



# Draft Determination

Application for authorisation A1000500

lodged by

7-Eleven Stores Pty Limited

in respect of

temporary closures and reduced trading hours for certain stores in its network during COVID-19

Authorisation number: A1000500

8 July 2020

Commissioners: Rod Sims, Delia Rickard, Mick Keogh, Sarah Court, and Stephen Ridgeway

## Summary

The ACCC proposes to grant conditional authorisation to enable 7-Eleven Stores Pty Limited (**7-Eleven**) to approach certain stores in its network and enter into arrangements which will provide for temporary closure or reduced trading hours.

The proposed arrangements allow 7-Eleven and its Franchisees to temporarily adjust trading activities, helping to reduce the economic impact of the Pandemic on participating Franchisees and the network 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 arrangements may assist in the return to competitive conditions. The ACCC considers that this is of benefit to the public.

The ACCC proposes to grant conditional authorisation until 31 March 2021. The condition will allow the ACCC to monitor the authorised conduct.

The authorisation granted by the ACCC is for the sole purpose of allowing the 7-Eleven network to respond to the Pandemic.

On 24 April 2020, the ACCC granted conditional interim authorisation to enable the proposed conduct to commence while the ACCC considers the substantive application.

The ACCC invites submissions in relation to this draft determination before making its final decision.

### 1. The application for authorisation

- 1.1. On 9 April 2020 7-Eleven Stores Pty Limited (**7-Eleven**) applied for authorisation to allow it to approach Franchisees to implement a program of temporary closure or reduced hours for some of its stores that have been substantially affected by decreases in demand during the COVID-19 pandemic (**Pandemic**).
- 1.2. 7-Eleven submits that the government-mandated lockdowns and social distancing measures introduced in response to the Pandemic have resulted in a drastic fall in pedestrian traffic and a corresponding decline in trade. It submits that without being able to coordinate with Franchisees its network would be operating more stores than required to support the current levels of demand.
- 1.3. 7-Eleven has sought authorisation for the following conduct:
  - to approach some of its Franchisees 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 certain stores during the Pandemic. This may include stores operated by the Franchisees, or by itself (or through its sister entity, Convenience Holdings Pty Limited).

(the **Proposed Conduct**)
- 1.4. In assessing which stores to approach, 7-Eleven will consider a store's location, trading performance and operational requirements. The criteria 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.
- 1.5. The Proposed Conduct also includes 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.
  - 1.6. 7-Eleven advises that it will not discriminate in favour of its corporate-owned stores over franchised stores, and the assessment will be applied in the same way to corporate as to franchised stores.
  - 1.7. Participating stores that temporarily reduce their trading hours are likely to be closed from late evening to early morning, with the possibility of further reductions in trading hours on weekends and/or public holidays, depending on demand. Participating stores will display signage directing customers from a closed store to nearby stores and provide information to customers about changes to the trading hours of the participating stores.
  - 1.8. The Proposed Conduct does not involve 7-Eleven and its Franchisees engaging in any price coordination.
  - 1.9. Where a franchised store closes temporarily, 7-Eleven will make an ex gratia payment to the Franchisee to assist in covering certain unavoidable operational costs. For stores that reduce their hours, the minimum guaranteed income that the Franchisee receives from 7-Eleven pursuant to their franchise agreement will be pro-rata adjusted to reflect the temporary reduction in trading hours.
  - 1.10. The Proposed Conduct is voluntary; Franchisees that elect not to participate will continue to receive the minimum gross income they are entitled to under their franchise agreement.
  - 1.11. If a Franchisee wishes to resume ordinary operations prior to the expiry of the arrangements made under the Proposed Conduct, 7-Eleven will not unreasonably withhold consent for them to do so.
  - 1.12. 7-Eleven also seeks authorisation to enable it to engage in the Proposed Conduct in respect of any person who becomes a Franchisee within the period of authorisation. 7-Eleven submits that it has included provision for this out of an abundance of caution and it is unlikely to approach new franchisees at this point in time.

