



# Determination

Application for authorisation AA1000650  
lodged by Bakers Delight Holding Ltd  
in respect of price setting at Bakers Delight Bakeries  
Authorisation number: AA1000650

14 March 2024

Commissioners: Keogh  
Carver  
Lowe

## Summary

The ACCC has decided to deny authorisation to enable Bakers Delight Holdings Ltd (Bakers Delight) to implement a price tiering system for a range of promotional products in its new point-of-sale system.

The ACCC considers that, generally, competition for manufacturing and retail sale of fresh baked bread, bread-based products and pastry-based products is characterised by competition in local areas. The ACCC considers that Bakers Delight bakeries are likely to be constrained by a number of effective competitors that manufacture and or sell fresh baked bread, bread-based products and pastry-based products including independent and/or other franchised bakeries, convenience stores or petrol stations, grocery stores and supermarkets.

The ACCC considers that the Proposed Conduct would be likely to result in public benefits in the form of the Franchisee Bakeries avoiding additional technology fees and costs which would in turn be passed onto consumers.

The ACCC considers that the Proposed Conduct is likely to result in a significant public detriment by limiting Franchisee Bakeries in their ability to make independent decisions affecting their financial viability (based on their particular local market conditions).

Based on the evidence available, the ACCC is not satisfied, in all the circumstances, that the Proposed Conduct would result or be likely to result in public benefits that would outweigh the public detriments that would result or be likely to result from the Proposed Conduct.

The ACCC understands that Bakers Delight is considering the introduction of additional fees which relate to the ongoing operation and maintenance of the new point of sale system. The ACCC was not asked to authorise either the imposition or the quantum of those fees. The ACCC's decision to deny authorisation to Bakers Delight should not be taken to mean that the ACCC has approved those fees. The ACCC expects that Bakers Delight would take into account any obligations it has under the agreements with the Franchisees and under the Franchising Code before deciding whether to introduce any such fees.

### 1. The application for authorisation

- 1.1. On 30 August 2023, Bakers Delight Holdings Ltd (**Bakers Delight**) lodged an application for authorisation AA1000650 with the Australian Competition and Consumer Commission (the **ACCC**). Bakers Delight is seeking authorisation to implement a price tiering system for a range of promotional products (**Promotion Discounts**) in its new Point of Sale (**POS**) system.
- 1.2. Bakers Delight seeks authorisation for a period of 5 years.
- 1.3. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation but must not do so unless it is satisfied in all the circumstances that the conduct would or is likely to result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).

- 1.4. Bakers Delight also requested interim authorisation to enable it to engage in the Proposed Conduct while the ACCC is considering the substantive application. On 27 October 2023, the ACCC denied interim authorisation in accordance with subsection 91(2) of the Act.<sup>1</sup>
- 1.5. On 14 December 2023, the ACCC issued a draft determination proposing to deny authorisation.<sup>2</sup>

## Bakers Delight

- 1.6. Bakers Delight is a franchisor that owns all the intellectual property relating to the conduct of Bakers Delight retail bakery businesses throughout Australia as well as in New Zealand, Canada and the United States of America. Bakers Delight grants franchises for the operation of retail bakeries and itself owns and operates a small number of retail bakeries.
- 1.7. Bakers Delight Bakeries are required to operate these businesses in accordance with the comprehensive bakery systems, methods, procedures, and controls specified by Bakers Delight for the production and retail sale of fresh baked bread, bread-based products and pastry-based products developed by Bakers Delight.
- 1.8. As of 30 August 2023, there were 509 Bakers Delight Bakeries in Australia, with 504 owned by franchisees (the **Franchisee Bakeries**) and 5 owned by Bakers Delight (the **Company Owned Bakeries**) (collectively, the **Bakers Delight Bakeries**).
- 1.9. Bakers Delight is introducing a new POS system that it will require all Bakers Delight Bakeries to use.<sup>3</sup> Bakers Delight submitted that it intended to begin implementation of the new POS system in October 2023 and that it intended to have the system implemented across the network for use by the Bakers Delight Bakeries by February 2024. Bakers Delight submits that the new POS system will be introduced regardless of whether authorisation is granted or not.
- 1.10. Bakers Delight will bear the implementation costs of the new POS system. Ongoing costs of the new POS system will be passed onto the Franchisee Bakeries in the form of the technology fees and costs pursuant to Bakers Delight franchise agreement. The ongoing costs include time incurred by Bakers Delight's Information Technology Services Team in developing and testing the new POS System to enable the Bakers Delight Bakeries to operate their retail services and software licence fees for software employed in the delivery of these solutions.
- 1.11. Under the existing POS system, the Franchisee Bakeries retain complete freedom to set their own prices on individual products they sell. The Franchisee Bakeries will retain that freedom in relation to individual products once the new POS system is implemented.
- 1.12. Under the existing POS system, a range of products are sold via Promotion Discounts, which are described as a set of rules that get evaluated against a customer's shopping cart and determine if the customer gets a discount or not. Promotion Discounts can apply to multiple Bakers Delight products of the same type which are known as Value Packs (e.g., 6 hot cross buns) or specific combinations of products which are known

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<sup>1</sup> See the ACCC's interim authorisation decision of 27 October 2023 on the ACCC's [public register](#).

<sup>2</sup> See ACCC's draft determination of 14 December 2023 on the ACCC's public register.

<sup>3</sup> Bakers Delight has indicated that it intends to exercise its contractual rights under its relevant franchisee agreements to require the implementation of the new POS system. The ACCC notes that Bakers Delight has an exclusive dealing notification ([N98304](#)) that allows it to require Bakers Delight Bakeries to acquire technology, including POS software and hardware, from nominated suppliers.

as Combos (e.g., a bottle of water and a loaf of bread). As at the date of the Application, Bakers Delight has provided the ACCC with a confidential list of 38 Promotion Discounts which are sold across the network of the Bakers Delight Bakeries.

- 1.13. Bakers Delight specifies a Recommended Retail Price (RRP) for all products sold in the Bakers Delight Bakeries, including Promotion Discounts. Under the existing POS system, the Franchisee Bakeries are not required to sell products, including Promotion Discounts, at that price. Under the existing POS system, the Franchisee Bakeries can deviate the Promotion Discount price to any price they want.
- 1.14. Under the existing POS system and the new POS system, Bakers Delight, as the franchisor, determines what Promotion Discounts are ranged and offered.
- 1.15. Under the existing POS system, a number of Promotion Discounts are mandatory and must be sold by the Bakers Delight Bakeries. For those that are not mandatory, the Bakers Delight Bakeries can choose which Promotion Discounts to offer for sale. Bakers Delight submits that this will not change if the Proposed Conduct is authorised, rather it will be easier for the Franchisee Bakeries to distinguish which Promotion Discounts are mandatory and which ones are optional in the new POS system.
- 1.16. Bakers Delight submits that, if the Proposed Conduct is authorised, under the new POS system the Franchisee Bakeries can set their own prices on individual products and select the price of Promotion Discounts from 5 price tiers that are available for each Promotion Discounts. The price tiers cover 80% of existing pricing strategies and are suitable for the Franchised Bakeries to respond to local market conditions and financial pressures. Bakers Delight submits that the highest price tier will eliminate any discount associated with the bundling of the individual products (based on the recommended retail price of those individual products) .<sup>4</sup>

## The Proposed Conduct

- 1.17. Bakers Delight seeks authorisation of the Proposed Conduct on its own behalf,<sup>5</sup> as the franchisor of the Bakers Delight retail baker businesses and the owner of the Company Owned Bakeries, as well as on behalf of current and future franchisees of the Franchisee Bakeries.<sup>6</sup>
- 1.18. As part of the introduction of the new POS system, Bakers Delight proposes to implement price limits, as part of a price tiering system, on all Promotion Discounts sold in the Bakers Delight Bakeries.
- 1.19. Bakers Delight proposes to limit the price that the Bakers Delight Bakeries will be able to charge for Promotion Discounts to 5 tiers of pricing. One price tier would be a RRP set by Bakers Delight, one price tier would be below that RRP and the remaining price tiers would be above that RRP.
- 1.20. In setting these price tiers, Bakers Delight proposes that the price tiers will be standard price increments from the RRP, and larger increments will apply where the RRP for a product is higher. For example, if the RRP is \$10.00, then the price increments may be

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<sup>4</sup> See Bakers Delight submission in response to the ACCC's draft determination on the [public register](#).

