



Draft Determination

Application for revocation of AA1000500 and the substitution of authorisation AA1000547

lodged by

7-Eleven Stores Pty Limited

in respect of

agreements between 7-Eleven Stores, Convenience Holdings Pty Limited and their franchisees to enter into arrangements with the Franchisees' consent to either temporarily close or reduce the trading hours of certain stores

Authorisation number: AA1000547

Date: 1 July 2021

Commissioners: Keogh

Rickard

Brakey

Ridgeway

Summary

The ACCC proposes to re-authorise 7-Eleven Stores, Convenience Holdings Pty Limited and their franchisees to continue to enter into arrangements with the franchisees' consent to either temporarily close or reduce the trading hours of certain stores.

This conduct has been authorised since 29 July 2020 and is not changed in the current application. The proposed re-authorisation would continue to have conditions that require 7-Eleven to notify the ACCC in advance of approaching franchisees as well as notifying details about agreements that are subsequently reached.

The ACCC considers that, given the ongoing circumstances of the COVID-19 pandemic, the conduct is likely to continue to result in public benefits including: assisting stores across 7-Eleven's network to remain in business for the duration of the pandemic; assisting stores to be better placed to resume normal trading once the effects of the pandemic subside; and by temporarily closing stores and reducing opening hours, reducing the demand on staff to travel to stores.

The ACCC considers that there are a number of factors which mitigate the risk of longer-term competitive detriment arising from the Conduct. These include: the limited, temporary and voluntary nature of the conduct; the existence of the Franchising and Oil Codes; and the conditions of authorisation that the ACCC proposes to also continue.

The ACCC proposes to re-authorise the Conduct for a period of 6 months commencing from the date the final determination comes into effect.

This draft determination follows the interim authorisation the ACCC granted on 25 March 2021 and enables the existing (previously authorised) arrangements to continue with the same conditions while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 22 July 2021. The ACCC will then make its final decision.

1. The application for authorisation revocation and substitution

- 1.1. On 25 March 2021, 7-Eleven Stores Pty Ltd (**7-Eleven**) lodged an application to revoke authorisation AA1000500 and substitute authorisation AA1000547 for the one revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). 7-Eleven is seeking re-authorisation on behalf of itself, its sister entity Convenience Holdings Pty Limited and current and future franchisees (the **Franchisees**) to continue to enter into arrangements with the Franchisees' consent to either temporarily close or reduce the trading hours of certain stores for a further 6 months. This application for re-authorisation AA1000547 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.

- 1.3. 7-Eleven also requested, and on 25 March 2021 the ACCC granted, under subsection 91(2) of the Act, conditional interim authorisation to enable 7-Eleven, Convenience Holdings Pty Limited and the Franchisees to engage in the conduct while the ACCC is considering the substantive application.

The Conduct

- 1.4. 7-Eleven seeks authorisation to continue engage in the following conduct:

- to approach some of its Franchisees (who form part of 7-Eleven's network in Australia), with the particular Franchisees yet to be identified, and
- to enter into arrangements with those Franchisees, should the Franchisees be willing, to temporarily close or reduce the trading hours of stores either operated by some of the Franchisees, or by itself (or through its sister entity, Convenience Holdings Pty Limited).

- 1.5. The conduct would also include:

- instances where a franchisee who doesn't meet the criteria approaches 7-Eleven on the grounds of hardship for the purpose of entering into an arrangement to temporarily close or reduce the trading hours of its store.
- 7-Eleven and the Franchisees would direct customers from a closed store to nearby stores and provide information to customers about changes to the operating hours of the relevant stores.
- where a Franchisee's store closes temporarily, 7-Eleven will make an ex gratia payment to the relevant Franchisee to cover certain unavoidable operational costs. For stores that reduce their hours, the minimum guaranteed income that the Franchisee receives from 7-Eleven would be pro-rata adjusted to reflect the temporary reduction in trading hours.
- Franchisees can choose not to temporarily close or reduce their trading hours. Franchisees will not be subject to any penalties if they do not agree to enter into the temporary arrangements, and will continue to receive the minimum gross income they are entitled to under their store agreements.
- if a Franchisee agrees to temporarily reduce its trading hours, the store is likely to be closed from late evening to early morning, with the possibility of further reductions on weekends and/or public holidays depending on demand. If a Franchisee wishes to resume ordinary operations prior to the expiry of the authorisation, 7-Eleven would not unreasonably withhold consent for them to do so.
- 7-Eleven will not discriminate in favour of its corporate owned stores over Franchisees, and the criteria will be applied in the same way to corporate as to non-corporate owned stores.

