

NOTICE OF FILING

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Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: VID180/2018
File Title: DAVARIA PTY LIMITED & ANOR v 7-ELEVEN STORES PTY LTD & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 6/04/2021 9:57:12 AM AEST

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

Registrar

Important Information

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

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~~Amended~~ Defence to ~~Second~~ Third Further Amended Statement of Claim

(filed pursuant to order 7 of the Orders made by Middleton J on 5 March 2021)

Federal Court of Australia

District Registry: Victoria

Division: General

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

Applicants

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

Respondents

Unless otherwise defined below, in this Defence the First Respondent (**7-Eleven**) adopts the defined terms in the ~~Second~~ Third Further Amended Statement of Claim dated ~~316~~ March ~~2020~~ 2021 as amended from time to time (**FASOC**).

In response to the FASOC, 7-Eleven says as follows:

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A.

1 In response to paragraph 1, it:

- (a) admits that in the ~~period 20 February 2012 to 19 February 2018~~ (Relevant Period), persons were or commenced to be franchisee parties (**Franchisees**) under a standard-form agreement with 7-Eleven substantially in the form of one of the following agreements:
- (i) identified by 7-Eleven internally as Store Agreement 10/1998 (**1998 Version**), which was 7-Eleven's standard form of agreement in the period from about October 1998 to about December 2001;
 - (ii) identified by 7-Eleven internally as Store Agreement 02/2001 (**2001 Version**), which was 7-Eleven's standard form of agreement in the period from about January 2001 to about January 2004;
 - (iii) identified by 7-Eleven internally as Store Agreement SA/01/04 (**2004 Version**), which was 7-Eleven's standard form of agreement in the period from about January 2004 to about April 2009;
 - (iv) identified by 7-Eleven internally as Store Agreement SA/04/09 (**2009 Version**), which was 7-Eleven's standard form of agreement in the period from about April 2009 to about November 2015;
 - (v) identified by 7-Eleven internally as Store Agreement SA/11/15 (**2015 Version**), which was 7-Eleven's standard form of agreement in the period from about November 2015 to about November 2016;
 - (vi) identified by 7-Eleven internally as Store Agreement SA/11/16 (**2016 Version**), which was 7-Eleven's standard form of agreement in the period from about November 2016 to 19 February 2018;
- (together, as amended from time to time, the **Franchise Agreements**); and
- (b) does not otherwise plead to paragraph 1 as there are no allegations pleaded against it.

1AA In response to paragraph 1AA, it:

- (a) refers to and repeats paragraph 1(a) above; and

- (b) does not otherwise plead to paragraph 1AA as there are no allegations pleaded against it.

1A It does not admit the allegations in paragraph 1A.

2 As to paragraph 2, it:

- (a) admits that the First Applicant is, and has been since 7 August 2013, a duly incorporated company entitled to sue in its own name;
- (b) admits sub-paragraph 2(b);
- (c) says in answer to sub-paragraph 2(c), it:
 - (i) admits that the First Applicant is, and at all times since 5 November 2013 has been, the operator of the Campbelltown Store; and
 - (ii) otherwise denies sub-paragraph 2(c);

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The "Effective Date", being the date on which the Campbelltown Store first opened for business under the Campbelltown Store Franchise Agreement was 5 November 2013.

- (d) admits sub-paragraph 2(d);
- (e) says in answer to sub-paragraph 2(e), it:
 - (i) admits that the First Applicant is, and at all times since 19 June 2015 has been, the operator of the Northmead Store;
 - (ii) otherwise denies sub-paragraph 2(e); and

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The "Effective Date" being the date on which the Northmead Store first opened for business under the Northmead Store Franchise Agreement was 19 June 2015.

- (f) says it does not know, and therefore, does not admit sub-paragraph 2(f); and
- (g) says it does not know, and therefore, does not admit sub-paragraph 2(g).

2A As to paragraph 2A, it:

- (a) admits that the Second Applicant is, and has been since 20 May 2013, a duly incorporated company entitled to sue in its own name;
- (b) admits sub-paragraph 2A(b);
- (c) admits sub-paragraph 2A(c); and
- (d) says it does not know, and therefore, does not admit sub-paragraphs 2A(d) and 2A(e).

3 As to paragraph 3, it:

(a) says in answer to sub-paragraph 3(a), it:

(i) admits the allegations in sub-paragraphs 3(a)(i) and (ii);

~~(ii) — objects to pleading to the allegations concerning the ASIC Act as they are embarrassing because no relief is sought against 7-Eleven under the ASIC Act and subject to this objection:~~

~~(iii)~~ (ii) admits that it is and was at all times during the Relevant Period a 'trading corporation' for the purposes of section 4 of the *Competition and Consumer Act 2010 (CCA)* and section 12BA of the ASIC Act;

~~(iv)~~ (iii) admits that it is and was at all times during the Relevant Period a 'person' for the purposes of section 18 of the ACL and or section 12DA of the ASIC Act;

(b) says in answer to sub-paragraph 3(b), it:

~~(i) — objects to pleading to the allegations concerning the ASIC Act as they are embarrassing as no relief is sought against 7-Eleven under the ASIC Act and subject to this objection:~~

~~(ii)~~ (i) admits that, ~~during the Relevant Period~~ at all material times, it supplied services to or was engaged in the possible supply of services to the First Applicant and each of the Franchisees in 'trade or commerce' within the meaning of sections 2 and 21 of the ACL, prior to 1 January 2011 within the meaning of section 4 of the TPA, and within the meaning of the ASIC Act;

~~(iii)(ii) under cover of the foregoing objection,~~ denies that 7-Eleven supplied financial services to each of the Applicants and to each of the Franchisees within the meaning of sections 12BA and 12CB of the ASIC Act, in respect of the Open Account; and

- (c) admits that, during the Relevant Period, it published and controlled the Website; and
- (d) otherwise denies the allegations in paragraph 3.

4 It does not plead to paragraph 4, as it makes no allegation against 7-Eleven.

5 [Not Used] ~~It does not plead to paragraph 5, as it makes no allegation against 7-Eleven.~~

B.

B1.

6 As to paragraph 6, it:

- (a) admits that, there were in February 2018 approximately 670, and now more than 700, 7-Eleven branded stores operating in Victoria, New South Wales, Queensland, Western Australia and the Australian Capital Territory;
- (b) admits the allegations in sub-paragraph 6(b), and says further that Convenience Stores were also known as non-fuel Stores;
- (c) admits that, as at 10 August 2018, the majority of the Stores were operated by independent franchise operators, with the remaining stores being Franchisor Stores;
- (d) admits the allegations in sub-paragraph 6(d), as at 23 March 2020;

(e) in response to sub-paragraph 6(e), subject to reference to the full terms and effect of the Manual and the Training Workbook at trial, it:

(i) admits the method of operation is set out in the Manual, the Training Workbook and written instructions and memoranda issued by 7-Eleven to Franchisees from time to time; and

~~(e)(ii) otherwise denies the~~ allegations in sub-paragraph 6(e);

- (f) in response to sub-paragraph 6(f), subject to reference to the full terms and effect of the Franchise Agreements at trial, it:
- (i) admits sub-paragraph 6(f)(i);
 - (ii) says in response to sub-paragraph 6(f)(ii), that it:
 - (A) admits that where 7-Eleven is the lessee of the Site, the Lease for the Site may be for a primary term of less than 10 years plus one or more options to renew; and
 - (B) says further the length of the primary term of the Lease for the Site and the number of any options to renew the Lease varies from Site to Site;
 - (iii) admits that under the Franchise Agreements, the Franchisee acknowledges that 7-Eleven either owns or leases the chattels and equipment installed upon the Site which is referred to as the *Licensed Equipment* in Recital E of the Franchise Agreements;

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Article 2(c) of the 1998 Version and the 2001 Version and Article 2(d) of the 2004 Version, the 2009 Version, the 2015 Version and the 2016 Version of the Franchise Agreements.

- (iv) admits that the Franchisee is granted leave and licence to enter upon, be in and use the Site and to use the Licensed Equipment under Article 2 of the Franchise Agreements subject to the terms of the Franchise Agreement; and
- (g) otherwise does not admit the allegations in paragraph 6.

B2.

7 As to paragraph 7, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) admits sub-paragraph 7(a);

- (b) says in response to sub-paragraph 7(b), it:
- (i) admits that Article 8(e) of the Franchise Agreements required that the Franchisee shall execute and furnish to 7-Eleven a security in the form set out in Exhibit G to the Franchise Agreements being an indenture that charges in favour of 7-Eleven the Franchisee's rights and interests in the Charged Assets as defined in clause 2 of Exhibit G to the Franchise Agreements;
 - (ii) otherwise denies the allegations in sub-paragraph 7(b);
- (c) says in response to sub-paragraph 7(c), it:
- (i) admits that the Franchise Agreements required that a guarantee in the form set out at Exhibit H to the Franchise Agreement be executed by the number of directors of the Franchisee identified pursuant to Article 43a(ii) or 45(a)(ii) of the Franchise Agreements; and

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Article 43(a) of the 1998 Version and the 2001 Version and Article 45(a) of the 2004 Version, the 2009 Version, the 2015 Version and the 2016 Version of the Franchise Agreements.

- (ii) otherwise denies the allegations in sub-paragraph 7(c);
- (d) as to sub-paragraph 7(d), it:
- (i) admits that during the Relevant Period, where the right to operate a Store was transferred from one Franchisee to another, the incoming Franchisee typically negotiated and made a payment to the outgoing Franchisee in respect of goodwill (**Goodwill Payment**);
 - (ii) otherwise denies the allegations in sub-paragraph 7(d);

(e) [Not Used]:

~~(e)~~(f) as to sub-paragraph 7(f), it:

- (i) admits that the 1998 Version and the 2001 Version of the Franchise Agreements required the Franchisee to pay to 7-Eleven a 'Franchise Fee' and a cash 'Investment' (under Article 6(a), and Article 7); and

- (ii) admits that the 2004 Version, the 2009 Version, the 2015 Version and the 2016 Version of the Franchise Agreements required the Franchisee to pay to 7-Eleven an 'Application Fee', a 'Franchise Fee' and a cash 'Investment' (under Article 6(a), Article 6(c) and Article 7); and
- (iii) otherwise denies the allegations in sub-paragraph 7(f).

B3.

8 As to paragraph 8 and subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) says in answer to sub-paragraph 8(a):
 - (i) that in the form pleaded the phrase "materially the same terms" in sub-paragraph 8(a) is vague and embarrassing and it objects to pleading to it;
 - (ii) under cover of this objection, with respect to the First Applicant, it:
 - (A) refers to and repeats sub-paragraphs 2(b) and 2(d) above;
 - (B) admits that the material terms of the franchise agreements between the First Applicant and 7-Eleven, insofar as they were express terms, were in writing and contained within the following documents:
 - (1) the Campbelltown Store Franchise Agreement as varied by written agreement dated 7 December 2015 (**Campbelltown Store Variation Agreement**); and
 - (2) the Northmead Store Franchise Agreement as varied by written agreement dated 7 December 2015 (**Northmead Store Variation Agreement**);
 - (C) admits that the Campbelltown Store Franchise Agreement and the Northmead Store Franchise Agreement were substantially in the form of the 2009 Version;
 - (iii) under cover of this objection, with respect to the Second Applicant, it:
 - (A) refers to and repeats sub-paragraph 2A(b) above;

- (B) admits that the material terms of the franchise agreement between the Second Applicant and 7-Eleven, insofar as they were express terms, were in writing and contained within the South Melbourne Store Franchise Agreement as varied by written agreement dated 7 December 2015 [SEV.0062.0001.0224] (**South Melbourne Store Variation Agreement**);
 - (C) admits that the South Melbourne Store Franchise Agreement was substantially in the form of the 2009 Version;
- (iv) under cover of this objection, with respect to the Franchisees, it:
- (A) refers to and repeats sub-paragraph 1(a) above;
 - (B) admits that the material terms of the Franchise Agreements between 7-Eleven and each of the other Franchisees, insofar as they were express terms, were in writing and substantially in the form of one of the agreements referred to in sub-paragraph 1(a) above as amended or varied from time to time;
- (b) says in answer to sub-paragraph 8(b):
- (i) that in the form pleaded the phrase “materially the same terms” in sub-paragraph 8(b) is vague and embarrassing and it objects to pleading to it;
 - (ii) under cover of this objection,
 - (A) with respect to the First Applicant, it refers to and repeats sub-paragraph 8(a)(ii)(B) above;
 - (B) with respect to the Second Applicant, it refers to and repeats sub-paragraph 8(a)(iii)(B) above;
 - (C) with respect to the Franchisees, it admits that from in or about December 2015, the majority of the then current Franchisees executed an agreement varying their franchise agreement with 7-Eleven (**Variation Agreements**); and
- (c) otherwise denies paragraph 8.

B4.**Term**

- 9 As to paragraph 9 and subject to reference to the full terms and effect of the Franchise Agreements at trial, it:
- (a) admits that each of the relevant versions of the Franchise Agreements contained the terms pleaded at Row 9 of Schedule 1 to this Defence; and
 - (b) admits that the term of some Franchise Agreements has ended; and
 - (c) otherwise denies paragraph 9.
- 10 As to paragraph 10 and subject to reference to the full terms and effect of the Franchise Agreements at trial, it:
- (a) admits that the term set out in paragraph 10 of the FASOC was an express term of the Franchise Agreements; and

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Article 2(d) of the 1998 Version and the 2001 Version and Article 2(f) of the 2004 Version, the 2009 Version, the 2015 Version and the 2016 Version of the Franchise Agreements.

- (b) otherwise denies paragraph 10.

Primary obligations

- 11 As to paragraph 11 and subject to reference to the full terms and effect of the Franchise Agreements at trial, it:
- (a) says as to sub-paragraph 11(a), it:
 - (i) admits that the term set out in sub-paragraph 11(a)(i) of the FASOC was an express term of the Franchise Agreements;
 - (ii) admits that, with the exception of the words (*which in over 90% of cases, is 24 hours per day, 7 days per week, and in all other cases, for extended opening hours*), the term set out in sub-paragraph 11(a)(ii) of the FASOC was an express term of the Franchise Agreements;

- (iii) admits that Article 1(k)(iii) of the Franchise Agreements required the Franchisee to cause the Store to be operated in accordance with the 7-Eleven System and the *Franchise Material* (as defined in Article 1(c) of the Franchise Agreement, which included manuals, forms, the Manual, and other materials included in 7-Eleven's System) in a manner that enhanced the 7-Eleven Image; and
 - (iv) otherwise denies the allegations;
- (b) says as to sub-paragraph 11(b), it:
 - (i) admits that the term set out in sub-paragraph 11(b) of the FASOC was an express term of the Franchise Agreements; and
 - (ii) otherwise does not admit the allegations;
- (c) says as to sub-paragraph 11(c), it:
 - (i) admits that each of the relevant versions of the Franchise Agreements contained the terms pleaded at Row 11(c) of Schedule 1 to this Defence; and
 - (ii) otherwise denies the allegations;
- (d) says as to sub-paragraph 11(d), it:
 - (i) admits that each of the relevant versions of the Franchise Agreements contained the terms pleaded at Rows 11(c) and 11(d) of Schedule 1 to this Defence;
 - (ii) says further that paragraph (h) of Exhibit D of the Franchise Agreements, where varied by the Variation Agreements, was varied to provide that "The Franchisee's draw on anticipated profits for an Accounting Period shall be \$[Insert Amount] each week. The amount remitted to the Franchisee 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 15% of the Net Sales (as defined in Exhibit E and excluding fuel sales, if any) for the previous draw period"; and
 - (iii) otherwise denies the allegations;

- (e) says as to sub-paragraph 11(e), it:
 - (i) admits that the term set out in sub-paragraph 11(e) of the FASOC was an express term of the 1998 Version, the 2001 Version, the 2004 Version and the 2009 Version of the Franchise Agreement;
 - (ii) admits that this term was modified by:
 - (A) in respect of the Franchisees, the Variation Agreements where made;
 - (B) in respect of the First Applicant, the Campbelltown Store Variation Agreement and the Northmead Store Variation Agreement;
 - (C) in respect of the Second Applicant, the South Melbourne Store Variation Agreement;
 - (iii) says further that Article 23 of the 2015 Version and the 2016 Version of the Franchise Agreements was in the same form as the Variation Agreements; and
 - (iv) otherwise does not admit sub-paragraph 11(e);
- (f) says as to sub-paragraph 11(f), it:
 - (i) admits that the term set out in sub-paragraph 11(f) of the FASOC was an express term of the Franchise Agreements as varied by the Variation Agreements; and
 - (ii) otherwise does not admit the allegations;
- (g) says further that the express terms of the Franchise Agreements also included that:
 - (i) the Franchisee shall comply with any law applicable to the Franchisee's use and occupancy of the Licensed Property or the Franchisee's Operation. Without limiting the generality of the foregoing, the Franchisee shall not engage in any trade practice or other activity which is harmful to or reflects unfavourably on:
 - (A) the 7-Eleven Image;
 - (B) the Trade Marks;

- (C) the Trade Secrets;
- (D) the 7-Eleven System; or

which constitutes misleading or deceptive conduct or unfair competition or is in violation of any applicable fair trade law (Article 34(a));

- (ii) the Franchise Agreement and any other agreements specified in Exhibit D contain all agreements between the Franchisee and 7-Eleven (oral or written) and cover their entire relationship concerning the Store. All and any prior or contemporaneous promises, representations, agreements or understandings in connection with the Store are expressly merged into this Agreement and any others specified in Exhibit D and superseded thereby (Article 41(b));
- (iii) the Franchisee, and where the Franchisee is a company, the Nominated Directors, acknowledge that they have entered into the Franchise Agreement after making a free and independent appraisal of the arrangement encompassed by the Franchise Agreement and after obtaining proper professional advice in appraising the proposal and in advising on the contents of the Franchise Agreement, including the Guarantee in Exhibit H of the Franchise Agreement, and the Franchisee covenants that they have not been induced to enter into the Franchise Agreement upon representations made or implied for and on behalf of 7-Eleven about the sales history or potential of the Store or about the profit potential of the enterprise (Article 41(g));
- (iv) the Franchisee is an independent contractor and shall control the manner and means of the Franchisee's Operation (Article 35(a));
- (v) the Franchisee shall have the sole right to employ and discharge such *Employees* as in the Franchisee's judgment may be necessary and such *Employees* shall be employees or agents of the Franchisee (Article 35(b));
- (vi) 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 relating thereto) and work schedules of the employees (Article 35(b)); and

- (vii) the Franchisee and its agents, representatives, servants and *Employees* shall under no circumstances hold themselves out to be or be considered to be or held out to be agents, representatives, servants or employees of the 7-Eleven (Article 35(c)).

Open Account and Financial Accounting

12 As to paragraph 12, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

(a) says as to sub-paragraph 12(a), it:

- (i) admits that under Articles 8(a), 14(a) and 15(a) of the Franchise Agreements, the Franchisee was responsible for the payment of all Operating Expenses and the purchase of the *Opening Inventory* and all merchandise for sale from the Store (excluding *Consigned Merchandise* as defined in Exhibit E to the Franchise Agreement) (**Purchases**); and
- (ii) otherwise denies the allegations;

(b) says as to sub-paragraph 12(b), it:

- (i) admits that under Article 8(a) of the Franchise Agreements, 7-Eleven agreed to establish and maintain an Open Account and subject to satisfaction of the conditions set out in Article 8(a) make available to the Franchisee, if the Franchisee so desired, through the Open Account, financing necessary for:

(A) Purchases;

(B) Operating Expenses (which expenses include payroll, payroll taxes, interest on the Open Account, general maintenance and repairs, and telephone as defined in Exhibit E);

(C) the unpaid balance of the Investment in the Store; and

(D) the cost of initial and ongoing business and software licences and permits; and

- (ii) otherwise denies the allegations in sub-paragraph 12(b);

(c) says as to sub-paragraph 12(c), it:

- (i) admits that the term set out in sub-paragraph 12(c) of the FASOC was an express term of the Franchise Agreements; and
 - (ii) otherwise does not admit the allegations in sub-paragraph 12(c);
- (d) says as to sub-paragraph 12(d) that, it:
- (i) refers to and repeats sub-paragraph 12(b)(i) above;
 - (ii) admits that under Article 8(c) of the Franchise Agreements, all Purchases and Operating Expenses shall be debited to the *Financial Records* (as defined in Exhibit E of the Franchise Agreements) and all *Sales Receipts* deposited or delivered pursuant to Article 20(j) shall be credited to the Financial Records; and
 - (iii) otherwise denies the allegations in sub-paragraph 12(d);
- (e) says as to sub-paragraph 12(e), it:
- (i) admits that under Article 8(e) of the Franchise Agreements, prior to the Effective Date, the Franchisee is required to execute and furnish to 7-Eleven a security, in the form set out in Exhibit G, charging the Franchisee's rights and interests in the Opening Inventory, the Inventory and the Sales Receipts with the payment of the unpaid balance which may exist in the Open Account from time to time, and, regardless of the balance of the Open Account, make complete or execute all documents which are deemed desirable by 7-Eleven for the purposes of perfecting the charge intended to be created; and
 - (ii) otherwise does not admit the allegations in sub-paragraph 12(e);
- (f) says as to sub-paragraph 12(f), it:
- (i) admits that the term set out in sub-paragraph 12(f) of the FASOC was an express term of the Franchise Agreements; and
 - (ii) otherwise does not admit the allegations in sub-paragraph 12(f).