- 1.13. 7-Eleven seeks authorisation for 6 months from the date of the final determination. If demand for convenience stores continues to be materially and adversely impacted as a result of the Pandemic 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 Proposed Conduct.
- 1.14. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

## Interim authorisation

- 1.15. 7-Eleven also requested interim authorisation to enable it to engage in the Proposed Conduct while the ACCC is considering the substantive application.
- 1.16. On 24 April 2020, the ACCC granted interim authorisation under subsection 91(2) of the *Competition and Consumer Act 2010* (Cth) (the Act) for 7-Eleven to engage in the Proposed Conduct.
- 1.17. Interim Authorisation is subject to the following condition that requires 7-Eleven to notify the ACCC of the matters outlined below to ensure there is transparency over the arrangements:

### Notification Condition

- 7-Eleven must notify the ACCC of the Franchisees it proposes to approach for temporary closure or a reduction in trading hours under the Proposed 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 trading 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.
- 1.18. The notification shall specify whether the store (either franchised or corporate owned) is a fuel or non-fuel store.
- 1.19. The conditional interim authorisation commenced on 24 April 2020 and remains in place until it is revoked or the ACCC's final determination comes into effect.

## 2. Background

- 2.1. 7-Eleven is a convenience retailer and Australia's third largest private company. It has a network of more than 700 stores across Victoria, NSW, ACT and Western Australia, most of which are franchised businesses. 7-Eleven stores sell takeaway coffee, snacks, and meals, basic groceries such as bread and milk, and convenience household items. Some 7-Eleven stores also sell fuel.
- 2.2. The ACCC recognises the significant challenges being faced by the economy as a result of the Pandemic. As the government continues to enforce social distancing measures and travel restrictions, various sectors within the economy are suffering from

a sharp decline in revenue while continuing to service their existing financial obligations. The Australian Retailers Association has noted that the impact on the retail sector has been significant, with a 17.9% fall in estimated turnover from March 2020 to April 2020.

- 2.3. Some economic effects may last beyond the period of the Pandemic itself. These effects in a number of sectors have given rise to the need for relief packages from both government and industry. The ongoing loss of employment and demand for products and services offered by businesses is making it increasingly difficult for individuals and businesses to continue to operate on a business as usual basis and to meet their financial obligations. The proposed arrangements allow 7-Eleven and its Franchisees to temporarily adjust trading activities in response to the Pandemic.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including Franchisees, industry associations, and government authorities.<sup>1</sup>
- 3.3. The ACCC received three formal submissions – from Professor Jenny Buchan, the Australian Small Business and Family Enterprise Ombudsman and from Levitt Robinson Solicitors representing a number of 7-Eleven Franchisees involved in a class action against 7-Eleven.
- 3.4. These parties noted concerns about:
  - the period of authorisation and duration of agreements entered into;
  - ability of Franchisees to genuinely 'opt-in' or 'opt-out' of arrangements;
  - ability for 7-Eleven to self-preference its corporate owned stores by closing or reducing the trading hours of franchised stores that are within the same geographic market.
- 3.5. The concerns of interested parties and the response provided by 7-Eleven are considered further in the Assessment chapter of this draft determination.

### 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. 7-Eleven has sought authorisation for proposed conduct that would or might contravene sections 45, 45AF, 45AG, 45AJ and 45AK of the Act.
- 4.3. Consistent with subsection 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 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.

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<sup>1</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- 4.4. The ACCC's assessment of AA1000500 is made in the context of the Pandemic. The Pandemic is impacting Australian consumers and businesses, with many businesses facing severe disruption. Maintaining competition in the long term will be critical to benefit both consumers and the economy. When considering applications for authorisation responding to the Pandemic, the ACCC is seeking to ensure that changes to the competitive landscape are, wherever possible, temporary.
- 4.5. In making its assessment of the Proposed Conduct, the ACCC has considered:
- the application and other relevant information available to the ACCC; this has included information provided by 7-Eleven on a confidential basis;
  - the likely effect of the Proposed Conduct on the relevant areas of competition. These areas of competition include convenience stores retailing in the central business districts of Brisbane, Sydney, and Melbourne;
  - the likely future with the Proposed Conduct compared with the likely future without the Proposed Conduct. Without the Proposed 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

- 4.6. 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.*<sup>2</sup>

- 4.7. 7-Eleven submits that the Proposed Conduct would 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 Proposed 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.
- 4.8. The ACCC considers that without the Proposed 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

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<sup>2</sup> 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.

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.

- 4.9. The ACCC considers that the Proposed 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 Proposed Conduct may assist in the return to competitive conditions. The ACCC considers that this is of benefit to the public.