(the **Conduct**)

- 1.6. The conduct does not involve 7-Eleven and its Franchisees engaging in any price coordination.
- 1.7. 7-Eleven advises that stores targeted for temporary closure or a reduction in operating hours are likely to be determined based on criteria relating to their location, trading performance and operational requirements. This may include:
- the store has experienced a decline in merchandise sales to a certain extent
 - the store is currently trading at less than a certain amount

- the store is located within a certain distance from another trading store, (which is more applicable to stores located in the CBD), and/or
- the store is not subject to any other operational requirements to continue trading. Operational requirements may include for example:
 - obligations in leases to remain open for a certain minimum hours, which only a landlord can release a tenant from
 - the store can be closed and secured in a manner that satisfies 7-Eleven's security requirements, and
 - ensuring sufficient network coverage whereby sufficient stores remain open and continue servicing catchment areas over the network, having regard to current (markedly diminished) levels of demand across the network and within particular catchment areas.

1.8. 7-Eleven also seeks authorisation to enable it to approach any person who becomes a Franchisee within the period of authorisation. 7-Eleven submits that it has included this as an abundance of caution, although it is unlikely to approach new franchisees at this point in time.

Commercial Rationale

1.9. 7-Eleven seeks authorisation for a further 6 months. If customer demand for convenience stores continues to be materially and adversely impacted as a result of COVID-19 prior to the end of this period, 7-Eleven may seek a variation of the authorisation to extend the period in which it and its Franchisees can continue to engage in the Conduct.

1.10. 7-Eleven expects to have only one Store on temporarily reduced trading hours as at 31 March 2021. However, 7-Eleven considers it vital to its long term sustainability and that of its Franchisees to have the ability to continue to respond to the real possibility of future outbreaks and Government restrictions.

2. Background

2.1. 7-Eleven is an Australian private company with a licence to operate and franchise 7-Eleven branded stores in Australia from the US based 7-Eleven Inc. The majority of 7-Eleven branded stores are franchised by 7-Eleven, many of which are operated by small businesses. Some 7-Eleven stores are also corporate owned. The 7-Eleven network comprises petrol and convenience stores across Australia.

2.2. 7-Eleven submits that it and its Franchisees have experienced an immediate and drastic fall in pedestrian traffic whenever a COVID-19 outbreak has occurred and government-mandated restrictions have come into effect. 7-Eleven submits that the existing authorisation of the Conduct allows it to navigate the continuing negative effects of the COVID-19 pandemic on retail trading patterns, particularly in densely populated areas and central business districts.

3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct. The ACCC invited submissions from a

range of potentially interested parties including 7-Eleven's franchisees.¹ The ACCC did not receive any submissions from interested parties in relation to the current application. However, the ACCC received submissions expressing some concerns during consultation on the first application for authorisation. These are discussed at paragraph 4.14.

- 3.2. The application by 7-Eleven and the ACCC's interim authorisation are available on the Public Register for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. 7-Eleven has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act², the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 4.3. In making its assessment of the Conduct, the ACCC has considered:
- the application and other relevant information available to the ACCC; this includes information provided by 7-Eleven on a confidential basis;
 - the likely effect of the Conduct on the relevant areas of competition. The ACCC considered convenience stores retailing in the central business districts of Brisbane, Sydney, and Melbourne;
 - the likely future with the Conduct that is the subject of the authorisation, compared with the likely future in which the Conduct does not occur. Without the Conduct the ACCC considers that 7-Eleven may offer similar trading concessions to Franchisees but only in circumstances where it considers that competition concerns due to the participation of corporate stores in the relevant area of competition would not arise. In these circumstances, more Franchisees are likely to be required to operate their stores in accordance with their current franchise agreements with 7-Eleven.