13 As to paragraph 13, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) admits that the term set out in sub-paragraph 13(a) of the FASOC was an express term of the Franchise Agreements; and

- (b) says as to sub-paragraph 13(b), it:
 - (i) admits that the terms set out in sub-paragraphs 13(b)(i)-(iii) of the FASOC were express terms of the Franchise Agreements; and
 - (ii) says as to sub-paragraph 13(b)(iv), it:
 - (A) refers to and repeats sub-paragraph 11(c) above; and
 - (B) otherwise does not admit the allegations in sub-paragraph 13(b)(iv).

14 As to paragraph 14, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) admits that the terms set out in paragraph 14 of the FASOC were express terms of the Franchise Agreements; and
- (b) otherwise does not admit the allegations in paragraph 14.

15 As to paragraph 15, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) admits that Article 20(a) of the Franchise Agreements required 7-Eleven to prepare (based on the Bookkeeping Records and information furnished by the Franchisee) and provide to the Franchisee:
 - (i) Financial Statements for the Store for each Accounting Period and for each financial year, within 30 days after the end of each applicable period;
 - (ii) payroll money for the Franchisee's payroll for the Store (within the time prescribed by applicable law); and
 - (iii) the Weekly Draw and the Profit Draw amounts (as provided in Article 22); and
- (b) otherwise does not admit the allegations in paragraph 15.

Inventory and Pricing

16 As to paragraph 16, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) says in response to sub-paragraph 16(a), that it:

- (i) admits that the term set out in sub-paragraph 16(a) of the FASOC was an express term of the Franchise Agreements; and
 - (ii) says further that such initial *Inventory* was defined in clause 14(a) of the Franchise Agreements as the “*Opening Inventory*”;
- (b) says in response to sub-paragraph 16(b), that it admits that Article 15(a) of the Franchise Agreements required the Franchisee to select, purchase and at all times thereafter carry in the Inventory, merchandise for sale from the Store that was adequate to provide customers of 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;
- (ba) says in response to sub-paragraph 16(ba), that it:
- (i) admits that the term set out in sub-paragraph 16(ba)(i) of the FASOC was an express term of the Franchise Agreements;
 - (ii) denies that the term set out in sub-paragraph 16(ba)(ii) of the FASOC was an express term of the Franchise Agreements;
 - (iii) denies that the Volume Pricing Representation was conveyed by the term set out in sub-paragraph 16(ba)(i) of the FASOC;
- (bb) says in response to sub-paragraph 16(bb), that it:
- (i) refers to and repeats sub-paragraph 17(b)(i) below;
 - (ii) says that Exhibit E to the Franchise Agreements defined “Bona Fide Supplier” as “any person or entity carrying on the business of supplying products or services in the area in which the Store is located on a commercial and competitive basis and shall not include any entity associated in any manner with the FRANCHISEE or any 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 at arms length customer”; and
 - (iii) otherwise admits that the term set out in sub-paragraph 16(bb) of the FASOC was an express term of the Franchise Agreements;
- (c) admits that the terms set out in sub-paragraphs 16(c) to 16(g) of the FASOC were express terms of the Franchise Agreements;

- (d) says further that Article 11(a)(iii) of the Franchise Agreements provided that 7-Eleven shall, subject to Article 11(b) to 11(g) of the Franchise Agreements, at its expense, indemnify the Franchisee for losses at replacement cost value, of Stock in Trade, Inventory, Store Supplies and Money, in the event of accidental physical loss, destruction, or damage not otherwise excluded, and subject further to the conditions referred to in clause 11(a)(iii) and 11(c) of the Franchise Agreements; and
- (e) otherwise ~~does not admit~~denies the allegations in paragraph 16.

Acquisition of stock

17 As to paragraph 17, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) admits that the terms set out in sub-paragraphs 17(a) and 17(b) of the FASOC were express terms of the Franchise Agreements;
- (b) says in response to paragraph 17(c) of the FASOC:
 - (i) save as to say that the term alleged in sub-paragraph 17(c) of the FASOC is incomplete and Article 15(c) stated “The Franchisee shall purchase or otherwise acquire items of stock only from Bona Fide Suppliers (as defined in Exhibit E to this Agreement) who are engaged in the business of supplying retailers at normal wholesale prices”;
 - (ii) it otherwise admits that the term set out in that sub-paragraph was an express term of the Franchise Agreements;
- (c) says in response to paragraph 17(d) of the FASOC, that it admits that Article 15(f) of the Franchise Agreements provided that the Franchisee is not required to purchase merchandise from merchandise vendors recommended by or owned by or affiliated with 7-Eleven or to purchase merchandise recommended by 7-Eleven. However, if the Franchisee purchases stock from suppliers other than those recommended by 7-Eleven as providing favourable pricing or trading terms, as anticipated by this Article, at a price in excess of the Fair Wholesale Price, then 7-Eleven may charge the Franchisee a fee of \$75.00 for each such Tax Invoice processed to cover 7-Eleven's administrative costs of processing such stock purchases; and
- (d) otherwise ~~does not admit~~denies the allegations in paragraph 17.

Discounts and allowances

18 As to paragraph 18, subject to reference to the full terms and effect of the Franchise Agreements at trial, it:

- (a) says in response to sub-paragraph 18(a), that it:
 - (i) admits that Article 20(f)(i) of the Franchise Agreements provided that the Franchisee “authorises [7-Eleven] to collect all discounts and allowances applicable to Purchases which are not deducted from the face of the franchisee’s receipts or invoices”; and
 - (ii) otherwise denies the allegations in sub-paragraph 18(a);
- (b) says in response to sub-paragraph 18(b), that it admits that Article 20(g) of the Franchise Agreements provided that the portion of all discounts and allowances which are allowed to or reasonably traceable to Purchases (**Direct Purchase Discount Payments**) or the value of any miscellaneous discounts and allowances attributable to merchandise and are not specifically allocated to, or cannot be reasonably traced to Purchases and which are paid to 7-Eleven by merchandise vendors (**Direct Miscellaneous Discount Payments**) will be credited to the Costs of Goods Sold (as defined in Exhibit E) less the cost to 7-Eleven of the promotional materials, media advertising and other marketing costs referred to in Articles 18(g)(i) to (iii) of the Franchise Agreements;
- (c) admits that the terms s set out in sub-paragraph 18(c) of the FASOC ~~was~~ were an express terms s of the Franchise Agreements;
- (d) says in response to sub-paragraph 18(d), that it:
 - (i) admits that Article 15(b) of the Franchise Agreement provided that the Franchisee acknowledged that suppliers of stock recommended by 7-Eleven (including those that may be owned or affiliated with 7-Eleven) may offer stock at prices or on terms which are more favourable than those which are offered or obtainable from other suppliers of comparable merchandise. Such favourable pricing or terms, which are of benefit to the Franchisee, are referable to and linked with the volume of merchandise ordered by 7-Eleven and the Franchisee on the recommendation of 7-Eleven; and
 - (ii) refers to and repeats sub-paragraphs 18(a) and 18(b) above;

- (e) otherwise ~~does not admit~~denies the allegations in paragraph 18.

Employees and Wages

19 As to paragraph 19, subject to reference at trial to the full terms and effect of the Franchise Agreements, and the Variation Agreements where made, it:

- (a) says in response to paragraph 19(a) of the FASOC that it:
- (i) refers to and repeats sub-paragraph 11(a) above; and
 - (ii) otherwise denies that the term alleged in sub-paragraph 19(a) of the FASOC was an express term of the Franchise Agreements;
- (b) admits that the term set out in sub-paragraph 19(b) of the FASOC was an express term of the Franchise Agreements;
- (c) in response to sub-paragraph 19(c);
- (i) admits that the Franchise Agreements contained the terms pleaded at Row 19(c) of Schedule 1 to this Defence; and
 - (ii) otherwise denies paragraph 19(c);
- (d) otherwise ~~does not admit~~denies the allegations in paragraph 19.

20 As to paragraph 20, subject to reference to the full terms and effect of the Franchise Agreements and the Variation Agreements at trial, it:

- (a) admits that the terms set out in sub-paragraphs 20(a), 20(b) and 20(c) of the FASOC were express terms of:
- (i) the Variation Agreements;
 - (ii) the Campbelltown Store Variation Agreement;
 - (iii) the Northmead Store Variation Agreement;
 - (iv) the South Melbourne Store Variation Agreement;
 - (v) the 2015 Version; and
 - (vi) the 2016 Version;

- (b) says further the Variation Agreements, the Campbelltown Store Variation Agreement, the Northmead Store Variation Agreement, the South Melbourne Store Variation Agreement, the 2015 Version, and the 2016 Version contained terms that:
- (i) the Franchisee acknowledges that compliance with the *Fair Work Act 2009* and any applicable modern award or enterprise agreement is of fundamental importance (Article 19(b)); and
 - (ii) all information provided by the Franchisee to enable 7-Eleven to provide or facilitate the provision of the Payroll Services must be correct and accurate as at the date it is submitted. If the Franchisee identifies any inaccuracy in information previously submitted to 7-Eleven the Franchisee must immediately notify 7-Eleven and work cooperatively with 7-Eleven to rectify any issues arising from the inaccurate information provided (Article 19(c)); and
- (c) otherwise ~~does not admit~~denies the allegations in paragraph 20.

Advertising expenses

21 Subject to reference to the full terms and effect of the Franchise Agreements at trial, it admits that the terms set out in paragraph 21 of the FASOC were express terms of the Franchise Agreements.

Termination

22 As to paragraph 22, subject to reference to the full terms and effect of the Franchise Agreements including Article 25, at trial, it:

- (a) save as to say that 7-Eleven's right to terminate the agreement under Article 25(c)(i) of the Franchise Agreement was subject to sub-Articles 25(f) and 25(g) of the Franchise Agreements, admits that the term set out in paragraph 22(a) of the FASOC was an express term of the Franchise Agreements;
- (b) save as to say that the relevant event (an act of Fraudulent Behaviour) was referred to at Article (xxii) under the definition of a Material Breach in Exhibit E (and not Article (xxi) as alleged), admits that the term set out in paragraph 22(b) of the FASOC was an express term of the Franchise Agreement;
- (c) says as to sub-paragraph 22(c), it admits that the term set out in paragraph 22(c) of the FASOC was an express term of the Franchise Agreements:

- (d) says as to sub-paragraph 22(d), it admits that the definition of Fraudulent Behaviour in Exhibit E of the Franchise Agreements includes the event by which the Franchisee allows the Net Worth to be or fall below the Minimum Net Worth (Article (xi) of the definition of Fraudulent Behaviour in Exhibit E);
- (e) says further, that the termination provisions of the Franchise Agreements were subject to the termination provisions contained in the Franchising Code 2010 (including clauses 21 to 23), Franchising Code 2014 (including clauses 27 and 29), and the Oilcode (including clauses 35 to 37); and
- (f) otherwise ~~does not admit~~denies the allegations.

B5.

23 As to paragraph 23, it:

- (a) admits that:
 - (i) at all material times during the Relevant Period, the Franchise Agreements contained an implied duty to co-operate in the doing of acts which were necessary to the performance by the parties or by one of the parties of fundamental obligations under the relevant Franchise Agreement;
 - (ii) in respect of conduct on or after 1 January 2015, pursuant to clause 3 and clause 6 of the *Franchising Code 2014*, the parties to Franchise Agreements entered into on or after 1 October 1998 and to which the Franchising Code 2014 applied, were subject to an obligation to act in good faith (within the meaning of the unwritten law from time to time) to one another in relation to any matter arising under or in relation to the Franchise Agreements or the *Franchising Code 2014*; and
- (b) otherwise denies the allegations.

24 It denies the allegations in paragraph 24.

B6.**C-Store Practices**

25 As to paragraph 25, it:

- (a) says as to sub-paragraph 25(a) that it admits that:

- (i) on or about 27 April 2005, it entered into an agreement with Metcash Trading Limited (ACN 000 031 569) ~~and its subsidiaries (Metcash Trading) including Campbells Cash Carry Pty Limited (ACN 000 226 399) trading as C-Store Distribution (C-Store Distribution)~~, for the wholesale supply by Metcash Trading Limited (ACN 000 031 569) and its subsidiaries (Metcash Trading) including Campbells Cash Carry Pty Limited (ACN 000 226 399) trading as C-Store Distribution (C-Store Distribution) to 7-Eleven and 7-Eleven's Franchisees of the Goods defined in the agreement for retail sale by the Franchisees;
 - (ii) on or about 13 November 2012, it entered into a further agreement with Metcash Trading Limited ~~including C-Store Distribution~~, for the wholesale supply by Metcash Trading and C-Store Distribution to 7-Eleven and 7-Eleven's Franchisees of the Goods defined in the agreement for retail sale by the Franchisees;
- (the **Metcash Agreements**),
- (iii) during the Relevant Period, Metcash Trading supplied Goods to 7-Eleven and the Franchisees including through C-Store Distribution subject to the terms of the Metcash Agreements;

(b) says as to sub-paragraph 25(b), that:

- (i) in the form pleaded, the phrase "the supply of the majority of stock" in sub-paragraph 25(b) is vague and embarrassing and it objects to pleading to it; and
- (ii) under cover of this objection, it admits that during the Relevant Period:
 - (A) 7-Eleven recommended C-Store Distribution to Franchisees as a recommended supplier; and
 - (B) 7-Eleven recommended to Franchisees the Goods supplied by C-Store Distribution under the Metcash Agreements;

(c) says as to sub-paragraph 25(c), that:

- (i) 7-Eleven was not obliged to 'designate' or 'recommend' to Franchisees any 'recommended merchandise supplier' or any 'alternative recommended merchandise vendors' of similar stock items to those that

had been offered or agreed to be supplied by C-Store Distribution under the Metcash Agreements, under Article 15(b) of the Franchise Agreements or otherwise; and

- (ii) during the Relevant Period, 7-Eleven recommended to Franchisees:
 - (A) recommended suppliers other than C-Store Distribution (**Recommended Suppliers**); and
 - (B) stock items which were distributed by Recommended Suppliers (**Recommended Products**);

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The Recommended Suppliers were contained in a document titled 'Approved Vendor Listing', which was updated from time to time. The Approved Vendor Listing was made available to Franchisees during the Relevant Period either in hard copy, or, from about early 2013, through its online back office Portal (**Online Portal**).

During the Relevant Period, the Recommended Suppliers included, among others, Daily Fresh (a business operated by 7-Eleven which distributed products from a number of suppliers), Australasian Food Group Pty Ltd trading as Peters Ice Cream Australia, Unilever Australia Limited (trading as Streets), The Smith's Snackfood Company, Gordon and Gotch Australia Pty Limited, John Sands Australia Ltd, Bells Pure Ice, Pacific Optics Pty Ltd, Repco Auto Parts, Fairfax Media, News Limited, Elgas Limited NSW, Five Star Distributors, The Interfresh Group, and Goodman Fielder / Quality Bakers Australia.

7-Eleven's Recommended Products were included in the 'Planograms' or category layouts for each format and location of store, which were updated from time to time. The Planograms were made available to Franchisees during the Relevant Period either in hard copy, or, from about early 2013, through its Online Portal.

(d) says as to sub-paragraph 25(d), that it admits that 7-Eleven negotiated the price and terms of supply of stock items available from C-Store Distribution together with any C-Store Discounts and Rebates associated with the supply of stock items from C-Store Distribution to its Franchisees with:

- (i) Metcash Trading; and/or
- (ii) the vendors and suppliers of *Goods* which Metcash Trading supplied under the Metcash Agreements;

(da) as to sub-paragraph 25(da), it:

- (i) says in response to sub-paragraph 25(da)(i) that it:
 - (A) admits that it was an express term of each of the Metcash Agreements that 7-Eleven and C-Store Distribution “acknowledge that the term of this Agreement and any supply to 7-Eleven hereunder are conditional on 7-Eleven being able to procure for [C-Store Distribution] supply of at least 90% of the combined total dollar value from time to time of *Goods* required by 7-Eleven franchisees for sale at their 7-Eleven outlets as measured rolling six monthly”;

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Clause 23.1 of the Metcash Agreement dated 27 April 2005 and clause 24 of the Metcash Agreement dated 13 November 2012.

- (B) admits that it was an express term of each of the Metcash Agreements that “to the extent that any Franchisee is obliged to do anything in accordance with its Franchise Agreement for the purposes of this Agreement, 7-Eleven agrees to use its best endeavours to procure that such obligation is satisfied”;

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Clause 3.2 of the Metcash Agreement dated 27 April 2005 and clause 3.2 of the Metcash Agreement dated 13 November 2012.

- (ii) says in response to sub-paragraph 25(da)(ii) that it:

- (A) admits that clause 6 of the Metcash Agreement dated 27 April 2005 provided that C-Store Distribution “agrees to pay to 7-Eleven such Rebates [defined in clause 1 as “50% of all applicable Supplier rebates ullage and supplier agreed coop”] as 7-Eleven may claim by invoice received by [C-Store Distribution] by the last day of each month within 10 days of the end of such month. Such Rebates will be inclusive of GST where they are applicable to *Goods* supplied under this Agreement”;
- (B) admits that clause 6.1 of the Metcash Agreement dated 13 November 2012 provided that C-Store Distribution “agrees to pay to 7-Eleven such Campbells Rebates [defined in clause 1 as “50% of all applicable Campbells Supplier coop rebates and ullage as received by Campbells” as 7-Eleven may claim by invoice received by [C-Store Distribution] by the last day of each month within ten 10 days of the end of such month. Such Campbells Rebates will be inclusive of GST where they are applicable to *Goods* supplied under this Agreement”;
- (iii) says in response to sub-paragraph 25(da)(iii) that it refers to and repeats sub-paragraph 25(da)(i) above;
- (e) as to sub-paragraph 25(e), it:
- (i) denies that 7-Eleven prevented Franchisees from ordering stock from alternative Bona Fide Suppliers (other than C-Store Distribution) at all, or on a regular basis;
- (ii) says in response to sub-paragraph 25(e)(i), that it admits that in respect of new Stores (other than Stores which were taken over from a previous Franchisee), 7-Eleven purchased Opening Inventory including from C-Store Distribution prior to the Franchisee taking possession, which the Franchisee was required to acquire in accordance with Article 14(a) of the Franchise Agreement;
- (iii) says in response to sub-paragraph 25(e)(ii), that it:
- (A) admits that most ambient stock items offered for order by Franchisees on 7-Eleven’s Online Portal were supplied and distributed by C-Store Distribution;

(B) admits that most fresh food stock items offered for order by Franchisees on 7-Eleven's Online Portal were supplied and distributed by "Daily Fresh";

~~(A)~~(C) says that stock items offered by suppliers other than C-Store Distribution and Daily Fresh were available for order by Franchisees on 7-Eleven's Online Portal;

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7-Eleven refers to and repeats the particulars to paragraph 25(c)(ii) above.

~~(iii)~~(iv) in response to sub-paragraph 25(e)(iii), it:

(A) admits that under Article 20(d)(i) of the Franchise Agreements, a Franchisee who made *Purchases*, including purchases from merchandise vendors other than those recommended by 7-Eleven and of merchandise items other than those recommended by 7-Eleven, provided such merchandise was purchased from a Bona Fide Supplier, was required to provide an invoice to 7-Eleven before 7-Eleven would pay the invoice on the Franchisee's behalf and debit the amount to the Financial Records subject to and in accordance with the conditions in sub-Article 20(d) of the Franchise Agreements;

(B) says further that:

- (1) Franchisees could order products directly from Recommended Suppliers and other Bona Fide Suppliers though means other than by the Online Portal;
- (2) 7-Eleven paid directly Recommended Suppliers, and some Bona Fide Suppliers which had trading accounts with 7-Eleven, if the invoices were issued directly to 7-Eleven by the Recommended Suppliers or by the Bona Fide Suppliers, or if the invoices were provided by the Franchisee to 7-Eleven for payment;
- (2A) 7-Eleven carried out the technical steps required to enable such products (that is, products purchased by Franchisees

from Bona Fide Suppliers other than C-Store Distribution, Daily Fresh and Recommended Suppliers) to be scanned using the point-of-sale system in a Franchisee's Store;

- (3) under Article 20(j) of the Franchise Agreements, the Franchisee could retain from its daily banking of Sales Receipts "*cash expended by the Franchisee for properly reported and substantiated Purchases or Operating Expenses*"; and
- (4) 7-Eleven provided a Cash Purchases function on the point of sale terminal and the Online Portal for Franchisees to report items purchased from Bona Fide Suppliers who did not invoice 7-Eleven directly; and

~~(iv)~~(v) says in response to sub-paragraph 25(e)(iv) that:

(A) in the form pleaded, each of:

(1) the phrase "required to use C-Store" in sub-paragraph 25(e)(iv)(1) of the FASOC; ~~and~~

(2) the phrase "required to accept, not less than 80% or 85% of the time" in sub-paragraph 25(e)(iv)(1A) of the FASOC; and

~~(2)~~(3) the phrase "looked upon badly by 7-Eleven head office or senior management" in sub-paragraph 25(e)(iv)(2) of the FASOC;

is vague and embarrassing and it objects to pleading to them;

(B) under cover of this objection, it says that:

(1) 7-Eleven informed Franchisees that C-Store Distribution enabled Franchisees to order and take delivery of *Goods* in a more efficient manner than if Franchisees placed multiple orders for, and took multiple deliveries of, goods from multiple *Bona Fide Suppliers*;

(f) otherwise denies the allegations in paragraph 25.