<sup>5</sup> Authorisation is not sought on behalf of the related entities and associates of Bakers Delight Holdings Ltd: see application for authorisation available on the [public register](#).

<sup>6</sup> Franchisee details are provided in Schedule 4 of the application for authorisation available on the [public register](#) (as at the date of the Application).

set at \$1.00 increments below and above the RRP, and for a product with a RRP of \$4.00 the price increments may be \$0.25 below and above the RRP.

- 1.21. Once the price tiers are set for all Promotion Discounts in the new POS system, Bakers Delight proposes that the Bakers Delight Bakeries will only be able to select one of the pre-configured price tiers for each Promotion Discount.
- 1.22. Bakers Delight proposes that, in the initial implementation of the price tiers, it would set the 5 tiers to reflect existing pricing patterns for Promotion Discounts across the Bakeries Delight Bakeries.
- 1.23. On 5 September 2023, Bakers Delight clarified that the Proposed Conduct is also intended to cover future changes to the rationale for setting individual price tiers, the spread of the price tiers and include Promotion Discounts not currently listed in a confidential list provided to the ACCC as part of the application for authorisation.
- 1.24. The conduct set out in paragraphs 1.18– 1.23 is the **Proposed Conduct**.
- 1.25. Bakers Delight submits that it is not proposing to limit the ability of Bakers Delight Bakeries to set pricing for individual products (being all products other than Promotion Discounts), including setting their own discounts for such products.
- 1.26. Authorisation is not sought for the introduction of the new POS system itself; however, the need for authorisation of the Proposed Conduct has arisen due to limitations that the specific POS system that Bakers Delight has selected has in its handling of price deviations for Promotion Discounts. Bakers Delight submits that these limitations do not affect individual products as they are administered in a different way within the POS system to Promotion Discounts.
- 1.27. Bakers Delight has clarified that authorisation, if granted, would not extend to the involvement of the Franchisees Bakeries in the setting of the 5 price tiers for Promotion Discounts, as this conduct would constitute cartel conduct under the Act, in that there would be an understanding or agreement that the Promotion Products would be fixed, controlled or maintained.<sup>7</sup>
- 1.28. Bakers Delight submits that the rationale for the Proposed Conduct is as follows:
  - The Proposed Conduct arises due to the implementation of the new POS system across the Bakers Delight network, which Bakers Delight submits will be completed by February 2024. All users of the existing POS system, including the Bakers Delight Bakeries and the Franchisee Bakeries, will be required to implement the new POS system.
  - The new POS system has limitations in its handling of price deviations for Promotion Discounts. This limitation does not affect individual products, as they are administered in a different way to Promotion Discounts.
  - A new Promotion Discount rule needs to be manually created in the new POS system for each price deviation which a Bakers Delight Bakery may wish to select. Therefore, under the Proposed Conduct, for each Promotion Discount a set of 5 records (corresponding to each price tier) must be separately set up in the POS system. The price for each record is defined within the Promotion discount record. Each Promotion Discount record needs to be tested to ensure that it works as intended.

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<sup>7</sup> Bakers Delight submission dated 20 October 2023 on the [public register](#), [Response to interested parties submission].

- The new POS system does not allow for individual Bakers Delight Bakeries to modify the price of the Promotion Discount. This differs from the existing POS system, which allows individual Bakers Delight Bakeries to set the price of a Promotion Discount. Under the existing POS system and the new POS system Bakers Delight, as the franchisor, determines what Promotion Discounts are offered. Bakers Delight submits that as the franchisor, it possesses the knowledge and data necessary for discerning successful and unsuccessful product offerings. Furthermore, Bakers Delight dedicates resources to research and development, creating new products to maintain the network's relevance and stay attuned to customer trends. This is commonplace in franchise networks.
- With the new POS system, it is not practical to create separate Promotion Discount records on the POS system to allow Bakers Delight Bakeries the unrestricted ability to deviate pricing as this would require the manual creation (by the Bakers Delight Information Technology Service Team) of potentially a high number of different records in the POS system. Based on data extrapolated by Bakers Delight from the existing POS system, to accommodate price deviations by individual Bakers Delight Bakeries, thousands of new Promotion Discount records will need to be set up in the new POS system (this is calculated by reference to the number of Promotion Discounts that currently exist, multiplied by the current average of 36 price deviations per Promotion Discount). Such a process would be extremely labour-intensive and would generate a significant amount of work for the Bakers Delight Information Technology Service Team.
- To address the limitation with the new POS system, the Proposed Conduct will allow Bakers Delight Bakeries to deviate to one of the 5 price tiers available for that Promotion Discount. The price tiers will be based on existing data extrapolated from the current POS system and will be consistent with approximately 80% of existing price deviations.<sup>8</sup> The Proposed Conduct will require significantly less Promotion Discount records to be set up in the new POS system, as compared to what would be required if the Proposed Conduct is not authorised.

1.29. Bakers Delight seeks authorisation for the Proposed Conduct for a period of 5 years from the date of the ACCC's final determination. Bakers Delight submits that this period is appropriate for the following reasons:

- Changing a POS system is a major undertaking and not something that Bakers Delight will pursue again for at least 5 years (unless there are major unexpected issues with the new system, or it is not fit for purpose).
- While there will be a slight adjustment for the Bakers Delight Bakeries when Bakers Delight implements the POS system, Bakers Delight expects the Bakers Delight Bakeries will quickly adopt the changes and will subsequently prefer that no further changes are made and cause further disruption by changing the Promotion Discount pricing again.

## 2. Consultation

### Consultation prior to the Draft Determination

2.1. The ACCC invited submissions from a range of potentially interested parties including the Franchisee Bakeries. The ACCC received 3 submissions from interested parties in

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<sup>8</sup> Bakers Delight submit that the data indiscriminately provides information as to the pricing behaviour of Bakers Delight Bakeries regardless of location or State or Territory, and therefore the price tiers will accommodate existing prices that Franchised Bakeries have selected.

relation to the application. All of these submissions were from owners of the Franchisee Bakeries.