Public benefits

- 4.4. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*³

¹ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

² See subsection 91C(7).

³ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 4.5. 7-Eleven submits that the Conduct will continue deliver a range of public benefits, including:
- assisting stores across 7-Eleven's network to remain in business for the duration of the pandemic by providing for the more efficient distribution of customer demand amongst areas that cannot support the current number of stores, and minimising overhead costs in doing this. 7-Eleven submits that without the Conduct, 7-Eleven and its Franchisees may be required to permanently close stores in areas where very low levels of demand are unnecessarily and inefficiently distributed amongst the 7-Eleven store network;
 - assisting the stores to be better placed to resume normal trading once the effects of the pandemic subside; and
 - by temporarily closing stores and reducing opening hours, reducing the demand on staff to travel to stores, promoting their health and safety.
- 4.6. The ACCC considers that without the Conduct, more Franchisees are likely to be required to operate their stores in accordance with their franchise agreements with 7-Eleven. In the context of the pandemic, this will include operating stores in locations and during hours where there is significantly reduced demand. 7-Eleven has provided confidential data to the ACCC, noting substantial decline in transactions and revenue experienced by some Franchisees as a result of the pandemic.
- 4.7. The ACCC considers that the Conduct, by allowing 7-Eleven and its Franchisees to temporarily adjust trading activities (rather than permanently close stores in areas where there are very low levels of demand) is likely to reduce the economic impact of the pandemic on participating Franchisees and the franchise system as a whole. The ACCC considers that maintaining competition in the long term will be critical to benefit both consumers and the economy. By providing a temporary mechanism to lessen the economic impact of the pandemic on Franchisees, the Conduct may assist in the return to competitive conditions. The ACCC considers that this is of benefit to the public.

Public detriments

- 4.8. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁴*
- 4.9. The ACCC has considers that, to the extent that their geographic markets overlap, the Conduct is likely to limit competition between stores owned by 7-Eleven or Convenience Holdings and their Franchisees and this is likely to constitute a public detriment. However, the ACCC also considers that there are a number of factors which mitigate the risk of longer-term competitive detriment arising from the Conduct. In particular, the ACCC notes that:
- the Conduct is a temporary measure. Authorisation is sought for a further 6 months from the expiry of the current authorisation AA1000500 and the Conduct can be discontinued in the event that the effects of the pandemic subside at an earlier date

4 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 7-Eleven intends to approach Franchisees based on criteria relevant to location, trading performance and operational requirements. Franchisees who do not meet the criteria can still approach 7-Eleven on hardship grounds
- it is not compulsory for Franchisees to agree to temporarily close or reduce their trading hours if they are approached by 7-Eleven. If a Franchisee wishes to resume ordinary operations prior to the expiry of the authorisation, 7-Eleven would not unreasonably withhold consent for them to do so
 - under the current authorisation AA1000500, despite meeting the eligibility criteria, some franchisees refused 7-Eleven's approach and have traded as normal
 - a significant number of eligible stores temporarily closed or limited their hours, however, almost all resumed ordinary operations at some point during the authorisation period
 - the ACCC has received no complaints from Franchisees or any other interested parties during the operation of the current authorisation or in response to its consultation on the current application regarding the Conduct
- the Conduct does not enable 7-Eleven and its Franchisees to agree the retail prices of products
- continuation of the current conditions of authorisation provides some transparency over the Conduct by requiring 7-Eleven to notify the ACCC of the stores that it intends to approach and those who agree to close or reduce their trading hours, and
- the Franchising Code will continue to apply to Franchisees that operate non-fuel stores and the Oil Code will continue to apply to Franchisees that operate fuel stores. Both codes contain a dispute resolution process.