26 As to paragraph 26, it says:

(a) that:

(i) it is vague and embarrassing without the provision of proper particulars, including the following: ~~and~~

(A) it does not identify which “stock items” ordered from C-Store Distribution had a price that exceeds the so-called Independent Fair Wholesale Price and/or Best Endeavours Wholesale Price;

(B) it does not identify from whom the so-called Independent Fair Wholesale Price and/or Best Endeavours Wholesale Price could have been obtained;

(C) it fails to identify the facts relied upon in support of the allegation in paragraph 26(b) that 7-Eleven could have obtained lower prices if 7-Eleven had used its best endeavours, including by failing to identify what 7-Eleven ought to have done, but did not do, to obtain those lower prices;

(D) it does not identify what the so-called Independent Fair Wholesale Price “would have been” or what the “obtainable” Best Endeavours Wholesale Price was for each of the (unidentified) stock items;

~~(i)~~ (ii) it objects to pleading to it; and

(b) under cover of this objection, it denies paragraph 26.

27 As to paragraph 27, it says:

(a) that it is vague and embarrassing without the provision of proper particulars and it objects to pleading to it; and

(b) under cover of this objection, it denies paragraph 27.

Inventory Practices

28 As to paragraph 28, it:

(a) says as to sub-paragraph 28(a) that it:

- (i) admits that during the Relevant Period it listed on its Online Portal suggested stock items and quantities (Suggested Orders) for ordering stock from Daily Fresh and C-Store Distribution for each Store (**Automated Replenishment System**);
- (ii) refers to and repeats sub-paragraph 25(e) above;
- (iii) says further that, during the Relevant Period, the Franchisees could:
 - (A) use the Online Portal to “tailor out” products such that those products would not be included in their Suggested Orders. adjust the Minimum Display Quantity for products so as to reduce the suggested quantities in future Suggested Orders and manually ~~with the exception of products identified by 7-Eleven as Core Products and subject to the Franchisee maintaining any minimum display quantity required for certain products (which minimum display quantity could be varied by the Franchisee)~~, vary the quantity of stock items in a Suggested Order ~~the Automated Replenishment System for purchase~~, including by choosing not to purchase any of a suggested ~~recommended~~ stock item at all, or by deleting suggested stock items from the order (with the exception of products identified by 7-Eleven as Core Products and subject to the Franchisee maintaining any minimum display quantity required for certain products); and
 - (B) add or “tailor in” other products available through the Online Portal to the Store’s range of layout products (which products would then be added to the Store’s Ssuggested Oorders in the Automated Replenishment System);

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The recommended products available for ordering through the Online Portal during the Relevant Period (including that distributed by C-Store Distribution and Daily Fresh) included approximately 15,000 articles. At any time, larger Stores typically stocked around 3,000 articles and smaller Stores typically stocked around 1,000 articles.

The Manual, including in the “Category Management” and “Back Office Portal” sections set out details of how a Franchisee could use the Online Portal’s ‘Store Tailoring’ page to add or remove products (other than Core products) in and out of the Store’s range of layout products (which products would appear in the Automated Replenishment System), including to allow the Franchisee to remove poor selling or ‘zero sales’ articles using a process known as “tailoring” as a result of which they would no longer appear in the Suggested Order in the Automated Replenishment System. The Automated Replenishment System calculated suggested quantities based in part on the Minimum Display Quantity and the Stock on Hand. The Foodservice Inventory Management section of the Manual provided Franchisees with instructions on how to adjust the Minimum Display Quantities, and Stock on Hand for stock items in the Online Portal.

- (b) says as to sub-paragraph 28(b) that it admits that, during the Relevant Period:
- (i) 7-Eleven nominated deadlines by which the Franchisees could vary the quantity of stock in the Automated Replenishment System listed on its Online Portal;
 - (ii) the deadlines nominated by 7-Eleven in the Automated Replenishment System varied from Franchisee to Franchisee, and depended on the Store’s location and time-zone, but typically were:
 - (A) once a day (Monday to Friday) for Daily Fresh orders; and
 - (B) once or twice a week for C-Store Distribution orders; and
 - (iii) stock was typically delivered to the Store within 1 to 2 days after an order was transmitted to 7-Eleven;

(ba) as to sub-paragraph 28(ba):

- (i) admits that, from time-to-time, Franchisees were required to accept nominated quantities of products on promotion; and

- (ii) says that for each such promotion, 7-Eleven agreed to bear 100% of the cost of any bad merchandise;
- (bb) as to sub-paragraph 28(bb), it refers to and repeats paragraph 28(a)(iii) above;
- (bc) as to sub-paragraph 28(bc), it refers to and repeats paragraphs 28(a)(iii), 28(ba) and (bb) above;
- (c) admits the allegations in sub-paragraph 28(c) in respect of the Relevant Period;
- (d) says as to sub-paragraph 28(d) that it admits that, during the Relevant Period:
- (i) when stock was ordered from the Online Portal that the cost of that stock was debited to the balance of the Applicants' or Franchisees' Open Account at the time of delivery; and
 - (ii) interest was debited to the Applicants' and the Franchisee's Open Account on the unpaid balance in the Open Account at the beginning of each Accounting Period in accordance with Article 8(b) of the Franchise Agreements;
- (e) says as to sub-paragraph 28(e) that it:
- (i) admits that under Article 16(c) of the Franchise Agreements, 7-Eleven was entitled to and did periodically provide Franchisees lists of recommended maximum selling prices (inclusive of any GST applicable) recommended by 7-Eleven for merchandise (**Recommended Price**);
 - (ii) admits that under Article 17(b) of the Franchise Agreements, Franchisees were required to ensure that merchandise was not sold at prices that were in excess of those published by 7-Eleven for 7-Eleven Stores;
 - (iii) admits that the 7-Eleven point of sale system does set prices for stock items across all Stores within the 7-Eleven Network; and
 - (iv) denies that 7-Eleven did not allow Franchisees to set prices for merchandise below the Recommended Price, or to alter prices of merchandise items; and

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7-Eleven provided Franchisees with price labels and a price gun, so that Franchisees could mark reduced pricing on stock items.

Franchisees could adjust the price for stock items in the Point of Sale using the price override function.

(f) says as to sub-paragraph 28(f) that:

(i) the Franchise Agreements contained terms that:

(A) The Franchisee and 7-Eleven acknowledge that periodic physical audits of the Inventory, Sales Receipts, the Cash Register Fund and Store Supplies (Physical Audit) are necessary to account properly for the Franchisee 's Operation. The Franchisee shall, whenever any Physical Audit of the Store is to be carried out pursuant to the Agreement, properly prepare the Store for a Physical Audit at the Franchisee's expense in accordance with procedures demonstrated to the Franchisee during the Training-Store Training or Ongoing Training. If the Store is not properly set up for a Physical Audit according to such procedures, 7-Eleven shall be entitled to cancel the Physical Audit and to reappoint another time and in such event the Franchisee shall be charged such fee as is then currently charged to 7-Eleven by its auditors for audits of a similar nature, which amount shall be debited to the Financial Records (Article 21(a)):

(B) Each Physical Audit which becomes final and binding (as provided in sub-Article 21(g)) shall be reflected by 7-Eleven on the Bookkeeping Records, and each Physical Audit (except the Physical Audits by 7-Eleven of the Opening Inventory and the Closing Inventory) shall consist of a physical count and computation of the total Weighted Average Cost of the Inventory: (Article 21(b)):

(C) 7-Eleven, at its expense, shall make or cause to be made at least one Physical Audit each calendar quarter which quarterly Physical Audit may be made pursuant to either sub-Articles 21(c) or (d) (Article 21(e)):

(D) The Franchisee, at the Franchisee's expense, upon 72 hours advance notice (oral or written) to 7-Eleven, may cause Physical Audits (if the Franchisee so desires) to be made by an independent firm of accountants reasonably acceptable to 7-

Eleven. In addition, upon the Franchisee 's request, 7-Eleven shall make such Physical Audits as the Franchisee may desire for such fee as is then currently charged to 7-Eleven by its auditors for audits of a similar nature which amount shall be debited to the Financial Records (Article 21(f)):

(E) If the provisions of Article 21 are complied with, each Physical Audit shall be final and binding unless the Franchisee notifies 7-Eleven, within 24 hours after completion of the Physical Audit, that it believes the conduct of a Physical Audit to be incorrect and provides to 7-Eleven bona fide specific reasons why it has formed such opinion. In such an event, 7-Eleven, at its expense, will make or cause to be made a re-audit within a reasonable time after it receives such notice (Article 21(g)):

(F) 7-Eleven and any persons employed by it, or auditors or accountants engaged by it, shall have access to the Licensed Property, the Inventory, Sales Receipts, Cash Register Fund, bank drafts, Store Supplies and the Franchisee 's operating records for the Store at any time during normal business hours for the purpose of making, observing or verifying any Physical Audit (Article 21(h)):

(G) 7-Eleven shall provide the Franchisee with a report showing the value of the Inventory at Weighted Average Cost (as defined in Exhibit E to this Agreement) reflected by each Physical Audit made by or for 7-Eleven immediately after completion of such Physical Audit, which report shall be promptly adjusted, if necessary, and verified (Article 21(i)):

(H) The Franchisee shall provide 7-Eleven with a copy of the report showing the value of the Inventory at Weighted Average Cost reflected by each Physical Audit made by or for the Franchisee within 24 hours after receipt by the Franchisee of such report (Article 21(j)):

(I) The Franchisee and 7-Eleven acknowledge that accurate Physical Audits can be made while the Store is open for business and neither the Franchisee nor 7-Eleven shall require the Store to be closed during any Physical Audit (Article 21(k)):

(J) Inventory Overage means the difference at cost, if any, remaining after the book inventory at cost (as reflected on the Bookkeeping Records) is deducted from the total cost value of the Inventory (as reflected by a binding Physical Audit) (Exhibit E);

(K) Inventory Shortage means the difference at cost, if any, remaining after the total cost value of the Inventory (as reflected by a binding Physical Audit) is deducted from the book inventory at cost (as reflected on the Bookkeeping Records) (Exhibit E); and

(L) Inventory Variation shall be equal to the Inventory Overage or Inventory Shortage, and is charged or credited, as applicable, to the Operating Expenses (Exhibit E);

(ii) admits 7-Eleven:

(A) conducted a Physical Audit of Franchisees' Stores including of Inventory on the Changeover of a store by a Franchisee, one month after Changeover, and approximately quarterly thereafter; and

(B) following each Physical Audit, charged or credited Inventory Variations to the relevant Franchisee's Operating Expenses, as applicable.

in accordance with the Franchise Agreements (including Article 21 and Exhibit E);

~~(f)~~(g) otherwise denies the allegations in paragraph 28.

Fund practices

28A. As to paragraph 28A, it:

- (a) refers to and repeats sub-paragraph 18(a) above; and
- (b) otherwise denies the allegations in paragraph 28A.

28AA. As to paragraph 28AA, it:

- (a) says that it is vague and embarrassing without the provision of proper particulars and it objects to pleading to it; and

(b) under cover of this objection, it denies the allegations in paragraph 28AA.

28B. As to ~~it admits~~ paragraph 28B, it:

(a) refers to and repeats paragraph 18(c) above; and

~~(a)~~(b) otherwise denies paragraph 28B.

28C. As to paragraph 28C, it:

(a) says that it is vague and embarrassing without the provision of proper particulars and it objects to pleading to it; and

a. under cover of this objection refers to and repeats sub-paragraph 18(a) above;

b. admits that, during the Relevant Period:

i. 7-Eleven received payments from merchandise vendors (**Supplier Payments**), which 7-Eleven then either:

1. Credited to the "Cost of Goods Sold" (as that term is used in Article 20(g) of the Franchise Agreements); or

2. Deposited into a common fund (**Promo Fund**);

ii. 7-Eleven applied funds from the Promo Fund to pay the costs of the marketing and promotional activities set out in Articles 20(g)(i) to (iii) of the Franchise Agreements;

c. says further that in each financial year during the Relevant Period, there was a shortfall between the Supplier Payments deposited into the Promo Fund and the total cost of the marketing and promotional activities set out in Articles 20(g)(i) to (iii) of the Franchise Agreements, which shortfall was paid by 7-Eleven; and

d. otherwise denies the allegations in paragraph 28C.

28CA. As to paragraph 28CA, it:

(a) does not know and therefore does not admit paragraph 28CA(a);

(b) refers to and repeats paragraph 28E(a)(ii) below; and

(c) otherwise denies the allegations in paragraph 28CA.

28D. It denies paragraph 28D.

28E. As to paragraph 28E, it:

(aa) refers to and repeats paragraphs 28A to 28CA above:

(a) says that:

- (i) Article 20(h) of the Franchise Agreements provided that 7-Eleven's "collection and treatment of any discounts and allowances in accordance with Article 20(f) and (g) will be audited annually by an independent auditor the results of which will be included in [7-Eleven's] Disclosure Statement";
- (ii) 7-Eleven's collection and treatment of any discounts and allowances in accordance with Article 20(f) and (g) of the Franchise Agreements were audited annually by an independent auditor the results of which were included in each of 7-Eleven's Franchising Code disclosure documents and 7-Eleven's Oilcode disclosure documents during the Relevant Period;

PARTICULARS

In respect of the First Applicant, 7-Eleven refers to and repeats paragraphs 41(b)(i) (regarding the Campbelltown Franchising Disclosure), 41(c)(i) (regarding the Northmead Oilcode Disclosure) and paragraphs 43(a), 43(b) and 44 below.

Prior to the Second Applicant entering the South Melbourne Store Franchise Agreement, 7-Eleven provided the Second Applicant with the 7-Eleven Franchising Code disclosure document for the 2011/2012 year dated 26 October 2012 [FRA.0004.0001.0143] **(South Melbourne Franchising Disclosure)**. Mr Jatinder Pal Singh signed an acknowledgement that the Second Applicant had received from 7-Eleven on or about 11 September 2013 a copy of the South Melbourne Franchising Disclosure [SEV.0062.0001.0082], [SEV.0062.0001.0332] and [SEV.0062.0001.0359]. 7-Eleven also refers to and repeats paragraphs 43(aa) and 43(ba) below.

(b) otherwise denies the allegations in paragraph 28E.

C.

28F. As to paragraph 28F, it:

(a) [refers to and repeats paragraph 28E\(a\)\(ii\) above:](#)

(b) admits that, in June and August 2019, it denied that the Fund is a “marketing or other co-operative fund” within the meaning of the Franchising Codes and the Oilcode as alleged in sub-paragraph 28F(a); and

(c) otherwise denies the allegations in paragraph 28F.

29 It denies paragraph 29.

30 It denies paragraph 30.

B7.

31 It denies paragraph 31.

31A. It denies paragraph 31A.

32 [Not used]

33 [Not used]

34 [Not used]

35 [Not used]

36 [Not used]

37 [Not used]

38 [Not used]

39 [Not used]

40 [Not used]

D.**D1.**

40A As to paragraph 40A, it says that with respect to the Relevant Period:

- (a) it admits sub-paragraph 40A(a);
- (b) as to sub-paragraph 40A(b):
 - (i) admits that from about 19 December 2014, 7-Eleven published on the Franchising Opportunities Website, where requested to do so by existing Franchisees (**Outgoing Franchisees**) who sought to sell their Stores (**Listed Stores**):
 - (A) certain details of the Listed Stores as referred to at paragraph 40B(a)(i) below; and
 - (B) certain information in respect of each of the Listed Stores as referred to at paragraph 40B(a)(i) below;

(Listed Stores Information);

- (c) as to sub-paragraph 40A(c):
 - (i) admits sub-paragraph 40A(c)(i);
 - (ii) admits sub-paragraph 40A(c)(ii)
 - (iii) admits that from time to time, 7-Eleven provided a list with Listed Stores within the relevant State (**State Franchise Opportunities List**) to certain employees within 7-Eleven and to certain prospective franchisees; and
- (d) otherwise denies paragraph 40A.

40B As to paragraph 40B, it says that with respect to the Relevant Period:

- (a) it admits that from about 19 December 2014, the Listed Stores Information:
 - (i) included the location of the Listed Store, the estimated total investment of the Listed Store, and whether the Store was a Fuel Store or a Non-Fuel Store;

- (ii) did not include information concerning the Operating Expenses for the Listed Stores;
 - (iii) otherwise denies sub-paragraph 40B;
- (b) subject to reference to the full terms and effect of the State Franchise Opportunities List at trial, says that the State Franchise Opportunities List included for each of the Listed Stores in the relevant State, among other things:
- (i) the name and location of each Store;
 - (ii) the Franchise Fee payable in respect of Store Agreement of each Store;
 - (iii) the Franchise Agreement Term for an incoming Franchisee;
 - (iv) the total retail sales or merchandise sales reported by the Franchise for the prior two financial years;
 - (v) the Franchisee total retail income, from retail sales for the Store (**Total Franchisee Retail Income**);
 - (vi) typically, miscellaneous non-retail income for the Store (**Miscellaneous Non-Retail Income**);
 - (vii) the price sought for the goodwill by the Outgoing Franchisee in respect of the Store (**Goodwill Price**);
 - (viii) the *Franchise Fee* payable in respect of the Store Agreement for the Store; and
 - (ix) no information concerning the *Operating Expenses* for the Store;
- (c) otherwise denies paragraph 40B; and
- (d) says further during the Relevant Period, the State Franchise Opportunities List stated words to the effect:
- (i) *Options are not guaranteed and lease extensions will be decided on a case by case basis at the sole discretion of 7-Eleven. Note: Franchise Agreements continue until; the earlier of: 1) the date on which the primary (current) term of the Lease expires, or 2) the expiration of any further term of the Lease (but only if the option to extend is (but only if the option to extend is exercised by 7-Eleven during the term of the agreement) or 3)*

10 years after the effective date. Franchisee Fees are subject to change;
or

- (ii) *Agreement terms are 10 years unless limited by an earlier expiry of the property lease. Lease Options are not guaranteed and remain at the sole discretion of 7-Eleven. All prospective franchisees must be approved by 7-Eleven. Franchise Fees are subject to change.*

40C As to paragraph 40C, it:

- (a) admits that during the Relevant Period up until about ~~November~~~~late September~~ 2015, 7-Eleven advised some existing Franchisee who sought to sell their Store and asked 7-Eleven for guidance about the Goodwill Price, that:

- (i) the Franchisee was to determine the Goodwill Price for the Store;
- (ii) as a guide the Franchisee could use the multiplier range calculated by 7-Eleven (which multiplier range was the average Goodwill from recent sales of 7-Eleven stores in the relevant State over the previous financial year divided by the number of Stores sold in that State) multiplied by Store IN for the Store;
- (iii) 7-Eleven would not prescribe how much Goodwill should be paid;

(Pre-2015 Goodwill Price Advice)

PARTICULARS

To the extent that the Pre-2015 Goodwill Price Advice was oral, it was given by the relevant Franchisee Development Managers in conversations with the Franchisees. To the extent that the Pre-2015 Goodwill Price Advice was written it was provided in [emails or](#) a document headed "Information and Tips for Selling your 7-Eleven Franchisees".

- (b) says further the multiplier range referred to at sub-paragraph 40C(a)(ii) above varied from State to State and from year-to-year; and
- (c) otherwise denies sub-paragraph 40C.

[40CA As to paragraph 40CA, it:](#)

(a) admits that during the Goodwill Guidance Period, 7-Eleven advised some prospective Franchisees when asked about the Goodwill Price that: (i) the Goodwill Price was determined by the Outgoing Franchisee; and/or (ii) the Goodwill Price was a matter for negotiation between the incoming Franchisee and the Outgoing Franchisee; and/or (iii) the Goodwill Price could be calculated in the matter alleged in paragraph 40C(a)(ii) above; and

PARTICULARS

The advice was oral and given by the relevant Franchisee Development Managers in conversations with the Franchisees.

(b) otherwise denies paragraph 40CA.

40CB As to paragraph 40CB, it:

(a) admits that during the Relevant Period, the Bank lent money to prospective Franchisees of 7-Eleven, in order to assist them to purchase Store franchises and the Bank was a party to loans to Franchisees relating to a majority of franchised Stores of 7-Eleven;

(b) admits that on 25 March 2015, 7-Eleven communicated by email with the Bank in the terms set out in that email; and

~~(a)~~(c) otherwise denies paragraph 40CB.

40D As to paragraph 40D, it:

(a) admits that it calculated and sought to charge a Franchise Fee for a Store by reference to a percentage of the *Gross Profit* for the Listed Store for the most recent full financial year;

(b) admits that the Franchise Agreement defined *Gross Income* to mean *Gross Profit* less the *7-Eleven Charge* (Exhibit E);

(c) otherwise denies paragraph 40D.