## Public detriments

- 4.10. 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.<sup>3</sup>*

- 4.11. Submissions received from interested parties have noted the potential for the Proposed Conduct to result in public detriment. In summary these are:
- the period of authorisation, if indicative of the duration of the arrangements entered into with Franchisees, is inappropriately long and fails to take into account changing circumstances;
  - there is a lack of clarity about the ability of Franchisees to 'opt-in' or 'opt-out' of the arrangements. It has been argued that Franchisees should be permitted to opt-out without first requiring the agreement of 7-Eleven; and
  - the Proposed Conduct may allow 7-Eleven to self-preference its corporate owned stores by closing or reducing the trading hours of franchised stores that are within the same geographic market.
- 4.12. 7-Eleven has noted that:
- the 6-month term sought for the authorisation is necessary and realistic due to the uncertainty surrounding the retail landscape and consumer spending patterns during the Pandemic. 7-Eleven considers that the ongoing economic effects of the Pandemic will likely persist beyond the easing of lockdown restrictions.
  - The agreements reached under the Proposed Conduct are short term and are intended to allow a resumption of trade in response to the easing of Pandemic restrictions. The duration of the signed agreements to temporarily reduce store trading hours is 4 weeks with the ability to extend for a further 4 weeks if both parties agree and around 8 to 12 weeks for agreements to temporarily close stores;
  - Franchisees may approach 7-Eleven to discuss opting out of the Proposed Conduct to resume normal trade as and when they consider it would be in their interests to do so. 7-Eleven will recommend any Franchisee that does approach them prior to the agreed period to seek independent legal and financial advice to

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

ensure they are informed and make the correct decision for them. 7-Eleven will not unreasonably withhold consent for a Franchisee that approaches them wanting to resume normal trade;

- any Franchisee can approach 7-Eleven and request to 'opt in' to temporarily close or reduce their trading hours under the Proposed Conduct if their sales have been negatively impacted by the Pandemic.
- 7-Eleven uses the same objective criteria to identify franchised stores to be approached and identify its corporate-owned stores for temporary closure or reduced trading hours. There is no discrimination against franchised stores in favour of corporate-owned stores;
- there is a coincidence of interest between 7-Eleven and its Franchisees in terms of franchised store performance, even where a franchised store is located in the same geographic catchment area as a corporate-owned store. This is because, under its Store Agreement with Franchisees, 7-Eleven receives a share of the gross profit generated by both franchised and corporate-owned stores. 7-Eleven is therefore incentivised to ensure that gross profit is maximised in all of its stores, not just its corporate-owned stores.

4.13. 7-Eleven submits that any public detriment that may arise from the Proposed Conduct is temporary and will not materially alter the competitive dynamics in any market.

4.14. The ACCC notes:

- the agreements reached under the Proposed Conduct are short term, do not extend for the duration of the authorisation, and are intended to allow a resumption of trade in response to the easing of Pandemic restrictions.
- in addition, Franchisees may approach 7-Eleven to request opting out of the Proposed Conduct to resume normal trade when they consider it would be in their interests to do so. The ACCC notes that 7-Eleven and its Franchisees share a common interest in returning to normal trade as soon as is practical;
- the confidential information provided by 7-Eleven indicates that many of the stores that 7-Eleven has approached to temporarily close or reduce their trading hours are located in CBD areas of Brisbane, Sydney, and Melbourne. The significant majority of 7-Eleven's stores in these areas are franchised. On the basis of the information before it, the Commission does not consider that 7-Eleven has given preference to its corporate-owned stores; and
- the Proposed Conduct is unlikely to lead to long term competitive detriment in the CBD areas of Melbourne, Sydney and Brisbane. There are a number of convenience retailers in these areas, including NightOwl, Woolworths Metro, SPAR and other local stores. The temporary change in intra-brand competition is unlikely to lessen inter-brand competition.

4.15. In some geographic areas, 7-Eleven and its Franchisees compete to provide convenience retailing. By providing a mechanism for 7-Eleven and its Franchisees to agree on elements of competition between them, the Proposed Conduct is likely to result in some public detriment.

## Balance of public benefit and detriment

4.16. The ACCC considers that the Proposed Conduct, by allowing 7-Eleven and its Franchisees to temporarily adjust trading activities, 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 Proposed Conduct may assist in the return to competitive conditions. The ACCC considers that this is of benefit to the public.