Balance of public benefit and detriment

- 4.10. The ACCC considers that maintaining competition in the long term will be critical to benefit both consumers and the economy. By providing a temporary mechanism to lessen the economic impact of the pandemic on Franchisees, the Conduct may assist in the return to competitive conditions.
- 4.11. The ACCC also considers that the Conduct is likely to result in some public detriment by providing for increased coordination between 7-Eleven and its competing Franchisees. However, the ACCC considers that there are a number of factors which mitigate the risk of longer-term competitive detriment arising from the Conduct, including: the limited, temporary and voluntary nature of the conduct; the existence of the Franchising and Oil Codes; and the conditions of authorisation that the ACCC proposes to also continue.
- 4.12. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Condition of authorisation

- 4.13. The ACCC may specify conditions in an authorisation⁵. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with⁶. The

⁵ Section 88(3)

ACCC may specify conditions in circumstances where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.⁷

- 4.14. Interested parties expressed concerns in relation to the previous application for authorisation AA1000500 about the potential for the Conduct to result in public detriment. These concerns were largely linked to a lack of transparency about how the Conduct would be implemented by 7-Eleven. In response, the ACCC introduced a targeted notification requirement to address those public detriment concerns. The conditions of authorisation are repeated in this draft determination at paragraph 5.10.

Length of authorisation

- 4.15. The Act allows the ACCC to grant authorisation for a limited period of time.⁸ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.16. In this instance, 7-Eleven seeks re-authorisation for a further 6 months. 7-Eleven submits that the impact on its network of stores and the convenience retailing industry in general is likely to be unpredictable and pronounced – particularly for stores located in CBD areas. It argues that, in all of circumstances, 6 months is a reasonable period for the authorisation.
- 4.17. In this case, the ACCC proposes to grant authorisation with conditions for 6 months from the date the final determination comes into effect.

5. Draft determination

The application

- 5.1. On 25 March 2021, 7-Eleven lodged an application to revoke authorisation AA1000500 and substitute authorisation AA1000547 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000547 was made under subsection 91C(1) of the Act.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.4. For the reasons outlined in this draft determination and continuing the current conditions of authorisation, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public

⁶ Section 88(3)(2).

⁷ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

⁸ Subsection 91(1)

would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.

5.5. Accordingly, the ACCC proposes to grant authorisation with conditions.

Conduct which the ACCC proposes to authorise

5.6. The ACCC proposes to revoke authorisation AA1000500 and grant authorisation AA1000547 in substitution to enable 7-Eleven, Convenience Holdings and Franchisees to continue to enter into arrangements with the Franchisees' consent to either temporarily close or reduce the trading hours of certain stores for a further 6 months, as described in paragraphs 1.4 and 1.5 and defined as the Conduct.

5.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

5.8. The ACCC proposes to grant authorisation AA1000547 for 6 months from the date the final determination comes into effect.

5.9. This draft determination is made on 1 July 2021.

Conditions of authorisation

5.10. The ACCC proposes to grant authorisation with the following conditions:

Notification Conditions

- 7-Eleven must notify the ACCC of the Franchisees it proposes to approach for temporary closure or a reduction in operating hours under the Conduct, at least 24 hours prior to approaching those Franchisees;
- 7-Eleven must notify the ACCC of: (a) those Franchisees that have agreed to either temporarily close or reduce the trading hours, and (b) any corporate owned store that is temporarily closed and/or has the hours reduced. Such notification must be provided as soon as practicable after an arrangement has been reached but not less than 48 hours after the implementation of the store's closure or reduction in hours.
- The notification shall specify whether the store (either franchised or corporate owned) is a fuel or non-fuel store.

5.11. These conditions are the same as those applying under the authorisation AA1000500 granted on 29 July 2020 and interim authorisation granted on 25 March 2021 under the current application AA1000547.

6. Next steps

6.1. The ACCC invites submissions in response to this draft determination by 22 July 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.