- 2.2. An interested party submits that they have reviewed all submissions by Bakers Delight and found that the initial proposed tier pricing aligns with the majority of current price deviations in the Bakers Delight network. However, if authorised by the ACCC, franchisees will no longer have input into pricing in future price adjustments. The Franchisee Bakeries will have to rely on Bakers Delight to increase the tiered options every 6 –12 months. In its submission, the interested party suggests amending the application to include 10% of bakeries in the network requesting that a tiered price point be amended, Bakers Delight should be required to amend the price point accordingly. Currently, over 50% of Bakers Delight Bakeries deviate above the RRP set by Bakers Delight, indicating an increasing number of franchisees no longer see the RRP as appropriate. The interested party submits that a dispute resolution method should be explicitly stated in the application for authorisation to avoid improper power being given to Bakers Delight.
- 2.3. An interested party submits that franchisees in the Bakers Delight network are concerned about the potential retribution from the franchisor for not allowing individual pricing in tiers. The interested party submits that the new POS system will prevent franchisees from surcharging, potentially causing business owners and consumers to pay more due to cost spreads or product reductions.
- 2.4. An interested party, who supported the application for authorisation and understood the reasoning to try to control the cost of the new POS system, submits that there needs to be clear guidelines and procedures for dispute resolution between Bakers Delight and the Franchisee Bakeries in relation to mandatory Promotion Discounts and the pricing tiers for each Promotion Discount. Specifically, the interested party raises the following issues in its submissions:
  - Concerns about the misalignment between Bakers Delight royalties and franchisees' key focuses, where Bakers Delight royalties are a percentage of net sales, while franchisees need to make a profit to survive.
  - Concerns about the mandatory Promotion Discounts. If approved, more discounts could put franchisees at risk of not being able to run a viable and profitable business. Currently, even if a Promotion Discount is mandatory, franchisees can price it at full price, effectively eliminating the discount.
  - That all Promotion Discounts be optional if franchisees cannot choose their own price point outside of the 5 tiers proposed by Bakers Delight with a minimum dispute resolution procedure in place if franchisees believe Bakers Delight are abusing their power to mandate these discounts.
  - The proposed price tiers for Promotion Discounts are not consistent or incremental, and further clarification is needed on how they will be determined. An example provided by Bakers Delight shows that only one bakery deviated below the RRP, suggesting a more accurate representation of pricing tiers would be RRP and 4 tiers above RRP.
  - The percentage of mandatory Promotion Discounts may account for a larger portion of sales at key trading times, such as Christmas and Easter.
  - It is important for franchisees to have enough input into setting the price tiers and establish a dispute resolution procedure if they believe Bakers Delight is compromising the ability of Franchisee Bakeries to make a profit when Promotion Discount pricing tiers are set.

- 2.5. Bakers Delight made a submission in response to these interested party submissions, in which it submits that the submissions do not provide compelling reasons for the ACCC to disapprove the application for authorisation.
- 2.6. In its submission, Bakers Delight emphasises that its main objective in setting the price tiers is ensuring that the current pricing behaviours for Promotion Discounts remain unchanged, and that:
- Bakers Delight does not wish to engage in the Proposed Conduct, and the Proposed Conduct is only necessary to address a limitation in the new POS system. Bakers Delight does not take issue with the Franchisee Bakeries selecting the price of Promotion Products and indeed individual products.
  - By maintaining the status quo of prices, there will be minimal changes to:
    - the profit and sales of Bakers Delight Bakeries
    - the price of Promotion Discounts for consumers.
  - In trying to maintain the status quo, Bakers Delight acknowledges that it will not accommodate every price deviation that currently exists. Promotion Discounts are deviated on average by 36 Bakers Delight Bakeries, with the highest recorded number of deviations for a particular Promotion Discount being 121 deviations out of a total of 509 Bakers Delight Bakeries. The Proposed Conduct is intended to accommodate for price deviations, whilst balancing the need to minimise costs and disruption to the Bakers Delight Bakeries that do not price deviate and therefore do not directly benefit from the introduction of the price tiers.
- 2.7. In its submission, Bakers Delight also made further submissions in response to the concerns raised by interested parties about the mandatory Promotion Discounts and Promotion Discount tiers.
- 2.8. In relation to the mandatory Promotion Discounts, Bakers Delight submits that it has the sole discretion in determining the list of products that can be sold by a Bakers Delight Bakery, including what specific combinations of products constitute a Promotion Discount. Bakers Delight submits that it prioritises the combination of products that would likely increase revenue, as it receives royalties from the Franchisee Bakeries calculated on net sales. Bakers Delight states that it has no intention to arbitrarily introduce more mandatory Promotion Discounts and declines the suggestion that all Promotion Discounts be made optional. The foundation of the Bakers Delight's franchise system is the adherence by the Franchisee Bakeries to Bakers Delight's standards and policies, which ensure uniform operation of all Bakers Delight Bakeries. Customers will have inconsistent shopping experiences if there is no uniformity in the Bakers Delight product list and mandatory Promotion Discounts offered at every Bakers Delight Bakery. Under the Proposed Conduct, the Franchisee Bakeries can select whichever price tier suits their needs, with price tier 5 being high enough to effectively eliminate the discount offered by grouping Individual Products (priced at the RRP) into the Promotion Discount. Baker Delight notes that dispute resolution mechanisms exist in the franchise system, and Bakers Delight will comply with good faith obligations under the Franchising Code in relation to the transition to the Proposed Conduct.
- 2.9. In relation to the Promotion Discount price tiers, Bakers Delight submits:
- Bakers Delight has not finalised its guidelines for setting the proposed price tiers for Promotion Discounts, which is a resource-intensive process. The guidelines will be substantially the same as the information provided in the Application and further responses to the ACCC. There will be 5 price tiers: Tier 1, Tier 2, Tier 3, and Tiers 3 – 5, which will reflect 80% of all existing Promotion Discount price deviations.



The spread of the price tiers will depend on current pricing patterns and may not be uniform or standard increments.

- The spread of the price tiers will be determined based on the price of the RRP, with larger price increments applying where the RRP for a product is higher. There is only a small percentage of price deviations below the RRP. Bakers Delight acknowledges the submission that setting one price tier as the RRP and 4 price tiers above the RRP would be a more accurate representation of pricing behaviours. However, it intends to set a price tier below the RRP to enable competitive pricing if appropriate in the circumstances.
- Bakers Delight disagrees with the submission that the application does not disclose how many Bakers Delight Bakeries currently deviate prices. Schedule 4 of the Application contains de-identified data relating to Promotion Discounts, including the number of Bakers Delight Bakeries that have deviated the price from the RRP of Promotion Discount and the actual deviation from the RRP.
- Bakers Delight does not agree with the suggestion that it should involve the Franchisee Bakeries in setting the price tiers, as this conduct would constitute cartel conduct under the Act. Instead, they will set price tiers based on an objective analysis of current pricing behaviours, without any element of collusion.
- Bakers Delight acknowledges that the Proposed Conduct may limit the profit of a small number of Bakers Delight Bakeries, but it does not consider this as the most compelling consideration. Bakers Delight is responsible for the interests of the Bakers Delight network, which does not deviate from its prices. The new POS system has limitations, allowing greater discretion to deviate prices, which is against the majority of Franchisee Bakeries' best economic interests. Additionally, the RRP is set at a price that would allow an average Bakers Delight Bakery to generate a profit based on average sales of individual products and Promotion Discounts. Bakers Delight Bakeries can select up to 3 price tiers above the RRP and compete on other factors.

2.10. In response to the ACCC's draft determination, Bakers Delight provided a further submission on 30 January 2024 in relation to the ACCC's assessment of the likely public benefits and public detriments. The ACCC has considered this submission in section 3 below.

