unreasonable unpaid or underpaid work in their Stores in order to avoid the risk of termination of their Franchise Agreements and loss of their Capital Investment (without any discharge of their Franchise Debts);
- (k) in the premises of the matters pleaded and particularised in subparagraphs 106(a), 106(b), 106(c), 106(d), 106(f), 106(g), 106(h), 106(i) and 106(j) above, the Franchisor knew or ought to have known, and it was the fact that:
- (i) there was, or was likely to be a widespread practice of wage underpayment within the 7-Eleven System; and
- (ii) the financial information provided to the Applicant and each prospective franchisee in the Average Store Financials was misleading and deceptive as stated in paragraphs 55 and 61 above;

***Particulars***

- A. *The Applicant repeats the matters pleaded and particularised in sub-paragraphs 106(a), 106(b), 106(c), 106(d), 106(f), 106(g), 106(h), 106(i) and 106(j) above.*
- B. *Further, and in the alternative, since 2008 the Fair Work Ombudsman 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 (**FWO**) 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 the Franchisor 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 the Franchisor 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.
- (l) the Franchisor knew, and it was the fact, that Mr Davaria (the sole director and principal of the Applicant) and the principals of some or all of the Franchisees were not provided training concerning their legal obligations concerning the payment of minimum wages, until the last week of their Franchisee training, by which time:
- (i) they or their associated corporate Franchisees had paid the non-refundable *Franchise Fee*;
  - (ii) the 7 day Cooling Off period under their Franchise Agreement had expired;

#### **Particulars**

*The Franchisor knew of this as it provided the training and was the recipient of the Franchise Fee.*

- (m) the Franchisor knew, and it was the fact that Mr Davaria and some of 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***

*The Franchisor knew this because it approved the Applicant 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, the Applicant refers to and repeats paragraphs 41 to 76 above and says that, prior to the Applicant and each of the Franchisees entering into their Franchise Agreements, the Franchisor conveyed the Misleading or Deceptive Conduct Representations to each of them.

108. By reason of the conduct of the Franchisor in conveying the Misleading or Deceptive Conduct Representations, and by making each of the statements pleaded in paragraphs 42 above, at the time of entering their respective Franchise Agreements, the Applicant 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;
- (e) they would have the opportunity to make profits from the operation of their respective businesses which was not 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;

- (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;
- (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 the Applicant and some or all of the other Franchisees as referred to in paragraph 108 above, by reason of the Franchisor's Operational Control (described in paragraph 34 above), under the Franchise Agreements as they were operated in practice by the Franchisor:

- (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 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 and at a price below the C-Store price;

***Particulars (a)-(c)***

*The Applicant repeats 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, 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) the Franchisor 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) the Franchisor determined the Maximum Prices by which stock could be sold by its control of the pricing field in the Online Portal;*
- (iv) the Franchisor nominated C-Store as the only supplier of goods and negotiated the C-Store pricing on the Franchisee's behalf;*
- (v) at all material times during the Relevant Period, the C-Store prices resulted in Franchisee and each other Franchisee paying wholesale prices for stock which exceeded*
  - A. the Independent Fair Wholesale Price;*
  - B. the Best Endeavours Wholesale Price; and/or*
- (vi) the Franchisor prevented Franchisees from ordering stock from alternative Bona Fide Suppliers (other than C-Store), at all, or on a regular basis by:*
  - A. only offering stock from C-Store on its Online Portal for most stock items;*
  - B. requiring Franchisees who had ordered stock other than from C-Store to submit invoices to the Franchisor 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;*
  - C. 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;*

- D. penalising Franchisees who have ordered from alternative suppliers in performance reviews.*
- (d) in the case of the Applicant and some of the Franchisees, the Franchisor 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 Franchisor's control over the *Open Account*, none of the Franchisees had any control over the cash inflows and outflows in relation to their Stores;

***Particulars***

*The Applicant repeats the matters pleaded and particularised in paragraphs 12, 13, 14 and 15 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 the Franchisor.