40E As to paragraph 40E, it:

(d) refers to and repeats paragraphs 40A to 40D above; and

(e) otherwise denies paragraph 40E.

40EA It denies paragraph 40EA.

40EB As to paragraph 40EB, it:

(a) refers to and repeats paragraphs 40E and 40EA above; and

(b) otherwise denies paragraph 40EB.

40F As to paragraph 40F, it:

(a) refers to and repeats paragraph 40A to 40EB above;

(b) admits that it published the Website and provided the State Franchise Opportunities List to prospective Franchisees in trade or commerce within the meaning of section 18 of the ACL, and insofar as the State Franchise Opportunities List was provided to prospective Franchisees before 1 January 2011, within the meaning of section 4 of the TPA;

~~(c) denies that section 52 of the TPA was applicable to conduct during the Relevant Period; and~~

~~(c)~~(c) otherwise denies paragraph 40F.

40G As to paragraph 40G, it:

(a) refers to and repeats paragraph 40A and 40B above; and

(b) otherwise does not know and therefore does not admit paragraph 40G.

40H As to paragraph 40H, it:

(a) refers to and repeats paragraph 40A and 40EB above; and

(b) otherwise denies paragraph 40H.

40I As to paragraph 40I, it:

(a) refers to and repeats paragraph 40A and 40EB above; and

(b) otherwise denies paragraph 40I.

40J [Not Used]~~As to paragraph 40J, it:~~

~~(a) refers to and repeats paragraph 40A and 40E above; and~~

~~(b) otherwise denies paragraph 40J.~~

40K It denies ~~As to~~ paragraph 40K, ~~it:~~

~~(c) denies paragraph 40K; and~~

~~(a) refers to and repeats paragraph 40A and 40J above.~~

41 As to paragraph 41, it says that:

(a) as to sub-paragraph 41(a), in respect of the First Applicant it admits that:

(i) prior to the First Applicant entering the Campbelltown Store Franchise Agreement, 7-Eleven provided information to the First Applicant which information included:

- (A) a 7-Eleven information brochure (First Applicant's 7-Eleven Brochure);
- (B) the statement of average earnings for the financial years ending 30 June 2011 and 30 June 2012 (**2012 Average Store Financials**);
- (C) income and expense statements for the Campbelltown Store for three years (**Campbelltown Store Financials**);
- (D) information on the relevant minimum wage rates for NSW non-fuel stores dated 20 June 2013 (**June 2013 Wage rates**);
- (E) 12-month budget form to be completed by the First Applicant;
- (F) a payroll costing form to be completed by the First Applicant;
- (G) a staff roster form to be completed by the First Applicant;
- (H) a copy of the store lease for the Campbelltown Store; and
- (I) a full copy of the Campbelltown Store Franchise Agreement in the form in which it was to be executed;

PARTICULARS

The First Applicant's 7-Eleven Brochure was sent to Mr Davaria by Ashleigh Bennett of 7-Eleven by email on 9 July 2013 (FRA.0002.0001.1729).

The 2012 Average Store Financials was sent to Mr Davaria by Mr Bennett by email on 10 July 2013 (FRA.0002.0001.1741), which email stated *“As per the attached statements of average earnings, average store income is approximately \$120K, so your income expectation of \$300K - \$350K is way too high. You may want to seriously consider this prior to taking your application further.”*

The Campbelltown Store Financials were sent to Mr Davaria by Mr Bennett by email on 17 July 2013 (FRA.0002.0001.1750).

Mr Davaria signed an acknowledgement that the First Applicant had received from 7-Eleven on or about 29 August 2013 a copy of wage determinations / current wage rates, the 12-month budget form, the payroll costing form and the staff roster form, a copy of the store lease, and a full copy of the Campbelltown Store Franchise Agreement in the form in which it was to be executed (SEV.0001.0010.0074).

The June 2013 Wage rates stated *“Please find attached updated Wage Rate Sheets reflecting the new wage rates. These are the new legal minimum rates. An employee cannot be paid less than these declared rates of pay.... 7-Eleven Franchisees are required to abide by all relevant laws and legislation, including all workplace laws. It is important that you understand your obligations as an employer to ensure you are compliant with the law.”* (SEV.0008.0004.0050).

The 12-month budget form to be completed by the First Applicant, a payroll costing form to be completed by the First Applicant, and a staff roster form to be completed by the First Applicant were provided by email from either Mr Bennett or Ms Boogaard of 7-Eleven to Mr Davaria, and the June 2013 Wage rates was provided by Mr Bennett of 7-Eleven to Mr Davaria either by email and/or in person, on a date prior to 5 August 2013. These emails are no longer in the possession of 7- Eleven, which is likely to be as a result

of the emails having been deleted through the ordinary course of business.

A copy of the store lease for the Campbelltown Store and a full copy of the Campbelltown Store Franchise Agreement in the form in which it was to be executed were provided to Mr Davaria on or about 29 August 2013 at a meeting at 7-Eleven with ~~Mr King~~ [Ms Boogaard](#) and possibly also Mr Bennett. Receipt of these documents on or prior to 29 August 2013 was acknowledged by Mr Davaria. However, these documents are no longer in the possession of 7-Eleven, as it is likely that these documents were provided to Mr Davaria in hardcopy on the day.

- (ii) prior to the First Applicant entering the Northmead Store Franchise Agreement, 7-Eleven provided information to the First Applicant which information included:
 - (A) an income and expense statement for the Northmead Store for approximately 13 months (**Northmead Store Financials**); and
 - (B) information on the relevant minimum wage rates for NSW fuel stores dated 19 June 2014 (**June 2014 Wage rates**);

PARTICULARS

Mr Davaria signed an acknowledgement that the First Applicant had received from 7-Eleven on or about 29 April 2015 the Northmead Store Financials and a copy of wage determinations/ current wage rates (SEV.0001.0001.0871).

The Northmead Store Financials were for part of the 2014 and 2015 calendar years (SEV.0001.0001.0871).

The June 2014 Wage rates stated *“Please find attached updated Wage Rate Sheets reflecting the new wage rates. These are the new legal minimum rates. An employee cannot be paid less than these declared rates of pay.... 7-Eleven Franchisees are required to abide by all relevant laws and legislation, including all workplace laws. It is important that you understand your obligations as an employer to*

ensure you are compliant with the law.”

(SEV.0008.0004.0062).

- (iii) prior to a Franchisee entering a Franchise Agreement during the Relevant Period, 7-Eleven provided information to prospective Franchisees which information included:
 - (A) if the Store was an existing Store, income and expense statements and a balance sheet for the relevant Store for up to the last 3 financial years (**Individual Store Financials**); and
 - (B) information on the relevant minimum wage rates for the relevant format and location of the Store;
- (iv) in addition to the documents referred to in sub-paragraph 41(a)(iii) above, prior to each Franchisee who was not already a member of the 7- Eleven System entering a Franchise Agreement, 7-Eleven provided information to the prospective Franchisee which included:
 - (A) in the period between 20 February 2012 to about April 2016, the 7- Eleven Brochure;
 - (B) in the period from about February 2016 to February 2018, a document entitled “Our Success is Your Success” (SEV.0001.0010.1279);
 - (C) in the period from about April 2016 to February 2018, a document entitled “The Local Franchise with Global Success” (SEV.0001.0010.1282); and
 - (D) during the Relevant Period, a statement of average earnings for the State in which the Store was located for up to the previous 2 financial years (the **Average Store Financials**); and
- (v) it says further that the Campbelltown Store Financials and the Northmead Store Financials were prepared from financial information, data and documents provided to it by the relevant former Franchisees in accordance with Article 20(b) of the Franchise Agreement;

PARTICULARS

The financial information, data and documents provided to 7-Eleven by the former Franchisees included:

- a) daily summaries of all purchases;
- b) daily reposts of all sales receipts;
- c) weekly time and wage authorisations for employees;
and
- d) orders, receipts and invoices for all purchases and all bills and receipts for all operating expenses.

The Campbelltown Store Financials were prepared from financial information, data and documents provided to 7-Eleven by B&O Enterprises Pty Ltd.

The Northmead Store Financials were prepared from financial information, data and documents provided to 7-Eleven by Ya Razik Pty Ltd.

- (aa) as to sub-paragraph 41(a) in respect of the Second Applicant:
 - (vi) as to sub-paragraph 41(a)(i), it admits that prior to the Second Applicant entering the South Melbourne Store Franchise Agreement, 7-Eleven provided information to the Second Applicant which information included:
 - (A) the 7-Eleven Brochure;
 - (B) the South Melbourne Franchising Disclosure; and
 - (C) the June 2013 Wage rates;

PARTICULARS

7-Eleven refers to and repeats the particulars to paragraph 28E(a) above. The June 2013 Wage rates stated "Please find attached updated Wage Rate Sheets reflecting the new wage rates. These are the new legal minimum rates. An employee cannot be paid less than these declared rates of pay.... 7-Eleven Franchisees are required to abide by all relevant laws and legislation, including all

workplace laws. It is important that you understand your obligations as an employer to ensure you are compliant with the law.” (SEV.0008.0004.0050).

(vii) as to sub-paragraphs 41(a)(ii) and (iii), says that in respect of the Second Applicant:

- (A) those paragraphs are likely to cause prejudice, embarrassment or delay in the proceedings and fail to disclose a reasonable cause of action, and it objects to pleading to those paragraphs; and
- (B) under cover of this objection, denies the allegations.

PARTICULARS

The Second Applicant makes no claim against 7-Eleven in respect of the Average Store Financials or Individual Store Financials.

(b) as to sub-paragraph 41(b), it:

- (i) admits that prior to the First Applicant entering the Campbelltown Store Franchise Agreement, 7-Eleven provided the First Applicant the 7-Eleven Franchising Code disclosure document for the 2011/2012 year dated 26 October 2012 [SEV.0001.0009.0001] (**Campbelltown Franchising Disclosure**);

PARTICULARS

Mr Davaria signed acknowledgements that the First Applicant had received from 7-Eleven on or about 29 August 2013 a copy of the Campbelltown Franchising Disclosure [SEV.0001.0010.0074] and [SEV.0001.0009.0001 at 0074].

- (ii) in respect of the Second Applicant, it refers to and repeats sub-paragraph 41(aa)(i) above;
- (iii) admits that prior to a Franchisee entering a Franchise Agreement for a Convenience Store during the Relevant Period, 7-Eleven provided the prospective Franchisee the Franchising Code Disclosure as updated from time to time; and
- (iv) otherwise denies the allegations;

- (c) as to sub-paragraph 41(c), it:
- (i) admits that prior to the First Applicant entering the Northmead Store Franchise Agreement, 7-Eleven provided to the First Applicant the 7-Eleven Oilcode disclosure document for the 2013/2014 year dated 26 September 2014 [SEV.0001.0003.0082] (**Northmead Oilcode Disclosure**);

PARTICULARS

Mr Davaria signed acknowledgements that the First Applicant had received from 7-Eleven on or about 29 April 2015 a copy of the Northmead Oilcode Disclosure [SEV.0001.0001.0871] and [SEV.0001.0003.0082 at 0158].

- (ii) admits that prior to a Franchisee entering a Franchise Agreement for a Fuel Store during the Relevant Period, 7-Eleven provided the prospective Franchisee the Oilcode Disclosure as updated from time to time; and
- (iii) otherwise denies the allegations;
- (d) it otherwise ~~does not admit~~denies paragraph 41;
- (e) it says further with respect to the Applicant, prior to entering into the Campbelltown Store Franchise Agreement and prior to making any non-refundable payment, Mr Davaria, as a director of the First Applicant:
- (i) on 18 September 2013, agreed that he had read and understood the contents of a letter from 7-Eleven (**Disclaimer Letter and Waiver and Release**) which relevantly stated:
- (A) *“the amount you pay the present franchisee for goodwill will not be considered by 7-Eleven as part of your investment in the franchise or an asset or operating expense of the franchise business. In this respect, the business will be considered the same as though the franchise was obtained directly from 7-Eleven in which case you would not have been charged anything for goodwill”;*
- (B) *“your goodwill payment will have no effect on your right or the right of 7-Eleven to terminate your Store Agreement pursuant to its terms”;*

- (C) *“economic conditions of the trade area, store conditions, location and other circumstances at such time as you or 7-Eleven terminates your Store Agreement, or it expires, will determine the amount, if any, you may realize as goodwill should you decide to sell your interest in the franchise to another person”*; and
- (D) *“in consideration of 7-Eleven processing your application for a franchise for the captioned location you agree to and hereby waive as against 7-Eleven and release 7-Eleven from any claims or causes of action which you or your heirs, legal representatives, successors or assigns have or which may arise at any time in connection with any goodwill payment to the present franchisee”*;

PARTICULARS

At trial, 7-Eleven will refer to and rely on the full terms and effect of the Disclaimer Letter and Waiver and Release which was in writing from Shayne Howarth, Franchising Manager of 7-Eleven, agreed to by Mr Davaria in writing on 19 September 2013 [SEV.0001.0001.0573].

- (ii) on 18 and 19 September 2013, confirmed that he had received from 7-Eleven and had read and had a reasonable opportunity to understand:
- (A) a copy of the Franchising Code of Conduct;
- (B) the Campbelltown Franchising Disclosure;
- (C) the disclosure document by the Master Franchisor; and
- (D) the Campbelltown Store Agreement in the form in which it is to be executed.

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Acknowledgement dated 18 September 2013
[SEV.0001.0010.0316].

Signed statement of director of Davaria dated 19 September 2013 [SEV.0001.0010.0363].

- (iii) on 18 September 2013, was counselled by 7-Eleven to obtain independent legal advice, independent business advice and independent accounting advice in relation to the Franchise Agreement and he declared that he did obtain the advice that was recommended; and

PARTICULARS

Statement as to Advice dated 18 September 2013
[SEV.0001.0010.0314].

- (iv) on 18 September 2013, had been asked by a legal practitioner and had confirmed that he understood the nature and effect of the Franchise Agreement and the possible consequences of the First Applicant failing to fulfil the obligations under the agreement.

PARTICULARS

Certificate of Independent Legal Advice dated 18 September 2013 [SEV.0001.0010.0308].

42 As to paragraph 42, it:

- (a) admits that each version of the 7-Eleven Brochure published in the period 20 February 2012 to about April 2016, included the statements referred to in subparagraphs 42(a) to 42(f) of the FASOC;
- (b) otherwise denies the allegations in paragraph 42; and
- (c) says further that each version of the 7-Eleven Brochure published in the period 20 February 2012 to about April 2016, also stated *inter alia*:
 - (i) *“Payroll services – although many franchised 7-Eleven stores are family operated, or run with a business partner, it is usually necessary to employ additional part time and full time assistants. You will be responsible for the hiring of employees and for all payroll expenses”* (Item 4);
 - (ii) *“...From your daily banking, 7-Eleven pays for all approved operating expenses and merchandise purchases that you authorise”* (Item 5);
 - (iii) *“Store Agreement – the typical term of the 7-Eleven Store Agreement is 10 years, unless limited by an earlier expiry of the property lease”* (Page 5);

- (iv) *“Initial Payment for Stock – in addition to the franchise fee and goodwill payment, the incoming franchisee is required to purchase the existing merchandise stock in the store. Financing for part of the purchase can be provided by 7-Eleven, or an outside finance source can be sought. Financing by 7-Eleven is termed the “Open Account” (Page 5);*
- (v) *“Financing – you are free at any time to obtain financing for the operation of the business from any source you choose...the amount financed fluctuates each accounting period based on sales, inventory, purchases, operating expenses and withdrawals from the store’s “Open Account”. The annual interest is 1% over the major banks’ Indicator Lending Rate calculated and charged each accounting period.” (Page 5);*
- (vi) *“Ongoing Fees – each accounting period a 7-Eleven store franchisee pays an ongoing fee to 7-Eleven for the licence of the trade mark and system, the licence of the facilities and continuing back up service. The 7-Eleven charge for a store is currently 57% of the gross profit dollars generated from merchandise sales of the store.” (Page 6);*
- (vii) *“7-Eleven receives 57% of the gross profit to pay for property, building rent and outgoings; equipment rent; utilities (heating/cooling/light and water); specified maintenance; bookkeeping; stocktaking; financial reports; merchandising; product selection and price recommendations; point of sale materials; general business advisory assistance; insurance for certain losses; and advertising at 7-Eleven’s discretion.” (Page 6); and*
- (viii) *“A franchisee receives 43% of the gross profit to pay for payroll; workers compensation and superannuation; telephone; business licence, permit and taxes; cleaning services; landscaping and security expenses; cash variation; bad merchandise; inventory variation; miscellaneous store expenses and store supplies.” (Page 6).*

43 As to paragraph 43, it says:

- (a) in respect of the Campbelltown Franchising Disclosure, subject to reference to the full terms and effect of the Campbelltown Franchising Disclosure at trial, it:
 - (i) admits that it included the statement: *“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 provided to*

franchisees by suppliers and which are disclosed at paragraph 12 of this document” [Clause 9.1(j)];

- (ii) denies that it included the statement referred to at sub-paragraph 43(b) of the FASOC;
- (iii) admits that it included the statement: *“[7-Eleven] collects and administers marketing funds paid to it by suppliers 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 by them from 7-Eleven Stores as part of their franchised business in accordance with the supply terms [7-Eleven] negotiates with the vendors in relation to their supply of goods and services to its franchise network. [7-Eleven] accounts for the money it so collects and applies that money first for the production and supply of point of sale, advertising and promotional material based on its marketing spend for the appropriate financial year. Any remaining money is applied to reduce the cost of goods and shared as part of the Gross Profit in accordance with the Store Agreement. Where the cost of the marketing and promotional material exceeds in any year the amount collected by [7-Eleven] in the fund, [7-Eleven] contributes that additional amount” [Clause 12.1(a)];*
- (iv) admits that it included the statement: *“The Franchisees do not have to directly contribute to the fund. Their only contribution is as described in above paragraph 12.1(a)” [Clause 12.1(c)];*
- (v) admits that it included the statement referred to at sub-paragraph 43(e) of the FASOC [Clause 12.1(h)];
- (vi) admits that it included the statement substantially in the form referred to at sub-paragraph 43(f) of the FASOC [Clause 19]; and
- (vii) says further that the Campbelltown Franchising Disclosure also included the following statements:
 - (A) in Clause 1.1(e), which stated:

“The Disclosure Document contains some of the information you need in order to make an informed decision about whether to enter into a Franchise Agreement.

Entering into a Franchise Agreement is a serious undertaking. Franchising is a business and, like any business, the franchise (or franchisor) could fail during the franchise term. This could have consequences for the franchisee.

A franchise agreement is legally binding on you if you sign it.

You are entitled to a waiting period of 14 days before you enter into this agreement.

If this is a new franchise agreement (not a renewal, extension, extension of the scope or transfer of an agreement), you will be entitled to a 7 day "cooling off" period after signing the agreement, during which you may terminate the agreement.

If you decide to terminate the agreement during the cooling off period, the Franchisor, must, within 14 days return all payments (whether of money or of other valuable consideration) made by you to the Franchisor under the agreement (Store Agreement). However, the Franchisor may deduct from this amount the Franchisor's reasonable expenses, if the expenses or their method of calculation have been set out in the agreement.

Take your time, read all the documents carefully, talk to other Franchisees and assess your financial resources and capabilities to deal with the requirements of the franchise business.

You should make your own enquiries about the franchise and about the business of the Franchise.

You should get independent legal, accounting and business advice before signing the Franchise Agreement.

It is prudent to prepare a business plan and projections for profit and cashflow.

You should also consider educational courses particularly if you have not operated a business before."

(B) in Clause 12.1(h), which stated:

“In the 2011-2012 financial year the merchandise suppliers to the franchise network contributed \$13,196,333 to the fund. The Franchisor contributed in the same year, a further \$3,714,387 to the fund. The fund was used in the entirety during that financial year for the payment of the costs of advertising and point of sale marketing material used in the 7-Eleven Stores.”

(C) in Clause 12.1(j), which stated:

“The Franchisor agrees, to spend the proceeds of the fund on the costs of the production and supply of point of sale promotional, advertising, marketing and other material, including all costs associated with such production and supply, promoting its System within and across its network some of which will directly relate to the Franchisee’s business and some of which will relate to the franchise network generally.”

(D) in Clause 13.6A, which stated, among other things:

In the conduct of the franchise business (as with the operation of any business) the Franchisee will be required to make payments of a recurring nature to persons other than the Franchisor or an associate of the Franchisor including payments for the purchase of stock and in respect of staffing and other operational expenses.... The extent to which such payments will need to be made will vary from one franchisee business to another and will be directly affected or influenced by the size and turnover of each Store and the business management practices adopted by the Franchisee.

Particulars of these type of payments on an annualised basis which are in the knowledge of, or are reasonably foreseeable by the Franchisor (but which do not necessarily represent the full extent of payments which might be made in any particular case) and the amounts or range which may apply are set out in the below table:

Description of Payment	Amount	To Whom Payable	When Payable	Refundable
Staffing (including the officers and	\$170,000 to \$350,000	Franchisee’s employees	Generally weekly	No

shareholders of the franchisee)				
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- (E) in the Independent auditor's (PWC) report to the directors of 7-Eleven Stores Pty Ltd dated 26 October 2012 and annexed to the Campbelltown Franchising Disclosure, which report included a 'Report on the marketing contribution and expenditure statement' which stated:

"In our opinion, the accompanying Statement presents fairly, in all material respects:

(a) the Marketing contribution of \$13,196,333 contributed by merchandise suppliers and by 7-Eleven Stores Pty Ltd to the network of outlets of which the Company is the franchisor, and

(b) the Point of sale in-store marketing, advertising and promotional expenditure of \$16,910,720."