2.11. In this submission, Bakers Delight also responded to the above interested party submissions:<sup>9</sup>

- Bakers Delight disagrees with the submission claiming that over 50% of Bakers Delight Bakeries deviate above the RRP. It estimates an average of 36 deviations per Promotion Discount, affecting 7% of all Bakers Delight Bakeries. Bakers Delight reviews the RRP annually for the Franchisee Bakeries and consumers.
- Bakers Delight submits that dispute resolution mechanisms already exist in the Franchise Agreement and under the Franchising Code of Conduct.
- In relation to EFTPOS surcharging, Bakers Delight submits that changes to surcharging policies are not relevant to the application, as the payment gateway platform is a separate platform to the new POS System.
- In relation to misalignment of interests between Bakers Delight and the Franchisee Bakeries, Bakers Delight submits that its interests are not misaligned with

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<sup>9</sup> See Bakers Delight submission in response to ACCC's draft determination dated 30 January 2024 on the [public register](#).

Franchisee Bakeries, as it holds 95% of head leases for the premises of the Bakers Delight Bakeries and enters into Occupancy Licences with the Franchisee Bakeries. If the Franchisee Bakeries fail, Bakers Delight is responsible for occupancy costs, creating significant exposure for Bakers Delight and added incentive to ensure profitability of the Franchisee Bakeries. The success of Franchisee Bakeries positively impacts the Bakers Delight Network's reputation.

- In relation to mandatory Promotion Discounts, Bakers Delight submits that in the new POS System it is easier for Franchisee Bakeries to distinguish which Promotion Discounts are mandatory and which are optional. The Franchisee Bakeries can choose which of the optional Promotional Discounts to range (or offer). At the point of checkout, if the individual products are selected then the new POS system will detect the relevant Promotion Discount. The price tier chosen by the Franchisee Bakery will then be automatically applied. If the Promotion Discount is not mandatory then the prices of the individual products that make up the Promotion Discount will be displayed. The Franchisee Bakery can then select the price of the individual products. The detriments with limiting Promotion Discounts to 5 price tiers only affect the mandatory Promotion Discounts for all Franchisee Bakeries.
- In relation to input from the Franchisee Bakeries about pricing strategies, Bakers Delight submits that it will not discuss pricing strategies with the Franchisee Bakeries, as it could be considered cartel conduct. Bakers Delight will continue to use data from the POS System and conduct an annual review of the RRP to minimise profitability effects and ensure a reasonable pricing strategy.

#### Consultation after the Draft Determination

2.12. In response to the ACCC's draft determination, an interested party provided a submission in support of the ACCC's draft determination. The interested party submits:

- They have not been informed of the additional costs if the Proposed Conduct is not authorised.
- Flexibility and independence to react to regional conditions is crucial for their business's success with the need to offer competitive pricing to compete with other bakeries in the local area, not at pre-determined prices set by Bakers Delight.
- Currently they choose not to offer many Promotional Discounts, which they can do by setting the price to 100% of the original total. If the Proposed Conduct was authorised, they would be obliged to offer discounts to customers under the new POS system. If one price tier was no discount at all, the Interested Party would be able to maintain their flexibility in the business.
- In the current market, they choose to price many items above the RPP price offered by Bakers Delight. They also offer Promotional Discounts either proportionally or higher than their RRP. The interested party is concerned that the proposed price tiering system under the Proposed Conduct would impact their ability to make decisions for their business and profitability.

2.13. On 8 February 2024, the ACCC conducted further consultation with the Franchisee Bakeries seeking views on how the Franchisee Bakeries would be impacted if Bakers Delight introduced a new price tiering system for a range of Promotion Discounts as part of its new POS system. The ACCC also sought views on the proposed increase in fees payable by the Franchisee Bakeries to Bakers Delight of approximately \$25 per month if the Proposed Conduct was not authorised and the price tiering system was not introduced. The ACCC received 6 public submissions and 2 confidential submissions from owners of Bakers Delight Bakeries.

- 2.14. One franchisee from Bakers Delight Bulli and Bakers Delight Corrimal was in support of the proposed price tiering system for Promotion Discounts as part of the new POS system. The franchisee submits that the Proposed Conduct provides flexibility for pricing Promotion Discounts, but also encourages Bakers Delight to seek the Franchisee Bakeries' input or network feedback before finalising the tiered pricing.
- 2.15. Bakers Delight Albury has no objection to the proposed price tiering system for Promotion Discounts allowing for a streamlined promotion process and reduced costs for the Franchisee Bakeries. Baker Delight Albury submits that if they were to deviate prices for the Promotion Discounts it would be within the proposed tier structure.
- 2.16. Bakers Delight Burnside supports Bakers Delight's proposed price tiering system, as it ensures a standardised system for product and pricing. While there are certain local conditions which may require deviation on pricing at times, Bakers Delight Burnside submits that, if the Proposed Conduct is not authorised, the estimated \$25 per month IT costs would impact their business more.
- 2.17. An interested party provided a submission opposing Bakers Delight's proposal for tiered pricing structure, submitting that it limits individual Franchisee Bakeries from setting prices based on business requirements, local markets, outgoings, and general overheads. It submits that the Bakers Delight Bakeries operate in diverse communities with varying business expenses and demographics, necessitating flexibility in pricing. Further, the interested party also opposes the \$25 per month additional ongoing costs if the proposed price tiering system is denied authorisation by the ACCC. It submits that the Franchisee Bakeries were not consulted on the new POS system being implemented by Bakers Delight, with no discussion or input on its benefits or limitations. As part of the upgrade to the new POS system, Bakers Delight is also imposing EFTPOS systems with ongoing fees and charges higher than other available providers. The Franchisee Bakeries are already seeing increased monthly fees related to the new POS system, and there is no valid reason for charging additional fees for a poorly chosen system with no prior input or discussion with business operators.
- 2.18. An interested party provided a submission opposing the Bakers Delight proposed price tiering system on the basis that their low-sale bakery is located in a small strip site, where they do not have massive foot traffic like big shopping centres. The interested party submits that discounting products comes from their margin line, and they already pay marketing, advertising, royalties, and other fees to Bakers Delight. The interested party submits that charging the Franchisee Bakeries extra fees for not following Bakers Delight proposal is highway robbery. The interested party submits that it already struggles with high business costs, such as wages, rent, electricity, ingredients, and insurance while sales have not gone up by the same, meaning their margins are lower. The interested party also notes that it does not want to pay additional costs if Bakers Delight's proposed price tier pricing system is not authorised by the ACCC.
- 2.19. In a submission provided to the ACCC, Triple Luc Enterprises submits that Bakers Delight proposed price tiering system may limit the ability of Franchisee Bakeries to set prices more aligned with individual regions and be centrally controlled by the Franchisee Bakeries. It submits that Bakers Delight has always passed on the cost to the Franchisee Bakeries, and there is no ability to question these costs. The proposed price tiering system also does not mention the cost of an expensive EFTPOS system for the Franchisee Bakeries, which is more costly than other available providers. The new POS system has also changed since the initial workshop with the Bakers Delight network, making it harder for staff to begin orders and slowing down customer service. Other changes may also occur before the system goes live.