***Particulars***

*The Applicant repeats the matters pleaded in subparagraph 11(a) above and says that the Franchise Agreements requires them to operate the Stores continuously throughout the term for 24 hours a day or 7 days per week (or in a small number of instances, for extended hours) which compels them to operate their Stores (and incur labour costs) in hours of low or no sales.*

110. Further and in the alternative to the matters pleaded in paragraphs 106, 107, 108 and 109 by reason of the level of control exercised by the Franchisor over the Franchisees and their Stores and the resulting inability of the Franchisees to influence the profit levels of their Stores by their own skill, effort and business

judgment, contrary to the reasonable expectations of the Applicant and some or all of the Franchisees as referred to in paragraph 108 above:

- (a) the entry into the Franchise Agreement was in substance the acquisition of a job from the Franchisor and not the purchase by each of the Franchisees of their own business;
- (b) each of their respective Stores was in substance a subsidiary business unit of the Franchisor and not an independent business of the Applicant or the respective Franchisees; and
- (c) by reason of (a) and (b) above, the Franchisor was in substance the employer, or alternatively the joint employer, with each of the Franchisees of all persons who worked at the Stores of the Applicant and each other Franchisee.

111. Further and in the alternative, contrary to the reasonable expectations of the Applicant and some or all of the Franchisees as referred to in paragraph 108 above, in entering into their Franchise Agreements:

- (a) the Applicant 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) the Applicant and some or all of the Franchisees were not afforded the opportunity to make reasonable profits or income which reflected their Capital Investment, or the investment of skill, money, time and effort during the term of their respective Franchise Agreements;
- (c) the Applicant 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 family members;
- (d) the Applicant 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) the Applicant 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 the Applicant 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 Franchisee to recoup its Capital Investment and any associated loan financing unless:
- (a) the Franchisor provided sales and financial information to prospective Franchisees which represented a level of profitability of Stores in the *7-Eleven System* which was not a true and fair view of the actual profitability of those Stores by reason of its failure to include a proper allowance for:
    - (i) the hours worked by the principals and 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 by the Franchisor at the rates prescribed by law;
  - (b) the Franchisor 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 the Franchisor, notwithstanding the accuracy or otherwise of the sales and financial information provided by the Franchisor to prospective Franchisees about the level of profitability 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, 110, and 111 and 112 above:
- (a) prospective Franchisees were enticed by the Franchisor to invest in the promise of buying into a business, which was, in substance, only the acquisition of a job;

- (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;
- (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 termination of the Franchise Agreement on the grounds of breaching the Minimum Net Worth requirement, to pay them at below award rates;
- (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 of the Store provided by the Franchisor, 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 the Franchisor had reached an agreement or understanding, and to whom the Franchisor 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 the Franchisor about the profitability of the Store, which assurance or comfort resulted in loan funding being made available to the prospective Franchisee to make that Goodwill Payment.

114. Further and in the alternative to the matters pleaded in paragraphs 106 to 113 above, the Franchisor's Operational Control (described in paragraph 34 above) and the consequences of that control described in paragraph 109 above was facilitated by and/or a consequence of the fact that:

- (a) the Franchisor was not willing to negotiate the terms and conditions of the Franchise Agreement with the Applicant or any other Franchisees;

- (b) the terms and conditions of the Franchise Agreement and the practices of the Franchisor referred to in paragraphs 9, 10 11(a), 16(a), 16(b), 16(c), 16(d), 17(a), 17(b), 17(d), 17(e), 18(a), 18(c), 25, and 28:
- (i) allowed the Franchisor to create a relationship of complete control over the Franchisees, and dependence by the Franchisees upon the Franchisor; and/or
  - (ii) allowed the Franchisor to engage in conduct that amounted to unfair influence or pressure and/or unfair tactics to compel:
    - A. the Applicant and some or all of the Franchisees to acquire working capital finance only from the Franchisor through the *Open Account*;
    - B. the Applicant and each of the Franchisees to acquire merchandise only from C-Store at the prices and terms negotiated by the Franchisor;
    - C. the Applicant and each of the Franchisees to charge sales prices for the merchandise sold at the Stores as determined by the Franchisor, without any ability to increase those prices to respond as and when necessary for the continued operation of their Stores;
    - D. the Applicant and each of the Franchisees to employ labour to keep each of the Stores open for hours that were longer than reasonably necessary for the efficient and viable operation of their Stores;
    - E. the Applicant and some or all of the Franchisees to cause the principals and their family members to work in the Stores for unreasonable and unsociable hours without any or any reasonable remuneration to keep the Stores open; and
    - F. by reason of (A)-(E) above, and the threat of termination of the Franchise Agreements (and loss of Capital Investment) in the event that the Franchisee's *Net Worth* fell below the Minimum Net Worth, continue the operation of their Stores in the absence of those Stores being profitable;