- (aa) in respect of the South Melbourne Franchising Disclosure, subject to reference to the full terms and effect of the South Melbourne Franchising Disclosure at trial, it refers to and repeats sub-paragraph 43(a) above, which applies *mutatis mutandis* to the South Melbourne Franchising Disclosure;
- (b) admits that the Franchising Code Disclosure dated 30 October 2015 [SEV.0001.0009.0160] provided to the First Applicant on or about 6 November 2015 (**Campbelltown Variation Franchising Disclosure**) included the statements referred to at sub-paragraphs 43(a), 43(b), 43(c), 43(d), 43(e) and 43(f) of the FASOC;
- (ba) admits that the Franchising Code Disclosure provided to the Second Applicant on or about 10 November 2015 [SEV.0062.0001.0331] (**South Melbourne Variation Franchising Disclosure**) included the statements referred to at sub-paragraphs 43(a), 43(b), 43(c), 43(d), 43(e) and 43(f) of the FASOC;
- (c) says that subject to reference to the full terms and effect of the various versions of the Franchising Code Disclosures published during the Relevant Period, that:
- (i) in relation to sub-paragraph 43(a) of the FASOC, it:
- (A) admits that each version of the Franchising Code Disclosure published during the Relevant Period included either;

- (1) the statement referred to at sub-paragraph 43(a) of the FASOC; or
- (2) the statement referred to at sub-paragraph 43(a)(i) above;
- (B) says further that the Franchising Code Disclosure which was in use during the Relevant Period from 27 October 2017 also stated further at Clause 10.1(j): *“The names of the businesses which have provided a rebate in the financial year ending 30 June 2017 are set out below: UNILEVER AUSTRALIA; VILIS CAKES; CEREBOS AUSTRALIA LIMITED; ANSELL HEALTHCARE LTD, CAMPBELL ARNOTTS LIMITED; VITACO HEALTH LTD; PFD FOOD SERVICES PTY LTD; FONTERRA BRANDS; MONDELEZ - SOUTH WHARF TO; SCHWEPPE AUSTRALIA, CEREBOS AUSTRALIA LIMITED, COCA COLA BOTTLERS; PILOT PEN AUSTRALIA PTY L, FERRERO AUSTRALIA PTY LTD, COCA COLA BOTTLERS; FRUCOR BEVERAGES (AUST) P, HEINZ FRESH JUICE; JACK LINK’S AUSTRALIA; JOHN SANDS (AUSTRALIA) LT, HANES BRANDS INC; KETTEN PTY LTD VIC; KEY PHARMACUTICALS, LINDT & SPRUNGLI (AUST) P; NATIONAL FOODS JUICE; NATIONAL FOODS JUICE, LION DAIRY & DRINKS; LIONS DAIRY 7 DRINKS; NATIONAL FOODS AUSTRALIA; NATIONAL FOODS AUSTRALIA; MR DONUT; MR DONUT W.A.; NESTLE AUSTRALIA LTD; PACIFIC DISTRIBUTOR PTY L; AUSTRALIAN OFFICE; PATTIES FOODS LTD; QUALITY BAKERS AUSTRALIA; RECKITT BENCKISER (AUSTRALIA); RED BULL AUSTRALIA; RENEGADE GAS PTY LTD; SKIN HEALTH PTY LTD; SPC ARDMONA OPERATIONS LI, UNILEVER AUSTRALASIA; VALCORP FINE FOODS PTY LT; VILIS CAKES; SNACK BRANDS AUSTRALIA; THE WRIGLEYS CO PTY LTD; THE WRIGLEYS CO PTY LTD; MURRAY GOULBURN; UNILEVER AUSTRALASIA; THE SMITHS SNACK FOOD CO; BALLAQUA PTY LTD TRADING”*
- (ii) in relation to sub-paragraph 43(b) of the FASOC, it:
- (A) denies that the versions of the Franchising Code Disclosure published during the Relevant Period before 28 October 2013,

included the statement referred to at paragraph 43(b) of the FASOC; and

- (B) admits that each version of the Franchising Code Disclosure published from 28 October 2013 during the Relevant Period included the statement substantially in the form referred to at sub-paragraph 43(b) of the FASOC;
- (iii) in relation to sub-paragraph 43(c) of the FASOC, it admits that each version of the Franchising Code Disclosure published during the Relevant Period included:
 - (A) the statement substantially in the form referred to at sub-paragraph 43(c) of the FASOC; or
 - (B) the statement substantially in the form referred to at sub-paragraph 43(a)(iii) above;
- (iv) in relation to sub-paragraph 43(d) of the FASOC, it admits that each version of the Franchising Code Disclosure published during the Relevant Period included either:
 - (A) the statement substantially in the form referred to at sub-paragraph 43(d) of the FASOC; or
 - (B) the statement substantially in the form referred to at sub-paragraph 43(a)(iv) above;
- (v) in relation to sub-paragraph 43(e) of the FASOC, it admits that each version of the Franchising Code Disclosure published during the Relevant Period included the statement referred to at sub-paragraph 43(e) of the FASOC; and
- (vi) in relation to sub-paragraph 43(f) of the FASOC, it:
 - (A) admits that each version of the Franchising Code Disclosure published during the Relevant Period included the statement substantially in the form referred to at sub-paragraph 43(f) of the FASOC;
 - (B) says further that each version of the Franchising Code Disclosure which was in use during the Relevant Period from 29 January

2016 also stated further at Clause 20: “**Important Note** The above financial statements are predominantly based on information as to expenses reported to 7-Eleven by its franchisees. They may not fully or accurately indicate all expenses incurred in the operation of a 7-Eleven franchise. In particular the Payroll expenditure line may not fully and accurately reflect the full labour costs involved in operation of a 7-Eleven franchise as it only includes those costs processed via the Payroll service provided by 7-Eleven and may not include labour payments to directors of the franchisee in the form of dividends or any other payments made outside of the 7-Eleven Payroll system. Please refer to the “Statement regarding Labour Costs” addendum which accompanies the financials. Where a franchise is being acquired further inquiry in relation to actual operational costs and expenditure should be made of the current franchisee”;

PARTICULARS

At trial, 7-Eleven will refer to the full terms and effect of the various versions of the Franchising Code Disclosure published during the Relevant Period which included:

Franchising Code Disclosure dated 28 October 2011
[SEV.0001.0011.0178];

Franchising Code Disclosure dated 26 October 2012
[SEV.0001.0009.0001];

Franchising Code Disclosure dated 28 October 2013
[SEV.0001.0011.0247];

Franchising Code Disclosure dated 22 October 2014
[SEV.0001.0011.0083];

Franchising Code Disclosure dated 30 October 2015
[SEV.0001.0009.0160];

Franchising Code Disclosure dated 29 January 2016
[SEV.0001.0011.0328];

Franchising Code Disclosure dated 12 October 2016
[SEV.0001.0011.0526]; and

Franchising Code Disclosure dated 27 October 2017
[SEV.0001.0010.0370].

(d) otherwise denies paragraph 43.

44 As to paragraph 44, it:

(a) in respect of the Northmead Oilcode Disclosure and the Oilcode Disclosure dated 30 October 2015 [SEV.0001.0003.0166] provided to the First Applicant on or about 6 November 2015 (**Northmead Variation Oilcode Disclosure**), subject to reference to the full terms and effect of the relevant versions of the Oilcode Disclosure at trial:

(i) admits that they included the statement referred to at sub-paragraph 44(a) of the FASOC;

(ii) admits that they included the statement: *“The Supplier collects and administers marketing funds sourced from monies paid to it by suppliers of goods or services to the 7-Eleven stores franchised network (which includes fuel re-selling businesses). 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 those vendors in relation to their supply of goods and services to its franchise network. The Supplier accounts for the money it so collects and expends that money initially on 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 Fuel Re-Selling 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 9.1(j)];

(iii) admits that they included the statement: *“The Retailers do not have to directly contribute to the fund. The source of funding is as described in above Item 12.1 (a)”* [Clause 12.1(c)];

(iv) admits that they included the statements referred to at sub-paragraphs 44(d) and 44(e) of the FASOC;

(v) says that the Northmead Oilcode Disclosure also included the following statements:

(A) in Clause 1.1(d), which stated:

“The Disclosure Document contains some of the information you need in order to make an informed decision about whether to enter into a fuel re-selling agreement.

Entering into a fuel re-selling agreement is a serious undertaking.

You are entitled to a waiting period of 14 days before you enter into the agreement.

If the agreement is a new fuel re-selling agreement (not a renewal, extension or transfer), you will be entitled to a 7 day "cooling off" period after signing the agreement, during which you may terminate the agreement without cost.

Take your time, read all the documents carefully, talk to other fuel re-selling businesses and assess your financial resources and capabilities to deal with the requirements of the fuel re-selling business.

You should make your own enquiries about the agreement and about the business of the agreement.

You should get independent legal, accounting and business advice before signing the fuel re-selling agreement. You should also seek advice on the Federal, State or Territory and local laws that apply to it.

It is often prudent to prepare a business plan and projections for profit and cashflow.

You should also consider educational courses particularly if you have not operated a business before.”

(B) in Clause 12.1(h), which stated:

“In the 2013-2014 financial year the merchandise suppliers to the franchise network contributed \$15,541,830 to the fund. The Supplier contributed, in the same year, a further \$2,792,315 to the fund. The fund was used in its entirety during that financial year for the payment of the costs of advertising and point of sale marketing material used in the 7-Eleven Stores”;

(C) in Clause 12.1(j), which stated:

“The Supplier agrees to spend the proceeds of the fund on the costs of the production and supply of point of sale, advertising and marketing material and other material, including all costs associated with such production and supply, promoting its System within and across its network some of which will directly relate to the Retailer's business and some of which will relate to the Supplier's network generally”;

(D) in the Independent auditor's (PWC) report to the directors of 7-Eleven Stores Pty Ltd dated 26 September 2014 and annexed to the Northmead Oilcode Disclosure, which report included a 'Report on the marketing contribution and expenditure statement' which stated:

“In our opinion, the accompanying Statement presents fairly, in all material respects:

(a) the Marketing contribution of \$15,541,830 contributed by merchandise suppliers and \$2,792,315 by 7-Eleven Stores Pty Ltd to the network of outlets of which the Company is the franchisor (including those outlets which, because they do not retail fuel are not covered by the Oilcode), and

(b) the Point of sale in-store marketing, advertising and promotional expenditure of \$18,334,145.”

(b) says that, subject to reference to the full terms and effect of the various versions of the Oilcode Disclosure published during the Relevant Period, that:

(i) in relation to sub-paragraph 44(a) of the FASOC, it:

- (A) admits that each version of the Oilcode Disclosure published during the Relevant Period before 27 September 2013 included the statement: “*The Supplier does not receive rebates from any supply of goods it makes to Retailers of its branded or proprietary goods, unlike the rebates it receives on goods provided to you, as a Retailer, by suppliers and which are disclosed at paragraph 12 of this document.*” [Clause 9.1(j)]; and
 - (B) admits that each version of the Oilcode Disclosure published during the Relevant Period from 27 September 2013 included the statement referred to at sub-paragraph 44(a) of the FASOC;
- (ii) in relation to sub-paragraph 44(b) of the FASOC, it:
- (A) admits that each version of the Oilcode Disclosure published during the Relevant Period before 27 September 2013 included the statement substantially in the form referred to at sub-paragraph 44(b) of the FASOC; and
 - (B) admits that each version of the Oilcode Disclosure published during the Relevant Period from 27 September 2013 included the statement referred to at sub-paragraph 44(a)(ii) above;
- (iii) in relation to sub-paragraph 44(c) of the FASOC, it:
- (A) admits that each version of the Oilcode Disclosure published during the Relevant Period before 28 September 2012 included the statement substantially in the form referred to at sub-paragraph 44(c) of the FASOC; and
 - (B) admits that each version of the Oilcode Disclosure published during the Relevant Period from 27 September 2013 included the statement referred to at sub-paragraph 44(a)(iii) above;
- (iv) in relation to sub-paragraph 44(d) of the FASOC, it admits that each version of the Oilcode Disclosure published during the Relevant Period included the statement referred to at sub-paragraph 44(d) of the FASOC;
- (v) in relation to sub-paragraph 44(e) of the FASOC, it:

- (A) admits that each version of the Oilcode Disclosure published during the Relevant Period included the statement substantially in the form referred to at sub-paragraph 44(e) of the FASOC; and
- (B) says further that each version of the Oilcode Code Disclosure which was in use during the Relevant Period from 29 January 2016 also stated further at Clause 24: ***Important Note: The above financial statements are predominantly based on information as to expenses reported to 7-Eleven by its retailers. They may not fully or accurately indicate all expenses incurred in the operation of a 7-Eleven fuel re-selling business. In particular the Payroll expenditure line may not fully and accurately reflect the full labour costs involved in operation of a 7-Eleven franchise as it only includes those costs processed via the Payroll service provided by 7-Eleven and may not include labour payments to directors of the Retailer in the form of dividends or any other payments made outside of the 7-Eleven Payroll system. Please refer to the "Statement regarding Labour Costs" addendum which accompanies the financials. Where a fuel re-selling business is being acquired further inquiry in relation to actual operational costs and expenditure should be made of the current Retailer"***;

PARTICULARS

At trial, 7-Eleven will refer to the full terms and effect of the various versions of the Oilcode Disclosure published during the Relevant Period which included:

Oilcode Disclosure dated 28 September 2011
[SEV.0001.0011.0632];

Oilcode Disclosure dated 28 September 2012
[SEV.0001.0011.0001];

Oilcode Disclosure dated 27 September 2013
[SEV.0017.0002.2721];

Oilcode Disclosure dated 26 September 2014
[SEV.0001.0003.0166];

Oilcode Disclosure dated 30 October 2015
[SEV.0001.0003.0166];

Oilcode Disclosure dated 29 January 2016
[SEV.0017.0060.5616];

Oilcode Disclosure dated 23 September 2016
[SEV.0017.0033.9102]; and

Oilcode Disclosure dated 29 September 2017
[SEV.0001.0011.0421].

(c) otherwise denies paragraph 44.

45 As to paragraph 45, it:

(a) admits the allegations in paragraph 45(a);

(b) says in response to sub-paragraph 45(b), it:

(i) admits that clause 14 of the Competition and Consumer (Industry Codes — Oilcode) Regulation 2006 prescribes that a disclosure document is used to:

(A) allow a supplier to give a person adequate information to help the retailer make a reasonably informed decision about an agreement;

(B) give a retailer current information that is relevant to the operation of the retailer's retail business;

(ii) admits that clause 14 of the Competition and Consumer (Industry Codes — Oil) Regulations 2017 prescribes that:

(A) a disclosure document in relation to a fuel re-selling agreement is used to allow a supplier to give: (a) a retailer; or (b) a prospective retailer; or (c) a person to whom the supplier has consented to be the transferee in relation to the agreement; adequate information to help the retailer, prospective retailer or person make a reasonably informed decision about the agreement;

(B) an updated disclosure document in relation to a fuel re-selling agreement is used to give a retailer current information that is relevant to the operation of the retailer's retail business; and

(c) otherwise ~~does not admit~~denies the allegations.

D2.

46 [Not used]

47 [Not used]

48 [Not used]

48A [Not used]

49 [Not used]

D3.

50 [Not used]

51 [Not used]

D4.

52 As to paragraph 52, it:

- (a) refers to and repeats paragraphs 41, 42 and 43 above; and
- (b) otherwise denies the allegations in paragraph 52.

53 As to paragraph 53, it:

- (a) refers to and repeats paragraph 52; and
- (b) otherwise denies the allegation in paragraph 53.

54 As to paragraph 54, it:

- (a) refers to and repeats paragraphs 3(b), 52 and 53 above;
- (b) admits that it provided the First Applicant with the 2012 Average Store Financials in trade or commerce within the meaning of s 18 of the ACL;
- (c) admits that it provided the Average Store Financials to prospective Franchisees during the Relevant Period in trade or commerce within the meaning of s 18 of the ACL;

- (d) denies that section 52 of the TPA was applicable to conduct during the Relevant Period; and
- (e) ~~objects to pleading to the allegations concerning the ASIC Act as no relief is sought against 7-Eleven under the ASIC Act and subject to this objection~~ otherwise denies paragraph 54.

55 As to paragraph 55, it:

- (a) refers to and repeats paragraphs 52 to 54 above; and
- (b) otherwise denies the allegations in paragraph 55.

56 It denies the allegations in paragraph 56.

D5.

57 As to paragraph 57, it:

- (a) refers to and repeats paragraphs 41, 42 and 43 above;
- (b) otherwise denies the allegation in paragraph 57.

58 As to paragraph 58, it:

- (a) refers to and repeats paragraph 57 above; and
- (b) otherwise denies the allegation in paragraph 58.

59 As to paragraph 59, it:

- (a) refers to and repeats paragraphs 57 and 58 above;
- (b) admits that it provided the First Applicant with the 2012 Average Store Financials in trade or commerce within the meaning of s 18 of the ACL;
- (c) admits that it provided the Average Store Financials to prospective Franchisees during the Relevant Period in trade or commerce within the meaning of s 18 of the ACL;
- (d) denies that section 52 of the TPA was applicable to conduct during the Relevant Period; and
- (e) otherwise denies paragraph 59.

60 As to paragraph 60, it:

- (a) refers to and repeats paragraph 57 to 59 above;
- (b) denies that section 51A of the TPA was applicable to conduct during the Relevant Period; and
- (c) otherwise denies the allegation in paragraph 60.

61 As to paragraph 61, it:

- (a) refers to and repeats paragraphs 57 to 60 above; and
- (b) otherwise denies the allegations in paragraph 61.

62 It denies the allegations in paragraph 62.

D6.

63 [not used]

D7.

64 As to paragraph 64, it:

- (a) admits that the Franchising Codes require that a disclosure document under those respective Codes must include the information referred to in paragraph 64 of the FASOC;
- (b) admits that Clause 15(1) of the Oilcode requires that if a disclosure document relates to a fuel re-selling agreement that specifies a duration of at least 5 years, the disclosure document must include the information referred to in paragraph 64 of the FASOC; and
- (c) otherwise denies paragraph 64.

65 It admits the allegations in paragraph 65.

66 As to paragraph 66, it:

- (a) refers to and repeats paragraphs 43 and 44 above; and
- (b) otherwise denies paragraph 66.

67 As to paragraph 67, it:

(a) says that paragraph 67 is vague and ambiguous, is likely to cause prejudice, embarrassment or delay in the proceedings and fails to disclose a reasonable cause of action, and it objects to pleading to it; and

(b) under cover of that objection, denies the allegations.

68 As to paragraph 68, it:

(a) refers to and repeats paragraphs 41, 43 and 44 above; and

(b) otherwise denies paragraph 68.

69 As to paragraph 69, it:

(a) refers to and repeats paragraph 68 above;

(b) otherwise denies paragraph 69; and

(c) says further or alternatively, if the Advertising Fund Representation was made to the Applicants and or the Franchisees (which is denied), to the extent that the Advertising Fund Representation concerned future matters, at the time it was made 7-Eleven had reasonable grounds for making the representations referred to at sub-paragraphs 43(c), 44(b) and 44(c) of the FASOC.

PARTICULARS

Under the Campbelltown Store Franchise Agreement, the Northmead Store Franchise Agreement, the South Melbourne Store Franchise Agreement and the Franchisee Agreements, neither the Applicants nor the Franchisees had an obligation to make any direct periodic or other contributions to any marketing or other co-operative fund.

70 As to paragraph 70, it:

(a) refers to and repeats paragraphs 68 and 69 above;

(b) admits that it provided the First Applicant with the Campbelltown Franchising Disclosure, the Campbelltown Variation Franchising Disclosure, the Northmead Oilcode Disclosure and the Northmead Variation Oilcode Disclosure in trade or commerce within the meaning of s 18 of the ACL;

- (ba) admits that it provided the Second Applicant with the South Melbourne Franchising Disclosure in trade or commerce within the meaning of s 18 of the ACL;
- (c) admits that it provided the Franchising Code Disclosure and the Oilcode Disclosure to prospective Franchisees during the Relevant Period in trade or commerce within the meaning of s 18 of the ACL;
- (d) denies that section 52 of the TPA was applicable to conduct during the Relevant Period; and
- (e) otherwise denies paragraph 70.

71 As to paragraph 71, it:

- (a) says that paragraph 71 is vague and ambiguous, is likely to cause prejudice, embarrassment or delay in the proceedings and fails to disclose a reasonable cause of action, and it objects to pleading to it; and
- (b) under cover of that objection, denies the allegations.

72 It denies the allegations in paragraph 72.

D8.

73 As to paragraph 73, it:

- (a) refers to and repeats paragraphs 41 and 42 above; and
- (b) otherwise denies paragraph 73.