2.20. On 21 February 2024, Bakers Delight provided a further submission in response to the Franchisee Bakeries submissions.<sup>10</sup> Bakers Delight submits:

- In response to the interested party submission dated 19 January 2024, Bakers Delight clarified that the Proposed Conduct will not require Franchisee Bakeries to offer discounts on Promotion Discounts. One of the proposed price tiers is above RRP for Promotions Discounts, which essentially eliminates the discount available when combining the selected products that make up the Promotional Discount rule.
- In response to the interested party submission dated 12 February 2024, Bakers Delight submits that Bakers Delight is not required to discuss, consult or obtain feedback from the Franchisee Bakeries prior to changing the POS system.<sup>11</sup> Bakers Delight submits that it has a robust tender process that suppliers must go through to become an approved or nominated supplier for the Franchise System. Bakers Delight submits that the new POS System is not poorly chosen and there are significant benefits, in particular an integrated payment gateway, more secure payment options, better layout and user interface and more customer support from the supplier.
- In response to Triple Luc Enterprises' submission, Bakers Delight submits that the Franchisee Bakeries can query Bakers Delight about the POS System costs, but Bakers Delight has no obligation to change the technology fees and costs based on feedback or questions received.<sup>12</sup> Bakers Delight notes that it has nonetheless been subsidising the costs associated with IT services since July 2017. Bakers Delight submits that this submission views the technology fees and costs to be more expensive when compared to a third-party supplier, in particular the EFTPOS machine. Bakers Delight submits that without details of the third-party supplier referenced by the Franchisee Bakery, Bakers Delight cannot compare and assess whether the POS systems are 'like for like'.
- Bakers Delight submits that the Bakers Delight network will transition to the new POS system in due course, regardless of the outcome of this authorisation application. This application is only relevant to the Proposed Conduct and price tiers of Promotion Discounts.

2.21. Public submissions by Bakers Delight and interested parties are available on the ACCC's [public register](#) for this matter.

### 3. ACCC assessment

- 3.1. Bakers Delight has sought authorisation for the Proposed 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. Specifically, Bakers Delight seeks authorisation to engage in conduct that would or might constitute cartel conduct within the meaning of sections 45AD(2) and (4) of the Act.
- 3.2. Consistent with 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 would

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<sup>10</sup> See Bakers Delight submission in response to interested parties dated 21 February 2024 on the ACCC's [public register](#).

<sup>11</sup> Bakers Delight has an exclusive dealing notification ([N98304](#)) that allows it to require Bakers Delight Bakeries to acquire technology, including POS software and hardware, from nominated suppliers.

<sup>12</sup> Bakers Delight has an exclusive dealing notification ([N98304](#)) that allows it to require Bakers Delight Bakeries to acquire technology, including POS software and hardware, from nominated suppliers.

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.

## Relevant areas of Competition

- 3.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 3.4. The ACCC considers the relevant area of competition likely to be affected by the Proposed Conduct is:
  - the manufacturing and retail sale of fresh baked bread, bread-based products and pastry-based products
  - intra-brand competition between Bakers Delight Bakeries.
- 3.5. The ACCC considers that generally, competition for manufacturing and retail sale of fresh baked bread, bread-based products and pastry-based products is characterised by competition in local areas. Accordingly, relevant to Bakers Delight Bakery locations, the ACCC considers that the Bakers Delight Bakeries are likely to be constrained from a number of effective competitors that manufacture and or sell fresh baked bread, bread-based products and pastry-based products including independent and/or other franchised bakeries, convenience stores or petrol stations, grocery stores and supermarkets such as Coles, Woolworth and IGA stores.

## Future with and without the Proposed Conduct

- 3.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 3.7. Bakers Delight submits that in the future without the Proposed Conduct:
  - Bakers Delight will continue its agreement with the new POS system supplier and progress the implementation of its plan for the new POS system.
  - The Franchisee Bakeries will continue to have unrestricted ability to deviate pricing for all Bakers Delight products, including for Promotion Discounts.
  - Bakers Delight will prioritise the performance of the POS system because it directly affects the consumer's shopping check out experience and the ability for Bakers Delight Bakeries to facilitate transactions. To ensure that the performance of the new POS system is at a high standard, Bakers Delight will incur costs associated with maintaining and servicing the POS system and the purchase of additional computer capacity. These are ongoing, recurring fees that will affect the entire franchise network and will be passed on to franchisees by way of increased technology fees.
  - The ongoing technology fees and costs are anticipated to increase by an additional \$25 per month which is above and beyond the costs of transitioning to the new POS system. The higher costs will be payable by all Franchisee Bakeries, even those Franchisee Bakeries that choose not to deviate prices for Promotion Discounts.
  - The technology fees and costs associated with the new POS system will also increase due to:
    - (i) Inflation. The fee for the current POS system has also increased, so the technology fees for the Bakers Delight Bakeries will increase regardless of the change in the POS system;

- (ii) The additional features and improvements that will be derived from the POS system including integrated payment gateway, more secure payment options, better layout and user interface and more customer support from the supplier. Furthermore, the supplier of the POS system is a multinational company so it can better facilitate BDH's global business and expansion plans and be implemented in other jurisdictions; and
- (iii) Increase in fees that are not related to the POS system implementation, such as increases in the salary of Bakers Delight Information Technology Services Team employees which would also impact the costs of the existing POS system.

3.8. The ACCC considers that in the future without the Proposed Conduct:

- Bakers Delight would likely proceed with the implementation of the new POS system and the Franchisee Bakeries would continue to incur monthly technology fees.
- The Franchisee Bakeries would likely continue to have the unrestricted ability to deviate pricing of all Bakers Delight products, including for Promotion Discounts.
- The Franchisee Bakeries may face additional ongoing technology fees and costs associated with the implementation of pricing records in the new POS system reflecting the unrestricted ability to deviate pricing of Promotion Discounts.

## Public benefits

3.9. 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 in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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>13</sup>*

3.10. Bakers Delight submits that the Proposed Conduct is likely to result in the following public benefits:

- efficiencies in the supply of Bakers Delight products, including Promotion Discounts, to consumers across the Bakers Delight network
- increased brand reputation of Bakers Delight by providing more consistent prices to consumers across the Bakers Delight network and
- lower costs charged to the Bakers Delight Bakeries for the setup of Promotion Discounts in the new POS system, which in turn results in lower costs for consumers.

3.11. A number of other matters raised in submissions by Bakers Delight as potential public benefits would not be, in the ACCC's assessment, causally connected to the Proposed Conduct in that they would be likely to exist or not be materially different in the future with as against the future without the Proposed Conduct because Bakers Delight would introduce the new POS system in any event:

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<sup>13</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.

- As a fully integrated payment solution for the Bakers Delight Bakeries, the new POS system will provide cost-efficiencies, a more seamless check-out experience for consumers and automated accounting processes.
- The new POS system includes production and waste tracking features allowing Bakers Delight Bakeries to easily report the level of production and waste in their stores.
- The new POS system has UberEATS integration allowing for Bakers Delight product prices to be automatically loaded, rather than manually entered by employees. The integration will reduce the number of steps that Bakers Delight Bakeries must do to accept UberEATS delivery orders and streamline the entire process.
- Data from the Bakers Delight loyalty program will be integrated into the new POS system. As a result, customers will no longer be required to call the Bakers Delight Customer Relation department if they wish to receive a refund because refunds can be processed through the new POS system, which will reflect the consumer's loyalty points in their account.