- (c) each of the Relevant Terms referred to in paragraph 36 above was an unfair term of the Franchise Agreement for the reasons set out in paragraphs 33 to 35 above.
115. Further and in the alternative to paragraphs 106 to 114 above, the provision of financial information by the Franchisor, prior to the entry by each of the Franchisees into their respective Franchise Agreements, purporting to show the profitability of Stores in the *7-Eleven System*, which was incorrect and incomplete, represented:
- (a) unfair tactics by the Franchisor to encourage the entry into their Franchise Agreements;
- (b) a failure by the Franchisor to disclose to each of them, as prospective Franchisees, of the risks to them of entry into the Franchise Agreements;
- (c) the failure of the Franchisor to act in good faith as stated in section 22(1)(l) of the ACL and/or in contravention of clause 6 of the Franchising Code 2014.

### **E3. Contravention of section 21 of the ACL**

116. By reason of the matters pleaded and particularised in each of paragraphs 106 to 115 above (separately or in any combination), the Franchisor 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 the Applicant within the meaning of section 21 of the ACL;
- (c) in contravention of section 21 of the ACL (**Unconscionable Conduct**).
117. As a result of the Unconscionable Conduct the Applicant suffered loss and damage.

#### ***Particulars***

*The Applicant repeat the particulars to paragraphs 101 above.*

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

**Particulars**

- (a) *At no time prior to entry into the Campbelltown Store Franchise Agreement did the Applicant understand that:*
- (i) *its reasonable expectations as stated in paragraph 108 were based on the Misleading or Deceptive Conduct Contraventions and each of the other contraventions of the Franchisor referred to in paragraph 101 above;*
  - (ii) *each of the Relevant Terms of the Franchise Agreement referred to in paragraph 36 above was an unfair term of the Franchise Agreement for the reasons set out in paragraphs 33 to 35 above;*
  - (iii) *the terms of the Franchise Agreement permitted the Franchisor to exercise the Franchisor's Operational Control in the manner described in paragraph 109 above;*
  - (iv) *the entry into the Franchise Agreement was in substance the acquisition of a job from the Franchisor and not the purchase by the Applicant of its own business as stated in paragraph 110 above, or would have the consequences for the Applicant as stated in paragraph 111 above;*
  - (v) *the ability of the Applicant to sell the Store was dependent on the matters stated in paragraphs 112 and/or 113 above.*
- (b) *The Applicant repeat the particulars to paragraphs 101 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, the Franchisor 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 (**Unconscionable Conduct (Franchisees)**);
- (c) in contravention of section 21 of the ACL.

120. As a result of the Unconscionable Conduct (Franchisees), some or all of the Franchisees suffered loss and damage.

**Particulars**

*The Applicant repeats 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 will be provided) following opt out, the determination of the 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.*

**F. BANK CLAIMS**

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**F1. Relationship between the Bank and the Franchisor**

122. In the period from at least the start to the end of the Relevant Period, the Bank lent money to prospective franchisees of the Franchisor, including the 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 the Franchisor and the Bank agreed on a standard form of deed for execution by:
- (a) prospective franchisees of the Franchisor who were seeking finance from the Bank to purchase a Store;
  - (b) the Bank; and
  - (c) the Franchisor,
- (Tripartite Deed).**
124. The Applicant and each other Franchisees who purchased a Store using finance from the Bank (**Bank Franchisees**) executed a Tripartite Deed with the Bank and the Franchisor.

125. The Terms of the Tripartite Deed were materially the same in the period from at least 2007 to the end of the Relevant Period and included the following express terms:

- (a) the Franchisee agreed that the Bank and the Franchisor may discuss and exchange information and documents regarding the financial and overall performance of Franchisee (clause 2);
- (b) the Franchisor 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, the Franchisor 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, the Franchisor 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 the Franchisor's charge (clause 4);
- (e) the Franchisor 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) the Franchisor agreed to notify the Bank if it intended to assign its rights or obligations under the Franchise Agreement (clause 6).