- 4.17. The ACCC also considers that the Proposed Conduct is likely to result in some public detriment by providing for increased coordination between 7-Eleven and its competing Franchisees.
- 4.18. As noted, some interested parties have expressed concerns about the potential for the Proposed Conduct to result in public detriment. The ACCC considers that these concerns are largely linked to a lack of transparency about how the Proposed Conduct is being implemented by 7-Eleven. The ACCC considers that a targeted notification requirement will provide a suitable mechanism to address these public detriment concerns such 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.
- 4.19. Overall, and subject to the proposed condition, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

### Proposed condition of authorisation

- 4.20. The ACCC may specify conditions in an authorisation<sup>4</sup>. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with<sup>5</sup>.
- 4.21. In its interim authorisation granted on 24 April 2020, the ACCC imposed a condition requiring 7-Eleven to notify the ACCC of the Franchisees it proposes to approach for temporary store closure or a reduction in hours, and the stores (both corporate owned and franchised) which will be closed or have reduced hours. The ACCC considers that the condition has been effective in allowing it to monitor conduct occurring under the protection of interim authorisation.
- 4.22. Interested parties commenting upon the substantive application have expressed concerns about the potential for the Proposed Conduct to result in public detriment. As has been noted the ACCC considers that these concerns are largely linked to a lack of transparency about how the Proposed Conduct is being implemented by 7-Eleven. The ACCC considers that a targeted notification requirement provides a suitable mechanism to address these public detriment concerns.
- 4.23. The ACCC is proposing to maintain the condition of interim authorisation in any final authorisation granted.

### Length of authorisation

- 4.24. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>6</sup> 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

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<sup>4</sup> Section 88(3).

<sup>5</sup> Section 88(3).

<sup>6</sup> Subsection 91(1).

review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

- 4.25. 7-Eleven seeks authorisation for 6 months from the date of the final determination. It notes that if demand for convenience stores continues to be materially and adversely impacted as a result of the Pandemic then it may seek to extend the period in which it and its Franchisees can continue to engage in the Proposed Conduct.
- 4.26. 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.
- 4.27. For the reasons outlined in this draft determination the ACCC proposes to grant authorisation until 31 March 2021.

## 5. Draft determination

### The application

- 5.1. On 9 April 2020, 7-Eleven lodged application AA1000500 with the ACCC, seeking authorisation under subsection 88(1) of the Act for the Proposed Conduct.
- 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 subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed 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 Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, and subject to the Proposed Condition, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Proposed conditions of authorisation

- 5.6. The ACCC may specify conditions in an authorisation.<sup>7</sup> The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.<sup>8</sup>
- 5.7. The 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.<sup>9</sup>
- 5.8. In this instance, the ACCC proposes to grant authorisation subject to the following condition:

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<sup>7</sup> Section 88(3) of the Act.

<sup>8</sup> Section 88(3) of the Act.

<sup>9</sup> Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

### Notification Condition

- 7-Eleven must notify the ACCC of the Franchisees it proposes to approach for temporary closure or a reduction in operating hours under the Proposed 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.

5.9. These proposed conditions are the same as those that currently apply under the Interim Authorisation granted on 24 April 2020.

### Conduct which the ACCC proposes to authorise

5.10. Subject to the proposed condition, the ACCC proposes to grant authorisation AA1000500 to allow 7-Eleven to approach certain stores in its network, including future Franchisees (as defined in paragraph 5.13)<sup>10</sup>, and enter into arrangements which will provide for temporary closure or reduced trading hours as described in paragraph 1.3 and defined as the Proposed Conduct. The proposed authorisation extends to conduct engaged in to give effect to the arrangements.

5.11. The proposed authorisation does not extend to 7-Eleven and its Franchisees engaging in any price coordination.

5.12. The proposed authorisation extends to conduct engaged in by Franchisees to approach 7-Eleven and request to participate in an arrangement to temporarily close or reduce the trading hours of its store on the grounds of hardship.

5.13. The proposed authorisation extends to Proposed Conduct engaged in by any person who becomes a Franchisee within the period of the proposed authorisation.

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

5.15. The ACCC proposes to grant authorisation to the Proposed Conduct only in so far as it is for the sole purpose of responding to the effects of the Pandemic.

5.16. The ACCC proposes to grant authorisation until 31 March 2021.

5.17. This draft determination is made on 8 July 2020.

## 6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination.

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<sup>10</sup> Section 88(2) of the Act.

6.2. In addition, consistent with section 90A of the Act, 7-Eleven or an interested party may request that the ACCC hold a conference to discuss the draft determination.