74 As to paragraph 74, it:

- (a) refers to and repeats paragraph 73 above;
- (b) otherwise denies paragraph 74; and
- (c) says further or alternatively, if the 7-Eleven Supplier Representation was made to the Applicants and/or some or all of the Franchisees (which is denied), to the extent that the 7-Eleven Supplier Representation concerned future matters, 7-Eleven had reasonable grounds for making the representation referred to at subparagraphs 42(f) of the FASOC at the time it was made.

PARTICULARS

7-Eleven refers to and repeats the matters alleged at sub-paragraphs 25(c), 28(a) and 28(e) above and the particulars subjoined thereto.

75 As to paragraph 75, it:

- (a) refers to and repeats paragraphs 41, 42 73 and 74 above;
- (b) admits that it provided the Applicants with the Applicants' 7-Eleven Brochure in trade or commerce within the meaning of s 18 of the ACL;
- (c) admits that to the extent that it provided the 7-Eleven Brochure to prospective Franchisees during the Relevant Period, it did so in trade or commerce within the meaning of s 18 of the ACL;
- (d) denies that section 52 of the TPA was applicable to conduct during the Relevant Period; and
- (e) otherwise denies paragraph 75.

75A As to paragraph 75A, it:

- (f) refers to and repeats paragraphs 25 and 28 above; and
- (g) otherwise denies paragraph 75A.

76 It denies the allegations in paragraph 76.

D9.

77 It denies the allegations in paragraph 77.

77A As to paragraph 77A, it:

- (a) refers to and repeats sub-paragraph 16(ba) above;
- (b) otherwise denies paragraph 77A; and
- (c) says further or alternatively, if the Volume Pricing Representation was made to the Applicants and/or some or all of the Franchisees (which is denied), to the extent that the Volume Pricing Representation concerned future matters, 7-Eleven had reasonable grounds for making that representation at the time it was made.

PARTICULARS

7-Eleven refers to and repeats the matters alleged at sub-paragraphs 25(a) ~~to, 25(d),~~ 25(da)(iii), 25(3f)(iii), 25(e)(iv)(B) and 28(a) ~~and 28(b)~~ above.

77B It denies the allegations in paragraph 77B.

77C It denies the allegations in paragraph 77C.

77D It denies the allegations in paragraph 77D.

D10.

78 As to paragraph 78, it:

- (a) refers to and repeats paragraph 41 above; and
- (b) otherwise denies paragraph 78.

79 As to paragraph 79, it:

- (a) refers to and repeats paragraph 78 above; and
- (b) otherwise denies paragraph 79.

80 As to paragraph 80, it:

- (a) refers to and repeats paragraphs 78 and 79 above;
- (b) admits that it provided the Campbelltown Store Financials to the First Applicant in trade or commerce within the meaning of s 18 of the ACL; and
- (c) otherwise denies paragraph 80.

81 As to paragraph 81, it:

- (a) refers to and repeats paragraph 41 and 80 above; and
- (b) otherwise denies paragraph 81.

82 It denies the allegations in paragraph 82.

D11.

83 As to paragraph 83, it:

- (a) says in the form pleaded the phrase “for an unreasonable or unsociable number of hours each week” in paragraph 83(b) is vague and embarrassing and it objects to pleading to it;
- (b) under cover of that objection, refers to and repeats paragraph 41 and 52 above; and
- (c) otherwise denies paragraph 83.

84 As to paragraph 84, it:

- (a) refers to and repeats paragraph 83 above; and
- (b) otherwise denies paragraph 84.

85 As to paragraph 85, it:

- (a) refers to and repeats paragraphs 83 and 84 above;
- (b) admits that it provided the Campbelltown Store Financials to the First Applicant in trade or commerce within the meaning of s 18 of the ACL; and
- (c) otherwise denies paragraph 85.

86 As to paragraph 86, it:

- (a) refers to and repeats paragraph 85 above; and
- (b) otherwise denies paragraph 86.

87 As to paragraph 87, it says that it is vague and embarrassing and it objects to pleading to it, and under cover of that objection, says:

- (a) that it refers to and repeats paragraphs 81 and 83 above; and
- (b) otherwise denies paragraph 87.

88 It denies the allegations in paragraph 88.

D12.

89 As to paragraph 89, it:

- (a) refers to and repeats paragraph 41, 78 and 88 above; and
- (b) otherwise denies paragraph 89.

D13.

90 As to paragraph 90, it:

- (a) admits that between about 28 August 2015 and 2 September 2015, Fairfax Media published a number of articles which alleged that there was widespread wage underpayment by 7-Eleven franchisees; and
- (b) otherwise denies paragraph 90.

91 As to paragraph 91, it:

- (a) admits that on about 31 August 2015, the ABC's Four Corners program screened an episode entitled "7-Eleven: the Price of Convenience" which alleged there was widespread wage underpayment by franchisees across many 7-Eleven stores; and
- (b) otherwise denies paragraph 91.

92 As to paragraph 92, it refers to and repeats paragraphs 90 and 91 above and:

- (a) says in answer to sub-paragraph 92(a), it:

(ia) in response to sub-paragraph (ia):

(A) it admits that in about September 2015, it conducted an analysis of the forecast costs of wages/other entitlements, superannuation and workers compensation (to provide a total "Payroll" amount), to fuel and non-fuel stores within the 7-Eleven network operating on different rosters on the basis that every hour worked at the store (irrespective of who worked, being the director or employees), was "fully costed", using various combinations of permanent and/or casual staff (Optimal Payroll Model):

(B) otherwise denies sub-paragraph (ia):

(ib) in response to sub-paragraph (ib):

(A) denies sub-paragraph 92(a)(ia):

(B) says further that, the Optimal Payroll Model estimated that:

(1) the projected annual payroll costs of operating a fuel site on an optimal roster, using a combination of permanent and casual labour, for a Fuel Store was about \$225,000;

(2) the projected annual payroll costs of operating a non-fuel site on an optimal roster, using a combination of permanent and casual labour, for a Non-Fuel Store was about \$254,000;

PARTICULARS

The Optimal Payroll Model was contained in spreadsheets which had been prepared with the assistance of ER Strategies, including [SEV.0234.0005.0023]; and [SEV.0166.0003.0494].

(i) in response to sub-paragraph (i):

~~(i)~~(A) refers to and repeats sub-paragraph 8(b) above;

~~(ii)~~(B) admits that paragraph (j) of Exhibit D of the Franchise Agreement provided that the *Total Gross Income* (as defined in Exhibit E) for an Accounting Period shall be at least equal to \$328.77 per day (the equivalent of \$120,000 a year) multiplied by the number of days in such Accounting Period;

~~(iii)~~(C) admits that the Variation Agreement amended the Franchise Agreement to delete paragraph (j) of Exhibit D, effective from 1 July 2015, and in its place provided that *Gross Income (Merchandise)* (as defined in Exhibit E) was:

~~(A)~~(1) \$849.31 per day (equivalent to \$310,000 per calendar year) multiplied by the number of days in such Accounting Period for Fuel Stores; and

~~(B)~~(2) \$931.50 per day (equivalent to \$340,000 per calendar year) multiplied by the number of days in such Accounting Period for Non-Fuel Stores;

(D) admits that in about August 2016, an internal review noted that the majority of the financial injection resulting to franchisees from the Variation Agreement should be attributable to increases in payroll expenses:

PARTICULARS

Submission to Board of Directors dated August 2016
[SEV.0235.0007.3347 at 3428].

~~(iv)~~ (E) otherwise denies sub-paragraph 92(a);

(b) says in answer to sub-paragraph 92(b), it:

- (i) admits that prior to a Franchisee entering into a Franchise Agreement during the Relevant Period (including after August 2015), 7-Eleven provided prospective Franchisees (including the First Applicant and the Second Applicant) information on the relevant minimum wage rates for the relevant format and location of the Store;

PARTICULARS

7-Eleven refers to and repeats the matters at paragraphs 41(a)(i)(D) and 41(aa)(i)(C) above.

- (ii) admits that, during the Relevant Period (including after August 2015), 7-Eleven provided prospective Franchisees information about the minimum staffing requirements for operating the Store;

PARTICULARS

7-Eleven refers to and repeats the matters at sub-paragraphs 106(l)(ii)(B) and 106(l)(iii)(B) below.

- (iii) admits that in about May 2016, it commenced providing prospective Franchisees with a detailed labour planning worksheet model which included the relevant applicable wages and enabled the franchisee to model the range of expected wage costs required to operate the type of 7-Eleven store;
- (iv) admits that prior to a Franchisee entering a Franchise Agreement during the Relevant Period (including after August 2015), if the Store was an existing Store, 7-Eleven provided the prospective Franchisee income and

expense statements and a balance sheet for the relevant Store for up to the last 3 financial years; and

(v) otherwise denies sub-paragraph 92(b);

(ba) says in answer to sub-paragraph 92(ba), it:

(i) admits that, during the Relevant Period (including after August 2015), 7-Eleven reviewed business plans, including projected financials and rosters provided by prospective Franchisees and provided feedback to Franchisees about the business plan, prior to approving the Franchisee's application to purchase a Store;

PARTICULARS

The review was conducted by 7-Eleven's franchising development team, regional managers and state managers, who provided feedback to prospective Franchisees in meetings with prospective franchisees, and included from about October 2015 a review of the projected financials by a representative of 7-Eleven's finance team.

(ii) otherwise denies sub-paragraph 92(ba):

(c) says in answer to sub-paragraph 92(c), it:

(ia) in response to sub-paragraph 92(c)(ia):

(A) admits that a franchising review was conducted by management in response to a 2016 request from the 7-Eleven Board, which review resulted in a submission to the 7-Eleven Board;

(B) admits that the submission contained statements to the effect alleged at sub-paragraphs 92(c)(ia)(1), (3) and (4); and

(C) otherwise denies sub-paragraph 92(c)(ia):

(i) in response to sub-paragraph 92(c)(i);

(A) refers to and repeats 40C above; and

(B) admits that it ceased to provide the Pre-2015 Goodwill Price Advice in about ~~September~~ November 2015;

(ii) in response to ~~it denies~~ sub-paragraph 92(c)(ii);

(A) it admits that from about August 2016, it has informed some Franchisees who sought to sell their Store and some prospective Franchisees, that in order to determine goodwill, 7-Eleven recommends that the Franchisee or prospective Franchisee should obtain an independent valuation; and

(B) otherwise denies sub-paragraph 92(c)(ii);

~~(ii)~~(iii) in response to sub-paragraph 92(c)(iii);

(A) denies sub-paragraph 92(c)(~~iii~~)(1); and

(B) admits sub-paragraph 92(c)(~~iii~~)(2);

(iv) in response to sub-paragraph 92(c)(iv), says it is ambiguous and embarrassing and therefore liable to be struck out under r 16.02(2)(c) and (d) of the Federal Court Rules 2011, and under cover of that objection denies the allegation.

(d) says in answer to sub-paragraph 92(d), it is ambiguous and embarrassing and therefore liable to be struck out under r 16.02(2)(c) and (d) of the Federal Court Rules 2011, and under cover of that objection:-

(i) refers to and repeats paragraphs 40C, 40CA, 40CB and sub-paragraphs (b) and (c) above; and

(ii) otherwise denies sub-paragraph 92(d);

(da) says in answer to sub-paragraph 92(da), it:

(i) refers to and repeats sub-paragraph 92(ba) above;

~~(iii)~~(ii) otherwise denies sub-paragraph 92(da);

(e) says in answer to sub-paragraph 92(e), it:

(i) admits that 7-Eleven has not exercised options to extend, or sought renewal of, Leases of some existing Stores in circumstances where the Stores have not had significant decreases in merchandise sales or Store IN;

- (ii) refers to and repeats 92(a)(ii) and (iii) above;
- (iii) otherwise denies sub-paragraph 92(e); and
- (iv) says further there are multiple factors that 7-Eleven takes into account when deciding whether to exercise an option to extend, or renew the Lease of existing Stores; and

PARTICULARS

The factors typically taken into account by 7-Eleven when deciding whether to exercise an option to extend or seek renewal of a Lease of an existing Store included, depending on the circumstances of each Store: the previous financial performance of the store including merchandise sales, fuel sales volume, fuel margin, franchisee profitability, merchandise gross profit percentage; projected sales growth; projected Store contribution to 7-Eleven's profit and cashflow over any extended term of the lease; current outgoings on the Store; the new negotiated rent; the projected rent increases or reductions; recent capital expenditure on the Store; any required or expected refurbishment or other capital expenditure for the Store and any agreed lessor contribution to that expenditure; the renewal period available; any make good costs at the end of the lease; the Store site position, environment and characteristics including the size of Store, passing trade, competitor activity and nearby developments; and market rent for comparable properties.

(ea) says in answer to sub-paragraph 92(ea), it:

(i) in answer to sub-paragraph 92(ea)(i), admits that:

(A) during the Relevant Period, 7-Eleven has acquired existing Stores and 7-Eleven and Convenience Holdings Pty Ltd, a related entity of 7-Eleven, opened new Stores; and

(B) during the Relevant Period 7-Eleven and Convenience Holdings Pty Ltd have operated some Stores that they have acquired or

opened as 7-Eleven branded Stores, which Stores are known within 7-Eleven as “CoHo” Stores;

(ii) in answer to sub-paragraph 92(ea)(ii), admits that it has offered to buy back franchisee Stores at a reasonable current valuation;

(iii) in answer to sub-paragraph 92(ea)(iii), admits that it has advertised and offered Corporate Stores for sale, with a franchise fee based on 7-Eleven’s assessment of the Store’s market value; and

~~(iv)~~ otherwise denies sub-paragraph 92(ea);

(f) says without the provision of particulars, sub-paragraph 92(f) is vague and embarrassing and it objects to pleading to it;

(i) under cover of that objection, it:

(A) refers to and repeats paragraphs 90 and 91 above; and

(B) otherwise denies paragraph 92(f).

93 As to paragraph 93, it:

(a) refers to and repeats paragraph 92(ea) above;

(b) admits that it sought, and in many cases obtained, releases from franchisees in the course of acquiring Stores from franchisees; and [not used]

(c) otherwise denies paragraph 93.

~~9394~~ It denies paragraph 94.

94A As to paragraph 94A, it:

(a) admits sub-paragraph 94A(a);

(b) says in response to sub-paragraph 94A(b):

~~(i) — says in the absence of proper particulars, paragraph 94A(b) is vague and embarrassing and it objects to pleading to it; and~~

~~(i) — under cover of that objection, it does not admit~~ denies paragraph 94A(b); and

(ii) says further on 8 January 2016, the First Applicant requested 7-Eleven to update the advertised goodwill price for the Campbelltown Store to \$390,000:

PARTICULARS

Email from Paresh Davaria to Shayne Boogaard dated 8 January 2017 [SEV.0013.0022.6557]:

(c) says in response to sub-paragraph 94A(c):

~~(i) says in the absence of proper particulars, paragraph 94A(c) is vague and embarrassing and it objects to pleading to it;~~

~~(ii)(i) under cover of that objection it does not admit~~denies sub-paragraph 94A(c); and

~~(iii)(ii)~~ (ii) says further the Campbelltown Store was included in the NSW Franchise Opportunities List for sale from at least October 2015 listed for a Goodwill Price of \$530,000.

94B As to paragraph 94B, it:

(a) says in the absence of proper particulars, paragraph 94B is vague and embarrassing and it objects to pleading to it; ~~and~~

(b) under cover of this objection, it denies paragraph 94B; and

(c) says further that:

(i) as at 2017, 7-Eleven had not made a decision whether to elect to exercise its option to extend the Lease of the Campbelltown Store;

(ii) on about 23 July 2018, 7-Eleven exercised its option to extend the term of the Lease of the Campbelltown Store from 1 April 2019 to 21 March 2024 (with an option thereafter of 5 years); and

(iii) in about March 2020, the term of the Lease of the Campbelltown Store was extended to 31 March 2029.

PARTICULARS

[Letter from David Llewellyn to LJ Hooker Commercial Campbelltown dated 23 July 2018 \[SEV.0231.0001.0064\].](#)

[Variation of Lease AP943803W registered on or about 9 March 2020 \[SEV.0088.0001.0423\].](#)

94C As to paragraph 94C, it:

- (a) refers to and repeats paragraphs 94B and 92(e)(iii) above;
- (b) admits that there was an increase in merchandise sales for the Campbelltown Store after the First Applicant commenced to operate it;

PARTICULARS

The merchandise sales for the Campbelltown Store were:

\$1,055,963, for the 2013 financial year;

\$712,473 for the last 8 months of 2014 financial year (after the First Applicant commenced operation);

\$1,488,406 for the 2015 financial year; and

\$1,630,209 for the 2016 financial year.

- (c) otherwise denies paragraph 94C.

94D As to paragraph 94D, it:

- (a) refers to and repeats paragraphs 94A to 94C above; and
- (b) denies paragraph 94D.

94E As to paragraph 94E, it:

- (a) refers to and repeats paragraphs 23 and 94A to 94D above; and
- (b) denies paragraph 94E.

9495 As to paragraph 95, it:

- (a) denies paragraph 95; and

- (b) says further that any loss and damage suffered by:
- (i) the First Applicant (which is denied) was diminished or eliminated by the increased Gross Income (Merchandise) Amount receivable, and decreased the 7-Eleven Charge payable, by the First Applicant under the Campbelltown Store Variation Agreement and Northmead Store Variation Agreement; and

PARTICULARS

The Gross Income (Merchandise) Amount effected under the Campbelltown Store Variation Agreement was further increased to:

- (i) \$347,200 effective 1 July 2016;
- (ii) \$362,200 effective 1 January 2017;
- (iii) \$374,200 effective from 1 July 2017;
- (iv) \$387,300 effective from 1 July 2018; and
- (v) \$399,000 effective from 1 July 2019.

The Gross Income (Merchandise) Amount effected under the Northmead Store Variation Agreement was further increased to:

- (i) \$316,600 effective 1 July 2016;
- (ii) \$331,600 effective 1 January 2017;
- (iii) \$342,600 effective from 1 July 2017;
- (iv) \$354,600 effective from 1 July 2018; and
- (v) \$365,300 effective from 1 July 2019.

- (ii) the Second Applicant (which is denied) was diminished or eliminated by:
- (A) the increased Gross Income (Merchandise) Amount receivable, and decreased 7-Eleven Charge payable, by the Second Applicant under the South Melbourne Store Variation Agreement; and

PARTICULARS

The Gross Income (Merchandise) Amount effected under the South Melbourne Store Variation Agreement was further increased to:

- (i) \$347,200 effective 1 July 2016;
 - (ii) \$362,200 effective from 1 January 2017;
 - (iii) \$374,200 effective from 1 July 2017;
 - (iv) \$387,300 effective from 1 July 2018; and
 - (v) \$399,000 effective from 1 July 2019;
- (B) further income support paid by 7-Eleven to the Second Applicant from 1 April 2016.

PARTICULARS

7-Eleven paid income support to the Second Applicant of:

- (i) \$3,000 per calendar month from 1 April 2016;
- (ii) \$2,000 per calendar month from 3 March 2017;
- (iii) \$3,500 per calendar month from 1 January 2018;
- (iv) \$3,000 for the month of November 2019; and
- (v) \$2,500 per month from December 2019.

9596 It denies paragraph 96 and says further that any loss and damage suffered by the Franchisees (which is denied) was diminished or eliminated by the increased Gross Income (Merchandise) Amount receivable, and decreased 7-Eleven Charge payable, by Franchisees under the Variation Agreements.

9697 As to paragraph 97, it:

- (a) refers to and repeats paragraphs 16(ba), 40E, 41, 42, 43, 44, 52, 57, 68, 73, 78 and 83 above; and
- (b) otherwise denies paragraph 97.

~~97~~98 As to paragraph 98, it:

- (a) refers to and repeats paragraph 97 above; and
- (b) otherwise denies paragraph 98.

~~98~~99 As to paragraph 99, it:

- (a) refers to and repeats paragraph 98 above; and
- (b) otherwise denies paragraph 99.

~~99~~100 It denies the allegations in paragraph 100.

~~100~~101 It denies the allegations in paragraph 101.

101A As to paragraph 101A, it:

- (a) refers to and repeats paragraphs 16(ba), 40E, 41, 42, 43, 68, 73 and 77 above;
and
- (b) otherwise denies paragraph 101A.

101B It denies the allegations in paragraph 101B.

~~101~~102 As to paragraph 102, it:

- (a) denies the allegations; and
- (b) say further that the particular defences available in relation to the claim of the Franchisees cannot be determined until after that Franchisee has been identified.

~~102~~103 As to paragraph 103, it:

- (c) denies the allegations; and
- (a) refers to and repeats paragraph 102 above.

~~103~~104 As to paragraph 104, it:

- (d) denies the allegations; and
- (a) refers to and repeats paragraph 102 above.

~~104~~105 As to paragraph 105, it:

- (e) denies the allegations; and
- (a) refers to and repeats paragraph 102 above.