126. During the Relevant Period:

- (a) the Applicant and each of the Bank Franchisees;
  - (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 the Franchisor (**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 Franchisee Loan Agreements (**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***

- A. *As to the Applicant's loan applications and agreements, see paragraphs 136-141 and 146-152 below.*
- B. *Particulars of Bank Franchisee loan applications and agreements will be provided, if necessary, after the initial trial of the applicant's claims.*

**F2. The Bank's actual or constructive knowledge of the 7-Eleven System**

127. At all material times from at least the start of the Relevant Period, 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 average sales and profit margins of the Stores;
  - (d) the average *Operating Expenses* of each of the Stores;
  - (e) that most or all Stores were required to operate 24 hours per day, seven days per week;
  - (f) that the Applicant and each other Bank Franchisees 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;

- (g) that the only material *Operating Expenses* over which the Franchisees had any control was payroll costs;
- (h) that the Franchisor 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);
- (i) that, in the premises of the matters referred to in (a)-(h) above:
  - (i) very few if any Stores in the *7-Eleven System* were financially viable without the employees working at those Stores being underpaid and/or that the principals of the Franchisees and their family members were required to work unreasonable or unsociable hours for nothing or at rates below award rates, by reason of which there was or was likely to be a culture of underpayment of wages in the *7-Eleven System*; and
  - (ii) the financial information provided to prospective franchisees in relation to each Store was likely unreliable, by reason of the matters stated in (A) above;
- (j) that many Stores are operated from a Site of which the Franchisor: (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;
- (k) that most prospective franchisees were adult immigrants to Australia from non-English speaking backgrounds and had limited or no Australian business experience;

***Particulars of (a)-(k)***

- (i) *It is to be reasonably inferred that the Bank had knowledge of the terms of the Franchise Agreements and the average profit margins and Operating Expenses of the Bank Franchisees given that:*

- A. *in the period from no later than about 2007 the Bank lent money to the Franchisor'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*
  - B. *it agreed the terms of the Tripartite Deed with the Franchisor;*
  - C. *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:*
- A. *the duty to have regard to its prudential obligations when meeting its key commitments (which included the assessment of credit applications); and/or*
  - B. *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.*
128. Further and in the alternative to the matters pleaded in paragraph 127 above, by reason of the relationship between the Franchisor 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 the Franchisor 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 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 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 the Franchisor.*

129. 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 Applicant and each of the Franchisees were the same from in or about 2004 to the end of the Relevant Period.

131. From in or about 2004 to the end of the 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 Code of Banking Practice; 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. Further and in the alternative, from about 2004 to the end of the Relevant Period, the material terms of the Bank Loan Contracts of, and the Bank Franchisee Guarantees relating to, the 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 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. Further and in the alternative, from about 2004 to the end of the Relevant Period, the material terms of the Bank Loan Contracts of, and the Bank Franchisee Guarantees relating to, the 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 of Practice (**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 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. Further and in the alternative, from about 2004 to the end of the Relevant Period, the material terms of the Bank Loan Contracts of, and the Bank Franchisee Guarantees relating to, the 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 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 Banking Agreements.*

135. The 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, 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 Banking Code of Practice 2004, and the Banking Code 2014, 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 Applicant and each other Bank Franchisee entered into their Bank Agreements in connection with the purchase of a Store which employed less than 20 full time or equivalent people.*

#### F4. Banks's breaches of Contract – Applicant

##### ***Campbelltown Store Loan Contract and approval process***

136. On or about 7 August 2013 the 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 (**First Loan Application**).
137. The First Loan Application included the following documents:
- (a) a draft copy of the Campbelltown Store Franchise Agreement including (in Exhibit A) the Franchisor'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 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 Campbelltown Store (**Campbelltown Store Loan Contract**) pursuant to which the Bank provided the 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 Applicant dated 22 August 2013 which the 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 (**Personal Guarantee**); and
  - (b) a General Security Agreement given by the Applicant over all present and after-acquired property.
142. At the time of receiving the First 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 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 the Franchisor 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 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 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 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):*
- A. *had due regard to its prudential obligations when meeting its key commitments (including its assessment of the credit applications of the Applicant); and/or*
  - B. *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 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 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 the Franchisor would be entitled to terminate the agreement with the result that the Franchisee would lose its Capital Investment.*

*(ii) Further particulars will be provided on service of expert evidence.*

***Breach of Contract – Campbelltown Store Loan Contract***

143. By reason of paragraphs 127, 129, 137, 138, 140, and 142 above, by approving the First 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 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 Applicant in its pre contractual dealings with the 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 Applicant to repay the loan sum to the Bank.

144. If the Bank had complied with its contractual obligations towards the Applicant:
- (a) it would not have advanced loan funds to the Applicant for the purchase of the Campbelltown Store; and
  - (b) the Applicant would not have entered into the Campbelltown Store Franchise Agreement as it would not have had the funds to do so.
145. By reason of the matters pleaded in paragraphs 143 and 144 above, the Applicant suffered loss and damage.