3.12. The ACCC understands from Bakers Delight that the new POS system will be implemented across the Bakers Delight network irrespective of the authorisation.<sup>14</sup> The ACCC considers that the matters identified by Bakers Delight in paragraph 3.11 above are likely to occur with and without the Proposed Conduct. Therefore, the ACCC considers that these potential public benefits lack a causal connection to the Proposed Conduct. Consequently, they are unlikely to materially affect whether the ACCC is satisfied of the test in section 90(7) of the Act.

3.13. The ACCC's assessment of the likely public benefits is set out below.

### **Efficiencies in supply**

3.14. Bakers Delight submits that the Franchisee Bakeries will be able to offer Promotion Discounts through the centralised POS system and consumers can conveniently and efficiently purchase Promotion Discounts from Bakers Delight Bakeries through the centralised POS system.<sup>15</sup>

3.15. Bakers Delight submits that the Proposed Conduct will enable the Bakers Delight Bakeries and Franchisee Bakeries to use a streamlined interface that only contains 5 pricing deviations per Promotion Discount. Without the Proposed Conduct, Bakers Delight submits that it will need to set individual Promotion Discount records in the new POS system which will cause a degradation of system performance. Bakers Delight also submits that this would cause delays in the processing of customer transactions which has a detrimental impact on the customer service experience.<sup>16</sup>

3.16. In response to the ACCC's draft determination, Bakers Delight submits that the customer experience as well as the Franchisee Bakeries' experience with the new POS system will not be the same with and without the Proposed Conduct. If the Proposed Conduct is not authorised and Bakers Delight is required to allow the Franchisee Bakeries absolute flexibility to select the price of each Promotion Discount, Bakers Delight submits that the performance of every transaction will deteriorate due to the large number of Promotion Discount records, regardless of whether the

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<sup>14</sup> See Bakers Delight submissions dated 20 October 2023 and 21 February 2024 on the [public register](#).

<sup>15</sup> The application for authorisation AA1000650 is available on the [public register](#), [Public Benefits, Efficiencies in supply].

<sup>16</sup> The application for authorisation AA1000650 is available on the [public register](#), [Public Benefits, Efficiencies in supply].

transaction relates to Individual Products or Promotion Discounts.<sup>17</sup> Bakers Delight submits the overall check out experience would be adversely affected and worse than the current performance if the Proposed Conduct is not authorised.

- 3.17. In this submission, Bakers Delight also submits that if the Proposed Conduct is not authorised it will consider 2 options (a fully automated solution or a less automated solution) to continue to facilitate the unrestricted ability of the Bakers Delight Bakeries to deviate prices for the Promotion Discounts in the new POS system. Both options would require additional resources to support the additional load of the Promotion Discount records in the new POS system, which would require a larger server to be purchased by Bakers Delight. Bakers Delight submits that if it purchases a larger server to facilitate the Promotion Discount records and to maintain a performance quality that is similar to the current POS system, than all Franchisee Bakeries will incur an additional \$300 per year in technology fees. Bakers Delight submits that these additional ongoing costs are likely to be on-charged to consumers by Franchisee Bakeries by way of increasing the price of Bakers Delight products.

### **ACCC view**

- 3.18. The ACCC considers that the streamlined interface for Promotion Discounts by setting 5 price tiers, as well as the reduced risk of degradation and delay of the entire POS system, may facilitate a better customer experience, compared to a point-of-sale experience where potential degradation to the POS system (because of the number of additional records or rules required in the POS system to allow unrestricted pricing on Promotion Discounts) results in delays in processing customer transactions. To the extent that the Proposed Conduct facilitates a more efficient and reliable POS system for the Bakers Delight Bakeries, the ACCC considers this may be likely to result in some small public benefit in the form of a more seamless customer experience for consumers purchasing Bakers Delight products, including Promotion Discounts.
- 3.19. Bakers Delights initially submitted that without the Proposed Conduct it would prioritise the performance of the new POS system because it directly affects the consumer's shopping check out experience and the ability for the Bakers Delight Bakeries to facilitate transactions.<sup>18</sup> To ensure that the performance of the new POS system is at a high standard, Bakers Delight will incur costs associated with maintaining and servicing the new POS system and the purchase of additional computer capacity. The ACCC notes Bakers Delight's submission that these additional costs will be passed onto the Franchised Bakeries through recurring payments by the Franchisee Bakeries to Bakers Delight. This is discussed further below at paragraph 3.33.
- 3.20. Based on the information before it, the ACCC considers that, if the Proposed Conduct is not authorised, it is likely that Bakers Delight will take steps to ensure that the overall shopping check out experience for customers and the Bakers Delight Bakeries in the new POS system is not adversely affected by the creation of additional Promotion Discount records, including by purchasing a larger server to maintain the performance quality of the new POS system. The ACCC therefore considers that customer experience is likely to be the same with or without the Proposed Conduct and consumers would conveniently and efficiently purchase Promotion Discounts from the Bakers Delight Bakeries with or without the Proposed Conduct.
- 3.21. The ACCC accepts that a more efficient and reliable POS system for Bakers Delight Bakeries may constitute a small public benefit in the form of a more seamless

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<sup>17</sup> See p6 of Bakers Delight submission dated 30 January 2024 available on the [public register](#).

<sup>18</sup> See Bakers Delight submission dated 20 October 2023 on the [public register](#).



customer experience for consumers purchasing Bakers Delight products, including Promotion Discounts. However, based on the information before it, the ACCC considers that there is not sufficient evidence for the ACCC to reach the conclusion that this public benefit is likely to result from the Proposed Conduct.

## Brand reputation

- 3.22. Bakers Delight submits that the Proposed Conduct will limit any excessive prices by Bakers Delight Bakeries by putting a limit on how far the Franchisee Bakeries can deviate from the RRP. Bakers Delight submits that, as in all franchise networks, the behaviour of one franchisee can negatively impact the whole brand and its network of franchisees.<sup>19</sup>
- 3.23. Bakers Delight submits that by reducing the spread of price deviations throughout the Bakers Delight network, consumers will benefit from the consistency in pricing particularly as some consumers may not be aware that prices are not consistent across the Bakers Delight network. Bakers Delight submits this is pertinent, given that consumers will want more certainty in pricing during an environment of high inflation and increasing costs of living.<sup>20</sup>
- 3.24. In response to the ACCC's draft determination, Bakers Delight provided information about the Promotion Discounts price points chosen by Franchisee Bakeries under the existing POS system.<sup>21</sup> Bakers Delight submits that of all the Promotion Discounts price points it has reviewed, 70% of all price deviations occurred within 3 price tiers from the RRP, and 80% of all deviations occurred within 4 price tiers from RRP. Further, Bakers Delight submits that 3% of deviations were more than \$4 above the RRP and 5% were \$3 above the RRP. The ACCC understands that from this information, Bakers Delight submits that the Proposed Conduct will limit price gouging by Bakers Delight Franchisee Bakeries, and this may increase brand reputation and customer loyalty across the Bakers Delight network.