105A It says in further response to paragraphs 41 to 105 of the FASOC:

- (a) that any Franchisee who entered into a Franchise Agreement before 20 February 2012 (or, in respect of the Goodwill Value Representation Contravention, before 2 March 2014) is statute barred from maintaining a cause of action:

(i) under section 237 or 243 of the ACL pursuant to sub-section 237(3) of the ACL; and

~~(i)~~(ii) under section 236 ~~or section 243~~ of the ACL pursuant to sub-section 236(2) of the ACL; and

~~(ii)~~(iii) under sections 82 or 87 of the CCA or the TPA pursuant to sub-section 82(2) and 87(1CA) of the TPA or CCA;

- (b) that the Second Applicant is statute barred from maintaining the Goodwill Value Representation Contravention, it having entered into the South Melbourne Store Franchise Agreement on 2 October 2013.

E.

E1.

~~105~~106 As to paragraph 106, it says:

- (a) as to sub-paragraph 106(a):
 - (i) it admits that before 7-Eleven entered into the Franchise Agreements with each Franchisee in relation to a Store during the Relevant Period, it knew:
 - (A) the matters referred to and admitted at paragraphs 6, 7 and 8 above;
 - (B) the terms of the Franchise Agreements referred to and admitted at paragraphs 9 to 22 above;
 - (C) in respect of sales and profit margins:

- (1) the prospective incoming Franchisee's forecast sales and profit margins for a Store if and to the extent that a prospective incoming Franchisee provided such forecasts to 7-Eleven; and
- (2) the historical sales and profit margins of Stores which had previously traded, which figures in the case of previously franchised Stores were known from financial information, data and documents provided to it by the relevant former Franchisees in accordance with Article 20(b) of the Franchise Agreement;

PARTICULARS

7-Eleven refers to and repeats the particulars sub-joined to sub-paragraph 41(a)(v) above.

- (CA) the matters referred to at sub-paragraph 106(a)(iia) of the FASOC;
- (D) in respect of Operating Expenses:
- (1) the prospective incoming Franchisee's forecast Operating Expenses if and to the extent that a prospective incoming Franchisee provided such forecasts to 7-Eleven; and
 - (2) the historical Operating Expenses of Stores which had previously traded, which figures in the case of previously franchised stores were known from financial information, data and documents provided to 7-Eleven by the relevant former Franchisees in accordance with Article 20(b) of the Franchise Agreement;

PARTICULARS

7-Eleven refers to and repeats the particulars sub-joined to sub-paragraph 41(a)(v) above.

- (E) the matters referred to at sub-paragraph 106(a)(v) of the FASOC;
- (F) in respect of payroll, subject to reference to the full terms and effect of the Franchise Agreements at trial, the terms of the

Franchise Agreements referred to at sub-paragraphs 12(a), 12(b) and 12(d) above;

- (G) the matters referred to and admitted at paragraph 22 above;
 - (H) the matters referred to at sub-paragraph 106(a)(viii) of the FASOC;
- (ii) it admits that before 7-Eleven entered into the Campbelltown Store Agreement and the Northmead Store Agreement with the First Applicant, it knew:
- (A) the matters referred to at sub-paragraph 106(a)(i)(A) above;
 - (B) the matters referred to at sub-paragraph 106(a)(i)(B) above;
 - (C) in respect of sales and profit margins:
 - (1) the historical sales and profit margins of the Campbelltown Store and the Northmead Store, which figures were known from financial information, data and documents provided to 7-Eleven by the relevant former Franchisees in accordance with Article 20(b) of the Franchise Agreement;
 - (2) the First Applicant's forecast merchandise sales and gross profit for the Campbelltown Store for one financial year provided to 7-Eleven;

PARTICULARS

The forecast merchandise sales and gross margins were contained in Budget forecast provided by the First Applicant to 7-Eleven by email dated 5 August 2013, together with a Franchise Business Plan and weekly roster [DPL.0001.0001.0023
DPL.0001.0001.0024; DPL.0001.0001.0026;
DPL.0001.0001.0037].

- (3) the First Applicant's forecast merchandise sales and gross profit for the Northmead Store for one financial year provided to 7-Eleven; and

PARTICULARS

The forecast merchandise sales and gross margins were contained in the Budget forecast provided by the First Applicant to 7-Eleven together with a Business Plan and weekly roster dated 25 February 2015. [SEV.0001.0001.0857].

- (4) otherwise denies sub-paragraph 106(a)(iii) in respect of the First Applicant;
- (CA) the matters referred to at sub-paragraph 106(a)(i)(CA) above;
- (D) in respect of Operating Expenses:
 - (1) the historical Operating Expenses of the Campbelltown Store and the Northmead Store, which figures were known from financial information, data and documents provided to 7-Eleven by the relevant former Franchisees in accordance with Article 20(b) of the Franchise Agreement;
 - (2) the First Applicant's forecast Operating Expenses for the Campbelltown Store for one financial year provided to 7-Eleven;

PARTICULARS

The forecast Operating Expenses were contained in the Budget forecast provided by the First Applicant to 7-Eleven by email dated 5 August 2013, together with a Franchise Business Plan and weekly roster. [DPL.0001.0001.0023 DPL.0001.0001.0024; DPL.0001.0001.0026; DPL.0001.0001.0037].

- (3) the First Applicant's forecast Operating Expenses for the Northmead Store for one financial year provided to 7-Eleven; and

PARTICULARS

The forecast Operating Expenses were contained in the Budget forecast provided by the First Applicant

to 7-Eleven together with a Business Plan and weekly roster dated 25 February 2015.

[SEV.0001.0001.0857].

- (4) otherwise denies sub-paragraph 106(a)(iv) in respect of the First Applicant;
- (E) the matters referred to at sub-paragraph 106(a)(i)(E) above;
- (F) the matters referred to at sub-paragraph 106(a)(i)(F) above;
- (G) the matters referred to at sub-paragraph 106(a)(i)(G) above;
- (H) the matters referred to at sub-paragraph 106(a)(i)(H) above;
- (ii) it admits that before 7-Eleven entered into the South Melbourne Store Agreement with the Second Applicant, it knew:
 - (A) the matters referred to at sub-paragraph 106(a)(i)(A) above;
 - (B) the matters referred to at sub-paragraph 106(a)(i)(B) above;
 - (C) in respect of sales and profit margins:
 - (1) the historical sales and profit margins of the South Melbourne Store, which figures were known from financial information, data and documents provided to 7-Eleven by the relevant former Franchisees in accordance with Article 20(b) of the Franchise Agreement;
 - (2) the Second Applicant's forecast merchandise sales and gross profit margins of the South Melbourne Store for one financial year provided to 7-Eleven; and

PARTICULARS

Those forecast sales and profit margins were contained in Annexure A to the "Proposed Business Plan" prepared by the Second Applicant and dated 19 August 2013 [SEV.0062.0001.0001; SEV.0225.0006.7910].

- (3) otherwise denies sub-paragraph 106(a)(iii) in respect of the Second Applicant;
- (CA) the matters referred to at sub-paragraph 106(a)(i)(CA) above;
- (D) in respect of Operating Expenses:
 - (1) the historical Operating Expenses of the South Melbourne Store, which figures were known from financial information, data and documents provided to 7-Eleven by the relevant former Franchisees in accordance with Article 20(b) of the Franchise Agreement;
 - (2) the Second Applicant's forecast *Operating Expenses* of the South Melbourne Store for one financial year provided to 7-Eleven; and

PARTICULARS

Those forecast Operating Expenses were contained in Annexure A to the "Proposed Business Plan" prepared by the Second Applicant and dated 19 August 2013 [SEV.0062.0001.0001; SEV.0225.0006.7910].

- (3) otherwise denies sub-paragraph 106(a)(iv) in respect of the Second Applicant;
- (E) the matters referred to at sub-paragraph 106(a)(i)(E) above;
- (F) the matters referred to at sub-paragraph 106(a)(i)(F) above;
- (G) the matters referred to at sub-paragraph 106(a)(i)(G) above; and
- (H) the matters referred to at sub-paragraph 106(a)(i)(H) above;
- (iii) otherwise denies sub-paragraph 106(a);
- (b) as to sub-paragraph 106(b), it:
 - (i) refers to and repeats sub-paragraph 7(e) above;

- (ii) admits that it knew the amount of the Franchise Fee, Application Fee and the Investment payable by the First Applicant in respect of the Campbelltown Store Agreement and the Northmead Store Agreement and by the First Second Applicant in respect of the South Melbourne Store Agreement;
 - (iii) admits that it knew the amount of the Franchise Fee, Application Fee and the Investment payable by the Franchisees within the terms of the Franchise Agreements in the Relevant Period; and
 - (iv) otherwise denies sub-paragraph 106(b);
- (c) as to sub-paragraph 106(c), it:
 - (i) refers to and repeats sub-paragraph 7(d) above;
 - (ii) admits that it knew the amount of, or alternatively the approximate amount, of the Goodwill Payment to be paid by:
 - (A) the First Applicant in respect of the Campbelltown Store and the Northmead Store;
 - (B) the Second Applicant in respect of the South Melbourne Store;
 - (iii) admits that it generally knew the amount of, or alternatively the approximate amount of, the Goodwill Payment to be paid by the Franchisees for the Stores in the Relevant Period; and
 - (iv) otherwise denies sub-paragraphs 106(c);
- (d) as to sub-paragraph 106(d), it:
 - (i) refers to and repeats sub-paragraphs 7(d), 7(e), 106(b) and 106(c) above; and
 - (ii) otherwise denies sub-paragraphs 106(d);
- (e) as to sub-paragraph 106(e), it:
 - (i) refers to and repeats sub-paragraphs 106(d) above;
 - (ii) admits that in respect of the First Applicant, 7-Eleven was aware that:

- (A) the First Applicant applied to the Bank for financial accommodation and that the Bank offered to provide financial accommodation to the First Applicant:
- (1) to enable the First Applicant to acquire or run the business connected with the Campbelltown Store, in the sum of \$291,360 (the **Campbelltown Finance**) [under a letter of offer dated 22 August 2013](#); and
 - (2) to enable the First Applicant to acquire or run the business connected with the Northmead Store, in the sum of \$828,622 (the **Northmead Finance**) [under a letter of offer dated 12 June 2015](#);
- (B) the First Applicant, as borrower, entered into a Deed of Loan and Guarantee dated 27 May 2015 with Ya Razik Pty Ltd, as lender, for the sum of \$50,000 in connection with the Northmead Store business;
- (ii) admits that in respect of the Second Applicant, 7-Eleven was aware that the Second Applicant had applied to the Bank for financial accommodation and that the Second Applicant had informed 7-Eleven that the Bank offered to provide financial accommodation to it to enable the Second Applicant to acquire or run the business connected with the South Melbourne Store, [in the sum of \\$424,363](#) (the **South Melbourne Finance**) [under a letter of offer dated 20 September 2013](#);
- (iii) admits that 7-Eleven knew that, during the Relevant Period, the majority of Franchisees applied for and were offered financial accommodation in connection with entering into a Franchise Agreement; and
- (iv) otherwise denies the allegations in sub-paragraph 106(e);
- (f) as to sub-paragraph 106(f), it:
- (i) refers to and repeats sub-paragraph 106(e) above;
 - (ii) admits that it:
 - (A) knew that the First Applicant may grant to the Bank, as security for the Campbelltown Finance, a fixed and floating charge or a

mortgage over the assets and undertakings of the First Applicant, but acknowledges that, pursuant to the Campbelltown Store Franchise Agreement it consented to the First Applicant granting those securities;

(B) knew that the First Applicant may grant to the Bank, as security for the Northmead Finance, a fixed and floating charge or a mortgage over the assets and undertakings of the First Applicant, but acknowledges that, pursuant to the Northmead Store Franchise Agreement it consented to the First Applicant granting those securities;

(C) knew that the Second Applicant may grant to the Bank, as security for the South Melbourne Finance, a fixed and floating charge or a mortgage over the assets and undertakings of the Second Applicant, but acknowledges that, pursuant to the South Melbourne Store Franchise Agreement it consented to the Second Applicant granting those securities;

(iii) otherwise ~~does not admit~~denies the allegations in sub-paragraph 106(f);

(g) it admits sub-paragraph 106(g) and says further:

(i) that at the time of receiving the Campbelltown Franchising Disclosure and prior to entering into the Campbelltown Store Franchise Agreement;

(ii) at all times prior to entering into the Northmead Store Franchise Agreement; and

(iii) at the time of receiving the South Melbourne Franchising Disclosure and prior to entering into the South Melbourne Store Franchise Agreement,

the:

(iv) First Applicant also knew that the Campbelltown Store and the Northmead Store, respectively,

(v) Second Applicant also knew that the South Melbourne Store,

opened 24 hours a day, 7 days a week, and required a minimum of 168 hours of labour per week to operate.

PARTICULARS

Item 16 of each of the Campbelltown Franchising Disclosure and South Melbourne Franchising Disclosure records the obligation of Franchisees to open the franchised business in accordance with Articles 1, 36 and Exhibit D of the Franchise Agreement.

- (h) it admits sub-paragraph 106(h);
- (i) it denies ~~does not plead to~~ sub-paragraph 106(i) ~~in accordance with order 7 of the Orders of Middleton J made 20 November 2018;~~
- (j) as to sub-paragraph 106(j), it:
 - (i) refers to and repeats paragraph 22 and sub-paragraphs 106(d) and 106(e) above; and
 - (ii) otherwise denies the allegations;
- (k) as to sub-paragraph 106(k), it:
 - (i) refers to and repeats the matters pleaded in paragraphs 41, 42, 55, 61 and sub-paragraphs 106(a) to 106(e) and sub-paragraphs 106(g) to 106(j) above; and
 - (ii) otherwise denies the allegations;
- (l) as to sub-paragraph 106(l), it:
 - (i) admits that it provided a seven-week 7-Eleven franchisee training program (SEFT) to incoming Franchisees and that the SEFT training took place only once the Franchisee had been approved;
 - (ii) says that prospective Franchisees were provided with documents setting out applicable award rates prior to their preparation of draft business and financial plans;
 - (iii) says that prospective Franchisees were ordinarily given oral advice by Franchise Development Managers to obtain independent accounting advice in relation to the preparation of their financial plans;
 - (iv) says that the review of draft business and financial plans as alleged in paragraph 92(ba)(i) above included a review of draft rosters;

~~otherwise~~

(i)(v) ~~otherwise~~ denies the allegations;

(ii)(vi) says further with respect to the First Applicant and the Campbelltown Store Agreement, that:

- (A) it refers to and repeats the matters pleaded in paragraph 41(a)(i) above and says that Mr Davaria was aware of or should have been aware of the June 2013 Wage rates (being the relevant Award minimum wage rates applicable to the Campbelltown Store) from on or about 29 August 2013 at the latest;
- (B) commencing on 11 September 2013, it provided ~~a seven-week 7-Eleven franchisee training program (SEFT training)~~ to Mr Davaria, which included:
 - (1) on about 11 September 2013, provision to Mr Davaria of a “7-Eleven Franchisee Reference Guide”;
 - (2) on 11 September 2013, training concerning the First Applicant’s legal obligations as an employer including under the Fair Work Act 2009, the National Employment Standards and Modern Awards and minimum wages;
 - (3) on 12 September 2013, training concerning labour planning and staffing requirements for the Campbelltown Store;
 - (4) on 13 September 2013, training concerning employing staff;
 - (5) on 8 October 2013, training concerning Award terms and pay rates; and
 - (6) on 11 October 2013, training concerning Labour planning include the labour planning tool; and on 22 October 2013, training concerning the First Applicant’s payroll system obligations;

PARTICULARS

The “7-Eleven Franchisee Reference Guide” dated February 2013 [SEV.0001.0016.4425] was provided to SEFT participants on the first day of training (being 11 September 2013 in the case of Mr Davaria). The Guide included a “Fair Work Information Statement” and a proforma “Letter of Engagement” for prospective Store employees which referred to the relevant Awards.

Mr Davaria signed a 7-Eleven Participant Assessment booklet on 11 September 2013 confirming that he had completed the assessments according to the instructions given for the “Employer Responsibility’ assessment task on that day [SEV.0001.0004.0001].

Mr Davaria signed a 7-Eleven Participant Assessment booklet on 12 September 2013 confirming that he had completed the assessments according to the instructions given for the ‘Labour Planning A’ assessment task on that day [SEV.0001.0004.0028].

Mr Davaria signed a 7-Eleven Participant Assessment booklet on 13 September 2013 confirming that he had completed the assessments according to the instructions given for the ‘Employing staff’ Part A and Part B assessment task on that day [SEV.0001.0004.0030]

The training on 11 October 2013 on Labour Planning B was for 4 hours. [SEV.0001.0001.0766]

The training on 22 October 2013 on Payroll obligations was for 4 hours. [SEV.0001.0001.0766]

The SEFT training modules including for the above tasks were set out in the [First](#) Applicant’s 7-Eleven Franchisee Training Participant Workbook (other than for Labour Planning B) [FRA.0002.0001.1073] and the dates on which the training was conducted are set out in the Course #7 2013 training calendar [SEV.0001.0001.0766].

- (C) the Campbelltown Store Franchise Agreement was executed by the First Applicant on 19 September 2013 and the 7-day cooling off period commenced on that day;
- (D) the First Applicant paid the Franchising Fee on or about 19 September 2013; and
- (E) the 7-day cooling off period expired on 26 September 2013;

~~(iii)~~(vii) says further with respect to the First Applicant and the Northmead Store Agreement, that:

- (A) it refers to and repeats the matters pleaded in paragraph 41(a)(ii) above; and
- (B) while trading, from the Campbelltown Store and before entering into the Northmead Store Agreement, the First Applicant was provided with at all relevant times details of the applicable minimum award wages payable for labour at the Campbelltown Store;

PARTICULARS

7-Eleven regularly provided the First Applicant and Franchisees during the Relevant Period with notices of wage rate increases introduced by Fair Work Australia. Such notices specified the date on which the increase came into effect and appended updated Wage Rate Sheets reflecting the new wage rates. The notices contained words: 'These are the new legal minimum rates. An employee cannot be paid less than these declared rates of pay'. They also specified the action that Franchisees were required to take in order to ensure compliance.

~~(iv)~~(viii) says further with respect to the Second Applicant and the South Melbourne Store Agreement, that:

- (A) it refers to and repeats the matters pleaded in paragraph 41(aa)(i) above and says that Mr Singh was aware of or should have been aware of the June 2013 Wage rates (being the relevant Award minimum wage rates applicable to the South Melbourne Store);

- (B) commencing on 7 October 2013, it provided a seven-week 7-Eleven franchisee training program (SEFT) to Mr Singh, which included:
- (1) on about 7 October 2013, provision to Mr Singh of a “7-Eleven Franchisee Reference Guide”;
 - (2) on 8 October 2013, training concerning the Second Applicant’s legal obligations as an employer including under the Fair Work Act 2009, the National Employment Standards and Modern Awards and minimum wages;
 - (3) on 11 October 2013, training concerning labour planning and staffing requirements for the South Melbourne Store;
 - (4) on 8 October 2013, training concerning Award terms and pay rates; and
 - (5) on 22 October 2013, training concerning the Second Applicant’s payroll system obligations;

PARTICULARS

The “7-Eleven Franchisee Reference Guide” dated February 2013 [SEV.0001.0016.4425] was provided to SEFT participants on the first day of training (being 7 October 2013 in the case of Mr Singh). The Guide included a “Fair Work Information Statement” and a proforma “Letter of Engagement” for prospective Store employees which referred to the relevant Awards.

- (C) the South Melbourne Store Franchise Agreement was executed by the Second Applicant on 2 October 2013 and the 7-day cooling off period commenced on that day;
- (D) the Second Applicant paid the Franchising Fee on or about 29 October 2013; and
- (E) the 7-day cooling off period expired on 9 October 2013;

(m) as to sub-paragraph 106(m) it:

- (i) denies the allegations; and
- (ii) says further with respect to the First Applicant, that prior to entering into the Campbelltown Store Franchise Agreement Mr Davaria represented to 7-Eleven that:
 - (A) his strongest language was English and his ability to read and write in the language was excellent; and
 - (B) he had:
 - (1) extensive experience working in a retail environment; and
 - (2) quite a bit of experience working with financial information and business reports;

PARTICULARS

The representations were made in writing in an Information Request completed on 9 July 2013 [SEV.0001.0010.0019].

- (iii) says further with respect to the Second Applicant, that prior to entering into the South Melbourne Store Franchise Agreement Mr Singh represented to 7-Eleven that:
 - (A) his strongest language was English and his ability to read and write in the language was excellent; and
 - (B) he had:
 - (1) a Bachelor's Degree in Science from the University of India, Delhi;
 - (2) training in "Finance for non-finance managers", a residential program at the Indian Institute of Management, Kolkata (described by Mr Singh as "One of the premier institution in India and well known across the world");
 - (3) worked as the Director Business Development for Sharaf Group Dubai, which Mr Singh described as an over "US \$4 Billion company, Group comprises of over 60 operating companies in Travel and Tourism, Hospitality, Shipping";

- (4) worked as the Vice President Sales & Services of InterGlobe Enterprises Ltd for 4 years;
- (5) worked as the Head of Commercial India of Virgin Atlantic Airways Ltd for 3 years;
- (6) worked as the Head of Route Management India-South Africa for South African Airways for 3 years;
- (7) worked as the Regional Marketing Manager India for United Airlines for 6 years;

PARTICULARS

The representations were made in writing in an Information Request completed on 2 June 2013 [SEV.0062.0001.0052].