***Particulars***

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

***Northmead Store Loan Contract and loan approval process***

146. In or about April 2015 the 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 (**Second Loan Application**).
147. The Second 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. 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 Store's Net Income for FY 2016 would be \$146,121.
150. At the time of receiving the Second Bank Application the Bank knew or ought to have known, and it was the fact, that:
- (a) the 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 cash flow projections were based on wage costs projections which were significantly below award rates;
- (e) the Northmead Store Financials indicated that the 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 unsociable unpaid hours; and
  - (iii) whilst paying such employees their minimum legal entitlements.

#### **Particulars**

A. *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 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 Applicant to repay the loan;*

B. *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 \$247,000 including superannuation) due to the operational requirements of running a Fuel Store; (ii) the 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 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 the Franchisor would be entitled to terminate the agreement with the result that the Franchisee would lose its Capital Investment.*

*C. Further particulars will be provided on service of the Applicant's expert evidence.*

151. On or about 12 June 2015 the Bank approved the Second Loan Application and the Applicant entered into a Bank Loan Contract with the Bank for the purpose of obtaining finance to enter into a Franchise Agreement for that Store with the Franchisor (**Northmead Store Loan Contract**) pursuant to which the Bank provided the 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 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 Agreement, Mr and Mrs Davaria signed the a guarantee and indemnity in favour of the bank (**Second 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 (**Mortgage**).
153. Prior to the Mr and Mrs Davaria granting the 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 Mortgage or required them to obtain such advice prior to entering into the 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 Second 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 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 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 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 Applicant to repay the loan sum to the Bank.
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 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 144 above, the Applicant suffered loss and damage.

***Particulars***

*The 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, 123, 125, 126, 127, 128, 129, 131 131, 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.

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 had 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 will be provided) following opt out, the determination of the 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 – Applicant**

***First 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 First Loan Application the Bank engaged in conduct in trade or commerce, in connection with the supply or possible supply of financial services to the Applicant and/or Mr Davaria as guarantor of the loans advanced by the Bank to the Applicant that was unconscionable within the meaning of s 12CB of the ASIC Act.

***Particulars***

- (a) *The 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(i) 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(j) and 138 above, it knew or ought to have known that the Franchisor 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:*

- A. *the Campbelltown Store Agreement could terminate on 31 March 2014 or, if it was renewed at that point, on 31 March 2019;*
  - B. *if that occurred the 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 Agreement;*
  - C. *the ability of the 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;*
  - D. *Mr Davaria would be at risk of personal liability for all or part of the principal amount due under the Campbelltown Store Bank Agreement;*
- (iii) *Further and in the alternative, the 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 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:*
- A. *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;*
  - B. *the 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;*
  - C. *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 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 Bank Loan Contract with the 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:*

  - A. 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;*
  - B. causing the 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 the Franchisor, that a material factor affecting the lending decisions by the Bank was its reliance upon the relationship that it had with the Franchisor, 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 Applicant in circumstances in which it:*

- A. *was in a superior bargaining position to the Applicant due to its superior knowledge of the 7-Eleven System;*
  - B. *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;*
  - C. *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 Applicant;*
  - D. *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;*
  - E. *failed to advise Mr Davaria to obtain legal advice in relation to the Franchise Agreement;*
  - F. *failed to meet with Mr Davaria to ensure that they understand the import of the transactions they were entering into;*
  - G. *failed to act in good faith towards the Applicant and Mr Davaria.*
161. By reason of the Bank's unconscionable conduct in approving the First Loan Application and entering into the Campbelltown Store Loan Contract, the Applicant was able to enter into the Campbelltown Store Agreement and thereby suffered loss and damage.

162. Had the Applicant not entered into the Campbelltown Store Franchise Agreement it would not have entered into the subsequent Northmead Store Franchise Agreement or provided the Guarantee of Mr Davaria.
163. In the premises of the matters pleaded in paragraphs 160 to 162, the Applicant has suffered loss and damage.

**Particulars**

*The 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.

**Second 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 Second Bank Application the Bank engaged in conduct in connection with the supply or possible supply of financial services to the Applicant and/or Mr and Mrs Davaria that was unconscionable within the meaning of 12CB of the ASIC Act.