## ACCC view

- 3.25. The ACCC acknowledges that there are benefits a franchisee receives from entering into business arrangements under a franchising model, including a franchisor's brand, reputation and customer loyalty. Therefore, maintaining positive brand reputation and loyal customers is likely important for the overall success of a franchise and its franchisees, and may constitute a benefit to the public.
- 3.26. Based on the information currently before it, the ACCC is not persuaded that the introduction of 5 pricing tiers for Promotion Discounts, which will reduce the spread of price deviations and result in more consistent prices for consumers throughout the Bakers Delight network, is likely to result in a benefit to the public in the form of increased brand reputation. In particular, the ACCC notes that:
- Bakers Delight submits that its customers are typically loyal to one Bakers Delight Bakery and are unlikely to purchase products from other Bakers Delight Bakeries (which may have different pricing of Bakers Delight products).<sup>22</sup> It also submits that

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<sup>19</sup> The application for authorisation AA1000650 is available on the [public register](#), [Public Benefits, Brand reputation].

<sup>20</sup> The application for authorisation AA1000650 is available on the [public register](#), [Public Benefits, Brand reputation].

<sup>21</sup> See p6 of Bakers Delight submission dated 30 January 2024 on the [public register](#) under the heading Paragraph 3.10 - limitation on price gouging

<sup>22</sup> The application for authorisation AA1000650 is available on the [public register](#), [Overlapping Products and Intra-brand Competition].

there is very little intra-brand competition between the Company Bakeries and Franchisee Bakeries.<sup>23</sup> The ACCC considers that the benefit of increased brand reputation, on the basis of more consistent pricing across the Bakers Delight Bakeries, is not likely to result from the Proposed Conduct if consumers are unlikely to purchase from other Bakers Delight Bakeries and if intra-brand competition is low.

- Bakers Delight submits that the Proposed Conduct does not seek to limit any price deviations on individual products across the Bakers Delight network: it is confined to the price deviations on Promotion Discounts.<sup>24</sup> The ACCC considers that the application does not address why these 2 categories are treated differently in relation to their impacts on brand reputation, in particular where Promotion Discounts are a relatively small subset of products that Bakers Delight Bakeries sell and account for a significantly smaller portion of total sales for an average Bakers Delight Bakery.<sup>25</sup>

3.27. While Bakers Delight submits that the Proposed Conduct will likely limit price gouging by individual Bakers Delight Bakeries<sup>26</sup>, existing Promotion Discounts reviewed by Bakers Delight demonstrate that only 3% of price deviations of Promotion Discounts are more than \$4 of the RRP, and 5% were \$3 above the RRP. The ACCC considers that this accounts for a very small proportion of price deviations of Promotion Discounts and therefore suggests that price gouging behaviour is limited. The ACCC does not consider that the Proposed Conduct is likely to result in a public benefit through increased brand reputation for Bakers Delight by providing more consistent prices to consumers across the Bakers Delight network. This is because the ACCC considers that an increase in brand reputation for Bakers Delight is not likely in circumstances where customer loyalty is to individual Bakers Delight Bakeries, there is limited intra-brand competition between the Bakers Delight Bakeries, and where the Proposed Conduct will only impact the price deviations of a relatively small subset of products that the Bakers Delight Bakeries sell.

### Lower costs

3.28. Bakers Delight submits that reducing the potential number of Promotion Discounts records in the new POS system will ensure that the POS system is run at a lower cost.<sup>27</sup> Bakers Delight submits that this is a benefit to the public because lower costs charged to the Bakers Delight Bakeries will in turn result in lower costs for consumers purchasing Bakers Delight products.

3.29. Without the Proposed Conduct, Bakers Delight submits that the Franchisee Bakeries will continue to have unrestricted ability to deviate pricing in respect of all products, including Promotion Discounts. This means that Bakers Delight will need to manually set up thousands of Promotion Discount records in the new POS system, resulting in:<sup>28</sup>

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<sup>23</sup> See p16 of the application for authorisation AA1000650 is available on the [public register](#), [Overlapping Products and Intra-brand Competition].

<sup>24</sup> See for example p4 of the application for authorisation AA1000650 is available on the [public register](#).

<sup>25</sup> The application for authorisation AA1000650 is available on the [public register](#), [Cartel conduct – decreased intra-brand competition for Promotion Discounts].

<sup>26</sup> See p6 of Bakers Delight submission dated 30 January 2024 on the [public register](#) under the heading Paragraph 3.10 - limitation on price gouging and p20 of the application for authorisation AA1000650 is available on the [public register](#), [Public Benefits, Brand reputation]

<sup>27</sup> The application for authorisation AA1000650 is available on the [public register](#), [Public Benefits, Lower Costs].

- Bakers Delight's Information Technology Service Team devoting significant time and resources to set up the Promotion Discounts and Promotion Discount records to facilitate the unrestricted ability for Bakers Delight Bakeries to deviate pricing.
- The costs associated with setting up the Promotion Discounts and Promotion Discount records to facilitate the unrestricted ability to deviate pricing would be passed on to the Franchisee Bakeries by way of increase to their IT services monthly fee.
- More 'compute' resources needing to be added to the new POS system. If the additional Promotion Discounts and Promotion Discount records degrade system performance, then the further costs associated with this will be directly charged to the Franchisee Bakeries again via an increase to their monthly IT services fee.
- Increased costs in the form of increases to the monthly IT services fee will most likely lead to price increases of Bakers Delight products to enable the Franchisee Bakeries to recover their increased IT service costs.

3.30. In response to the ACCC's draft determination, Bakers Delight provided information to the ACCC on the processes that would be necessary to set up Promotion Discounts in the new POS system if authorisation was not granted and provided public and confidential estimates of the costs associated with these processes.<sup>29</sup> Irrespective of whether the Proposed Conduct is authorised, Bakers Delight submit that there are 2 main costs associated with the implementation of the new POS system, namely:<sup>30</sup>

- (i) costs which are associated with implementing and developing the new POS system (**Implementation Costs**); and
- (ii) costs which relate to the ongoing operation and maintenance of the new POS system (**Ongoing Costs**). These costs are on-charged to the Franchisee Bakeries as part of the technology fees and costs that is payable by the Franchisee Bakeries on a monthly basis to Bakers Delight.

3.31. In its submission, Bakers Delight submits that another cost associated with the new POS system is the requirement for the Franchisee Bakeries to purchase and install a new EFTPOS pin pad machine. Bakers Delight submits that the cost of one pin pad is nominal and is a once-off fee, along with a monthly warranty fee per pin pad device. The Franchisee Bakeries are not required to purchase any other hardware or software as part of the transition to the new POS system.<sup>31</sup>

3.32. Bakers Delight submits that the Implementation Costs will be borne by Bakers Delight because it relates to the transitioning of the current POS system to the new POS system, and the Ongoing Costs will be borne by and spread across the Franchisee Bakeries. Bakers Delight submits that the Ongoing Costs will include:

- (i) time incurred by Bakers Delight Information Technology Services Team in developing and testing and supporting the new POS System to enable the Bakers Delight Bakeries to operate their retail services; and

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<sup>29</sup> Bakers Delight can exercise its contractual rights under its relevant franchisee agreements to require the implementation of the new POS system. The ACCC notes that Bakers Delight has an exclusive dealing notification ([N98304](#)) that allows it to require Bakers Delight Bakeries to acquire technology, including POS software and hardware, from nominated suppliers.

<sup>30</sup> See Bakers Delight submission in response to ACCC's draft determination dated 20 October 2023 and 30 January 2024 on the [public register](#).

<sup>31</sup> See Bakers Delight submission in response to ACCC's draft determination dated 30 January 2024 on the [public register](#).