- (n) says as to the whole of paragraph 106 that particular defences available in respect of the Franchisees' claims, other than those of the Applicants, cannot be determined until after each Franchisee has been identified.

E2.

~~106~~107 As to paragraph 107, it:

- (a) says that the pleading is vague and embarrassing as 7-Eleven does not know which Franchisees other than the Applicants are alleged to have had the alleged Misleading or Deceptive Conduct Representations conveyed to them prior to each of them entering into their Franchise Agreements and therefore objects to pleading to these allegations;
- (b) says further that particular defences available in respect of the Franchisees' claims, other than the Applicants, cannot be determined until after that Franchisee has been identified; and
- (c) under cover of the foregoing objection it:
 - (i) refers to and repeats paragraphs 40A to 77D above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 107.

~~107~~108 As to paragraph 108, it:

- (a) says that the pleading is vague and embarrassing as it does not identify with any or sufficient specificity the Misleading or Deceptive Conduct Representations alleged to give rise to the reasonable expectation of the Applicants and some or all of the Franchisees and it objects to pleading to it;
- (b) says further that particular defences available in respect of the Franchisees' claims, other than the Applicants, cannot be determined until after that Franchisee has been identified; and
- (c) under cover of the foregoing objections, it:
 - (i) refers to and repeats paragraphs 16(ba), 24, 40E, 41, 42, 43, 52, 57, 68, 73, 97, 106 and 107 above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 108.

~~108~~109 As to paragraph 109, it:

- (a) says that the pleading is vague and embarrassing, and it objects to pleading to it;
- (b) says further that particular defences available in respect of the Franchisees' claims, other than the Applicant, cannot be determined until after that Franchisee has been identified; and
- (c) under cover of the foregoing objection it:
 - (i) refers to and repeats paragraphs 11, 12, 13, 15, 16, 17, 18, 25, 26, 27, 28, 41, 42, 43, 44, 92(a) and 108 above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 109.

~~109~~110 [not used]

~~110~~111 As to paragraph 111, it:

- (a) says that the pleading is vague and embarrassing, and it objects to pleading to it;
- (b) says further, particular defences available in respect of the Franchisees' claims, other than the Applicant, cannot be determined until after that Franchisee has been identified; and

- (c) under cover of the foregoing objections it:
 - (i) refers to and repeats paragraphs 11, 106, 107 and 108 above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 111.

~~111~~112 As to paragraph 112, it:

- (a) says that the pleading is vague and embarrassing, and it objects to pleading to it;
- (b) says further, particular defences available in respect of the Franchisees' claims, other than the Applicant, cannot be determined until after that Franchisee has been identified; and
- (c) under cover of the foregoing objections it:
 - (i) refers to and repeats paragraphs 7, 11, 41 and 106 above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 112.

~~112~~113 As to paragraph 113, it:

- (a) says that the pleading is vague and embarrassing, and it objects to pleading to it;
- (b) says further, particular defences available in respect of the Franchisees' claims, other than the Applicants, cannot be determined until after that Franchisee has been identified; and
- (c) under cover of the foregoing objections it:
 - (i) refers to and repeats paragraphs 22, 41, 42, 52, 57, 106, 108, 109, 111, 112 above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 113.

~~113~~114 [Not used]

~~114~~115 As to paragraph 115, it:

- (a) says that the pleading is vague and embarrassing including because it does not identify with any or sufficient specificity: the alleged "financial information" or how

it is alleged to be “incorrect or incomplete”, the alleged “unfair tactics”, the alleged “risk” and or the alleged “lack of good faith”, and it objects to pleading to it;

- (b) says further, particular defences available in respect of the Franchisees’ claims, other than the Applicants, cannot be determined until after that Franchisee has been identified; and
- (c) under cover of the foregoing objections it:
 - (i) refers to and repeats paragraphs 3(b), 40A, 41, 42, 43 and 106 above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 115.

E3.

445116 It denies paragraph 116 and refers to and repeats paragraphs 3(b), 106 to 115 above.

446117 It denies paragraph 117.

447118 As to paragraph 118, it:

- (a) says that the paragraph is vague and embarrassing including because there is no properly pleaded definition of ‘Unconscionable Conduct’ and objects to pleading to it; and
- (b) under cover of the foregoing objections it:
 - (i) refers to and repeats paragraphs 41, 42, 43, 78, 83, 101, 106 to 115 above and the particulars subjoined thereto; and
 - (ii) otherwise denies paragraph 118.

448119 As to paragraph 119, it:

- (a) says that the pleading is vague and embarrassing and it objects to pleading to it;
- (b) says further, particular defences available in respect of the Franchisees’ claims, other than the Applicants, cannot be determined until after that Franchisee has been identified; and
- (c) under cover of the foregoing objections it:

- (i) refers to and repeats paragraphs 3(b), 106 to 115 above and the particulars subjoined thereto; and
- (ii) otherwise denies paragraph 119.

~~119~~120 It denies paragraph 120.

~~120~~121 It denies paragraph 121.

121A It says in further response to paragraphs 106 to 121 of the FASOC, that any Franchisee who entered into a Franchise Agreement before 20 February 2012 is statute barred from maintaining a cause of action:

- (a) under section 236 of the ACL, pursuant to section 236(2) of the ACL; ~~and~~
- ~~(b)~~ under section ~~237 or~~ 243 of the ACL, pursuant to section 237(3) of the ACL;
- ~~(c)~~ under sections 82 or 87 of the CCA or the TPA (to the extent applicable) pursuant to sub-section 82(2) and 87(1CA) of the TPA or CCA;
- ~~(d)~~ under section 12GF of the ASIC Act, pursuant to section 12GF(2) of the ASIC Act; and
- ~~(e)~~ under section 12GM of the ASIC Act, pursuant to section 12GM(5) of the ASIC Act.

F.

~~122~~ As to paragraph 122: ~~It does not plead to paragraph 122, as the paragraph makes no allegation against it.~~

- ~~(a)~~ in the Second Relevant Period (which is the same as the Relevant Period), the Bank lent money to prospective franchisees of the 7-Eleven, including the First Applicant and the Second Applicant, in order to assist them to purchase Store franchises;
- ~~(b)~~ in the Second Relevant Period, the Bank was a party to loans to Franchisees relating to a majority of franchised Stores of 7-Eleven; and
- ~~(b)~~ otherwise does not know and cannot admit that the Bank 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.

~~121~~123 As to paragraph 123, to the extent that any allegation is made against it, it admits the allegations.

~~122~~124 As to paragraph 124, to the extent that any allegation is made against it, it admits the allegations.

~~123~~125 As to paragraph 125, to the extent that any allegation is made against it and subject to reference to the full terms and effect of the Tripartite Deed at trial, it admits the allegations.

126 As to paragraph 126, it:

(a) refers to and repeats paragraph 106(e) and (f) above; and

(b) otherwise does not know, and therefore, does not admit paragraph 126.

127 ~~[Not Used] It does not plead to paragraphs 126 to 170, as those paragraphs make no allegation against it.~~

128 [Not Used].

129 [Not Used].

130 It does not know, and therefore, does not admit paragraph 130.

131 [Not Used].

132 [Not Used].

133 [Not Used].

134 [Not Used].

135 [Not Used].

136 As to paragraph 136, it:

(a) refers to and repeats paragraph 106(e)(ii) above; and

(b) otherwise does not know, and therefore, does not admit paragraph 136.

137 It does not know, and therefore, does not admit paragraph 137.

~~124~~138 It admits paragraph 138.

139 It does not know, and therefore, does not admit paragraph 139.

140 As to paragraph 140, it:

(a) refers to and repeats paragraph 106(e)(ii) above; and

(b) otherwise does not know, and therefore, does not admit paragraph 140.

141 It does not know, and therefore, does not admit paragraph 141.

142 [Not Used].

143 [Not Used].

144 [Not Used].

~~125~~145 [Not Used].

145A As to paragraph 145A, it:

(a) refers to and repeats paragraph 106(e)(iia) above; and

(b) otherwise does not know, and therefore, does not admit paragraph 145A.

145B It does not know, and therefore, does not admit paragraph 145B.

145C It does not know, and therefore, does not admit paragraph 145C.

145D It does not know, and therefore, does not admit paragraph 145D.

145E As to paragraph 145A, it:

(a) refers to and repeats paragraph 106(e)(iia) above; and

(b) otherwise does not know, and therefore, does not admit paragraph 145E.

145F It does not know, and therefore, does not admit paragraph 145F.

146 As to paragraph 146, it:

(a) refers to and repeats paragraph 106(e)(ii) above; and

(b) otherwise does not know, and therefore, does not admit paragraph 146.

147 It does not know, and therefore, does not admit paragraph 147.

148 It does not know, and therefore, does not admit paragraph 148.

149 [Not Used].

150 [Not Used].

151 As to paragraph 151, it:

(a) refers to and repeats paragraph 106(e)(ii) above; and

(b) otherwise does not know, and therefore, does not admit paragraph 151.

152 It does not know, and therefore, does not admit paragraph 152.

153 [Paragraphs 153 to 170 are Not Used].

~~426~~154 To the whole of the FASOC, 7-Eleven says that save for where a defence is pleaded, further and/or particular defences that may be available to 7-Eleven in respect of a Franchisee's claims, cannot be determined until after the Franchisee has been identified.

Date: 1 April 2021



Signed by Nigel Jones

Lawyer for 7-Eleven

This amended pleading was prepared by Kathleen Foley, Fleur Shand and Andrew McRobert of counsel and settled by Robert Craig QC.

Certificate of lawyer

I Nigel Jones certify to the Court that, in relation to the defence filed on behalf of the First Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 1 April 2021



Signed by Nigel Jones

Lawyer for 7-Eleven

Schedule

No. VID180 of 2018

Federal Court of Australia

District Registry: Victoria

Division: General

Applicants

Second Applicant Kaizenworld Pty Ltd (ACN 163 833 565)

Respondents

Second Respondent: 7-Eleven Inc. (a Texas corporation)

~~Third Respondent: Australia and New Zealand Banking Group Limited~~

~~(ABN 11 005 357 522)~~

Schedule 1 - Terms of Franchise Agreements

Row	1998 Version	2001 Version	2004 Version	2009 Version	2015 Version	2016 Version
9	<p>Article 24: Term and expiration</p> <p>The term of this Agreement shall commence on the Effective Date and continue until termination of this Agreement as provided in Article 25 (Termination) or until expiration of this Agreement (Expiration) or the earlier of</p> <ul style="list-style-type: none"> a) if the Licensed Premises are owned by 7-Eleven 15 years after the Effective Date or b) if a Lease is applicable either <ul style="list-style-type: none"> i) the expiration of the primary term, or cancellation or termination of the Lease, or ii) the expiration of the extended term of the Lease (if an option to extend the primary term of the Lease has been exercised by 7-Eleven on the Effective Date or is exercised by 7-Eleven during the term of this Agreement). <p>The term of this Agreement may be extended or renewed only by mutual agreement in writing between Franchisee and 7-Eleven.</p>		<p>Article 24: Term and expiration</p> <ul style="list-style-type: none"> (a) The term of this Agreement shall commence on the Effective Date and continue until termination of this Agreement as provided in Article 25, or until expiration of this Agreement on the earlier of: <ul style="list-style-type: none"> (i) the expiration of the primary term, or cancellation or termination of the Lease; or (ii) the expiration of the extended term of the Lease (if an option to extend the primary term of the Lease has been exercised by 7-Eleven on the Effective Date or is exercised by 7-Eleven during the term of this Agreement); or (iii) 10 years after the Effective Date; or (iv) 7-Eleven's exercise of its Option to Purchase in accordance with Article 27 of this Agreement. (b) The term of this Agreement may be extended or renewed only by mutual agreement in writing between the Franchisee and 7-Eleven. 			
11(c)	Article 22(a) and (b):		Article 22(a):			

Row	1998 Version	2001 Version	2004 Version	2009 Version	2015 Version	2016 Version
	<p>So long as Franchisees are not in breach of paragraph (f) of Article 20, 7-Eleven shall -</p> <p>(a) remit to Franchisees weekly, and debit the Open Account with, an amount determined as provided in paragraph (k) of Exhibit D;</p> <p>(b) At the end of each calendar month remit to Franchisees, and debit the Open Account with, an amount equal to the excess of the Net Worth over "total assets" as reflected on the balance sheet provided by 7-Eleven for such calendar month.</p>		<p>(a) So long as the Franchisee is not in breach of Article 20 and the Net Worth as demonstrated in the Bookkeeping Records is not less than the minimum Net Worth, 7-Eleven shall:</p> <p>(i) remit to the Franchisee weekly, and debit the Financial Records with, an amount determined and provided in paragraph (h) of Exhibit D to this Agreement;</p> <p>(ii) at the end of each Accounting Period, remit to the Franchisee and debit the Financial Records with an amount equal to the excess of the Net Worth over total assets as reflected on the balance sheet provided by 7-Eleven for such Accounting Period.</p>			
11(d)	<p>Paragraph (k) of Exhibit D:</p> <p>Franchisees ' draw on anticipated profits for an Accounting Period shall be remitted Franchisees by cheque payable to [] and shall be \$[] each week reduced by:</p> <p>(i) if Franchisees operate the Store as a 24-Hour Operation, an amount equal to the amount by which said draw plus the amount of Franchisees ' payroll for the Store for the previous draw period exceeds the greater of:</p> <p>(A) 11% of Net Sales (as defined in Exhibit E, and excluding gasoline sales, if any) for the previous draw period;</p> <p>(B) \$750.00;</p>		<p>Paragraph (h) of Exhibit D:</p> <p>The Franchisee's draw on anticipated profits for an Accounting Period shall be \$1,500 each week. The amount remitted to the Franchisee 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:</p> <p>(i) 11% of the Net Sales (as defined in Exhibit E and excluding gasoline sales, if any) for the previous draw period; or</p> <p>(ii) \$750.00.</p>		<p>Paragraph (h) of Exhibit D:</p> <p>The Franchisee's draw on anticipated profits for an Accounting Period shall be \$ [] each week. The amount remitted to the Franchisee 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 15% of the Net Sales (as defined in Exhibit E and excluding fuel sales, if any) for the previous draw period.</p>	

Row	1998 Version	2001 Version	2004 Version	2009 Version	2015 Version	2016 Version
	<p>(ii) if Franchisees operate the Store as a Limited-Hour Operation, an amount equal to the amount by which said draw plus the amount of Franchisees ' payroll for the Store for the previous draw period exceeds the greater of:</p> <p>(A) 10% of Net Sales (excluding gasoline sales, if any) for the previous draw period; or</p> <p>(B) \$650.00;</p> <p>(iii) if Franchisees operate the Store as a Minimum Hour Operation, an amount equal to the amount by which said draw plus the amount of Franchisees ' payroll for the Store for the previous draw period exceeds the greater of:</p> <p>(A) 9% of Net Sales (excluding gasoline sales, if any) for the previous draw period; or</p> <p>(B) \$600.00</p>					
19(c)	<p>Article 20(b)(i)(C): Franchisees shall -</p> <p>i) prepare on forms provided by 7-Eleven and at such times as may be designated by 7-Eleven and furnish to 7-Eleven -</p> <p>...</p>		<p>Article 20(b)(i)(3): The Franchisee shall:</p> <p>(i) prepare on forms, whether in hard or electronic format, provided by 7-Eleven at such times as designated by 7-Eleven and furnish to 7-Eleven:</p> <p>...</p> <p>(3) weekly time and wage authorisations for the Employees; and</p>			

Row	1998 Version	2001 Version	2004 Version	2009 Version	2015 Version	2016 Version
	<p>C) weekly time and wage authorisations for Franchisee's employees; and</p> <p>Article 20(c)(iii):</p> <p>So long as Franchisees are not in breach of (f) below, Franchisee hereby authorise 7-Eleven and 7-Eleven shall timely pay on behalf of Franchisee, on receipt of any invoice for goods or services, which in 7-Eleven's opinion is reasonably traceable to the store, has been bona fide incurred and does not entail any direct or indirect rebate, commission or benefit to Franchisee (not declared to 7-Eleven) and debit the Open Account with - ...</p> <p>iii) Franchisee's payroll for the Store PROVIDED THAT nothing herein shall oblige 7-Eleven to make any payment on behalf of Franchisee the effect of which would be to reduce Franchisee Net Worth below the minimum amount specified in paragraph r of Exhibit D.</p>		<p>Article 20(c)(iii):</p> <p>Provided that the Franchisee is not in breach of sub-Article 20(g) and the Net Worth is above the minimum Net Worth, 7-Eleven shall in a timely manner pay on the Franchisee's behalf, on receipt of any invoice for goods or services which in 7-Eleven's opinion is reasonably traceable to the Store, has been bona fide incurred and does not entail any direct or indirect rebate, commission or benefit to the Franchisee (not declared to 7-Eleven) and debit the Financial Records with: ...</p> <p>iii) the Franchisee's payroll for the Store provided</p>	<p>Article 20(d)(iii):</p> <p>Provided that the Franchisee is not in breach of sub-Articles 20(b) and 20(j) and the Net Worth is above the minimum Net Worth, 7-Eleven shall in a timely manner pay on the Franchisee's behalf, on receipt of any invoice for goods or services which in 7-Eleven's opinion is reasonably traceable to the Store, has been bona fide incurred and does not entail any direct or indirect rebate, commission or benefit to the Franchisee (not declared to 7-Eleven) and debit the Financial Records with: ...</p> <p>(iii) the Franchisee's payroll for the Store provided that nothing in this Agreement shall oblige 7-Eleven to make any payment on behalf of the Franchisee the effect of which would be to reduce the Franchisee's Net Worth below the minimum Net Worth.</p>		

Row	1998 Version	2001 Version	2004 Version	2009 Version	2015 Version	2016 Version
			that nothing in this Agreement shall oblige 7-Eleven to make any payment on behalf of the Franchisee the effect of which would be to reduce the Franchisee's Net Worth below the minimum Net Worth.			
	N/A	N/A	N/A	N/A	Article 19A(c)	(c) the Franchisee must use the Payroll Services and must provide 7-Eleven with all information as and when required by 7-Eleven to enable 7-Eleven to provide or facilitate the provision of such services. All such information must be correct and accurate as at the date it is submitted.

Schedule 2 - Schedule of defined terms in 7-Eleven's Defence

Defined Term	Paragraph Number
1998 Version	1(a)(i)
2001 Version	1(a)(ii)
2004 Version	1(a)(iii)
2009 Version	1(a)(iv)
2012 Average Store Financials	41(a)(i)(B)
2015 Version	1(a)(v)
2016 Version	1(a)(vi)
Applicant's 7-Eleven Brochure	41(a)(i)(A)
Automated Replenishment System	28(a)(i)
Average Store Financials	41(a)(iv)(D)
C-Store Distribution	25(a)(i)
Campbelltown Finance	106(e)(ii)(A)(1)
Campbelltown Franchising Disclosure	41(b)(i)
Campbelltown Store Financials	41(a)(i)(C)
Campbelltown Store Variation Agreement	8(a)(ii)(B)(1)
Campbelltown Variation Franchising Disclosure	43(b)
CCA	3(a)(ii)
Direct Miscellaneous Discount Payments	18(b)
Direct Purchase Discount Payments	18(b)
Disclaimer Letter and Waiver and Release	41(e)(i)
First Applicant's 7-Eleven Brochure	41(a)(i)(A)
Franchise Agreements	1(a)
Franchisees	1(a)
Goodwill Payment	7(d)(i)
Goodwill Price	40B(b)(vii)
Individual Store Financials	41(a)(iii)(A)
June 2013 Wage rates	41(a)(i)(D)
June 2014 Wage rates	41(a)(ii)(B)
Lease	6(e)(i)(B)
Listed Stores	40A(b)(i)
Metcash Agreements	25(a)

Metcash Trading	25(a)(i)
Miscellaneous Non-Retail Income	40B(b)(iv)
Mr Davaria	34(b)
Mr Davaria	34(b)
Northmead Finance	106(e)(ii)(A)(2)
Northmead Oilcode Disclosure	41(c)(i)
Northmead Store Financials	41(a)(ii)(A)
Northmead Store Variation Agreement	8(a)(ii)(B)(2)
Northmead Variation Oilcode Disclosure	44(a)
Online Portal	25(c)(ii)
Optimal Payroll Model	92(a)(ia)(A)
Outgoing Franchisees	40A(b)(i)
Physical Audits	28(f)(i)(A)
Pre-2015 Goodwill Price Advice	40C(a)
Promo Fund	28C(b)(i)(2)
Purchases	12(a)(i)
Recommended Price	28(e)(i)
Recommended Products	25(c)(ii)(B)
Recommended Suppliers	25(c)(ii)(A)
Relevant Period	1(a)
SEFT	106(l)(i)(ii)(B)
South Melbourne Franchising Disclosure	28E
South Melbourne Finance	106(e)(ia)(ii)(a)
South Melbourne Store Variation Agreement	8(a)(iii)(B)
State Franchise Opportunities List	40A(c)(iii)
Suggested Orders	28(a)(i)
Supplier Payments	28C(b)(i)
Total Franchisee Retail Income	40B(b)(v)
Variation Agreements	8(b)(ii)(B)