**Particulars**

- (a) *The 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(i) 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 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 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:*

  - A. *from the proceeds of sale of the Northmead Store to an incoming franchisee who agreed to pay an amount for goodwill; or*
  - B. *by exercising its rights pursuant to the personal guarantees signed by Mr & Mrs Davaria and/or the General Security Agreement executed by the 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 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 Agreement had been secured by a mortgage over the home of the Guarantors;*
  - (ii) *the Bank knew that: (I) the Northmead Store was the 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 Second Loan Application and entering into the Northmead Store Loan Contract, the Applicant was able to enter into the Northmead Store Agreement and thereby suffered loss and damage.

***Particulars***

*The 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 Second 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**

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***

(a) *The Applicant repeats the matters pleaded and particularised in paragraphs 122-135 and says that:*

- (i) *by reason of the Bank's actual or constructive knowledge of the matters pleaded and particularised in paragraphs 127(a) to 127(i) 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;*
- (ii) *by reason of the Bank's actual or constructive knowledge of the matters pleaded and particularised in subparagraphs 127(a) and 127(j), it knew or ought to have known that the Franchisor 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 Agreements;*
  - 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 the 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 Banks 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 unsociable unpaid hours and/or the Franchisee paying its employees below award wages;*
- (b) further an 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:*
- (i) creating a market for the buying and selling of Stores with prices for goodwill that bore no relationship to the actual profitability of*

- the Stores in question and in which the price of the Stores was likely inflated;*
- (ii) 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;*
  - (iii) 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 the Franchisor, that a material factor affecting the lending decisions by the Bank was its reliance upon the relationship that it had with the Franchisor, 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.*
- (c) In the premises, the Bank entered into the some or all of the Bank Loan Contracts in circumstances in which it:*
- (i) was in a superior bargaining position to some or all of the Bank Franchisees due to its superior knowledge of the 7-Eleven System;*
  - (ii) knew that the principals of many of the Bank Franchisees had immigrated to Australia as adults with limited experience in running their own business;*
  - (iii) 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;*
  - (iv) 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:*

- A. *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*
  - B. *by exercising its rights pursuant to the personal guarantees and/or security agreements signed by the principals of the Bank Franchisees;*
- (v) *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;*
  - (vi) *failed to advise some or all of the Bank Franchisees to obtain legal advice in relation to the Franchise Agreement;*
  - (vii) *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;*
  - (viii) *failed to act in Good Faith towards some or all of the Bank Franchisees.*
- (d) *Full particulars of individual Bank Franchisee claims will be obtained (and particulars will be provided) following opt out, the determination of the 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.*
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.

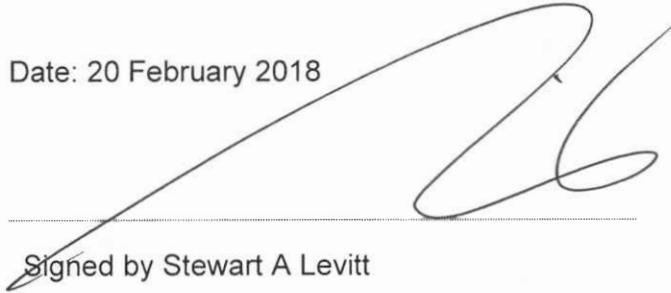
#### **Particulars**

*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 will be provided) following opt out, the determination of the 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: 20 February 2018

A handwritten signature in black ink, appearing to be 'SL', written over a horizontal dotted line.

Signed by Stewart A Levitt

Levitt Robinson

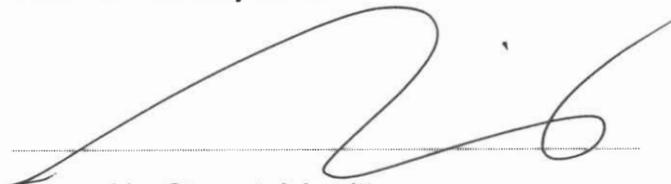
Solicitor for the Applicant

This pleading was prepared by Guy Donnellan and Tim Castle, with the assistance of Levitt Robinson, and was settled by Tim Castle.

**Certificate of lawyer**

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

Date: 20 February 2018

A handwritten signature in black ink, appearing to be 'SL', written over a horizontal dotted line.

Signed by Stewart A Levitt

Levitt Robinson

Solicitor for the Applicant

## SCHEDULE

No. VSD

of 2018

Federal Court of Australia

District Registry: Victoria

Division: General

### Respondents

Second Respondent: **7-Eleven Inc (a Texas corporation)**  
 Third Respondent: **Australia and New Zealand Banking Group  
 Limited (ABN 11 005 357 522)**

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