- (ii) software licence fees for software employed in the delivery of these solutions.
- 3.33. If the Proposed Conduct is not authorised, Bakers Delight submits that the Franchisee Bakeries are anticipated to pay an additional \$25 per month in technology fees and costs that are above and beyond the costs of transitioning to the new POS system. Bakers Delight submits this will be payable by all Franchisee Bakeries, and these additional ongoing costs are likely to result in price increases for Promotion Discounts being passed on to consumers to enable the Franchisee Bakeries to retain current profit margins. As described at paragraph 3.17 above, Bakers Delight also submits that if the Proposed Conduct is not authorised it will consider 2 options (a fully automated solution or a less automated solution) to continue to facilitate the unrestricted ability of the Bakers Delight Bakeries to deviate prices for the Promotion Discounts in the new POS system. Both options will require substantial Ongoing Costs and require higher costs to be payable by the Franchisee Bakeries.<sup>32</sup>
- 3.34. With the Proposed Conduct, Bakers Delight submits that the costs detailed in paragraphs 3.32 to 3.33 will be avoided as only 5 price deviations for each Promotion Discount will need to be set up in the new POS system. Bakers Delight submits that the Proposed Conduct will save on technology fees and costs which would otherwise be passed onto the Franchisee Bakeries and in turn to consumers in the form of higher prices to recoup increased costs.<sup>33</sup>
- 3.35. Bakers Delight also submits that the Proposed Conduct will minimise the chance that the Franchisee Bakeries will change their current pricing strategy, whilst also reducing the work effort and associated cost of Bakers Delight's Information Technology Service Teams to implement the coding of Promotion Discounts in the new POS system.<sup>34</sup>
- 3.36. However, Bakers Delight also submits that technology fees and costs may increase due to a number of other factors, which are not solely caused by the implementation of the new POS system and will increase in the likely future with and without the Proposed Conduct.<sup>35</sup>
- 3.37. Further, Bakers Delight submits that irrespective of whether the Proposed Conduct is authorised, Bakers Delight's Information Technology Service Team will need to create a new Promotion Discount record in the new POS system for each price deviation which Bakers Delight or a Franchisee Bakery may want to select for a Promotion Discount.<sup>36</sup> Further, Bakers Delight submits that services rendered by Bakers Delight's Information Technology Service Team are directly chargeable to the Franchisee Bakeries via the technology services fee. The more work undertaken by this team, the higher the costs that could be on-charged to consumers by way of Bakers Delight Bakeries' decision to increase Bakers Delight products and recoup the increased supply-side costs. Bakers Delight submits that at one extreme, the cost charged by Bakers Delight's Information Technology Service Team is greatest where the Bakers Delight Bakeries are granted the unfettered ability to deviate the pricing of Promotion Discounts and at the other extreme, the lowest cost solution is to completely restrict

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<sup>32</sup> See Bakers Delight submission in response to ACCC's draft determination dated 30 January 2024 on the [public register](#), [Paragraph 1 (i)].

<sup>33</sup> The application for authorisation AA1000650 is available on the [public register](#), [Public Benefits, Lower Costs].

<sup>34</sup> See Bakers Delight submission dated 22 September 2023 on the [public register](#), [p 2, paragraph 4].

<sup>35</sup> On 21 February 2024, Bakers Delight provided a submission to the ACCC clarifying that the Technology Fees and Costs was increased so that Bakers Delight could reduce the subsidy that was being provided to Franchised Bakeries and to redirect such funding towards maintaining and increasing the range of information technology services being provided to the Franchise System.

<sup>36</sup> See Bakers Delight submission dated 22 September 2023 on the [public register](#).

the ability for Bakers Delight Bakeries to choose the price of Promotion Discounts. Bakers Delight submits that the technology costs associated with the new POS system will be similar to the costs under the existing POS system.<sup>37</sup>

### ACCC view

- 3.38. Bakers Delight has made commercial arrangements for the procurement and implementation of the new POS system at all Bakers Delight Bakeries. The costs of implementing the new POS system will be incurred with or without the Proposed Conduct. The ACCC understands that Bakers Delight proposing to set 5 price tiers for Promotion Discounts mitigates limitations of the new POS system.
- 3.39. The ACCC understands that the public benefit of lower costs charged to the Franchisee Bakeries, which in turn may result in lower costs for consumers, relates to additional costs over and above the implementation of the new POS system that would not be incurred if the Proposed Conduct was authorised. Based on the information provided by Bakers Delight<sup>38</sup>, the ACCC understands that if the Proposed Conduct is not authorised the additional costs over and above the implementation of the new POS system may be approximately \$25 per month and will be payable by all Franchisee Bakeries.
- 3.40. The ACCC accepts that setting 5 price tiers for each Promotion Discount would be likely to reduce the time and resources needed to create records for and facilitate the sale of Promotion Discounts in the new POS system, as compared to the requirements to continue to facilitate the unrestricted ability of the Bakers Delight Bakeries to deviate pricing for Promotion Discounts. To the extent that the Proposed Conduct avoids additional technology fees and costs being incurred compared to the likely future without the Proposed Conduct, the ACCC considers this would be likely to result in potential cost savings on recurring payments made by the Franchisee Bakeries to Bakers Delight, and in turn lower costs for consumers.
- 3.41. During further consultation conducted by the ACCC, a number of Franchisee Bakeries have provided their views on the likely impacts of the proposed price tiering system and the additional ongoing costs of approximately \$25 per month if the Proposed Conduct was not authorised.
- 3.42. The views of Franchisee Bakeries who provided a submission on this issue are set out above at paragraphs 2.14 to 2.19. In summary:
- Two franchisees supported the Proposed Conduct and did not offer a view on the possible additional costs over and above the implementation of the new POS system if the Proposed Conduct was not authorised.
  - One franchisee supported the Proposed Conduct and noted that possible additional costs of the Proposed Conduct would impact their business more than the standardised system.
  - An interested party opposed the Proposed Conduct as it limits individual Franchisee Bakeries from setting prices based on business requirements, local markets, outgoings, and general overheads and submitted that the Bakers Delight Bakeries operate in diverse communities with varying business expenses and demographics, necessitating flexibility in pricing. The interested party was also

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<sup>37</sup> See Bakers Delight submission dated 22 September 2023 on the [public register](#), [p 3, paragraph 9].

<sup>38</sup> See Bakers Delight submission dated 21 February 2024 on the [public register](#), [p 1]

opposed to the possible additional ongoing fees and submitted that Franchisee Bakeries are already seeing increased monthly fees related to the new POS system, and there is no valid reason for charging additional fees for a poorly chosen system with no prior input or discussion with business operators.

- Another interested party opposed the Proposed Conduct on the basis that their low-sale bakery is located in a small strip site, where they do not have massive foot traffic like big shopping centres and submitted that discounting products comes from their margin line, and they already pay marketing, advertising, royalties, and other fees to Bakers Delight. The interested party does not want to pay additional costs if Bakers Delight's proposed price tier pricing system is not authorised by the ACCC.
- Another interested party submitted that the proposed price tiering system may limit the ability of Franchisee Bakeries to set prices more aligned with individual regions and be centrally controlled by the Franchisee Bakeries

3.43. The ACCC considers that the Franchisee Bakeries' feedback on the impacts of the proposed price tiering system, and additional ongoing costs of approximately \$25 per month in the future without the Proposed Conduct, demonstrates the important balance for the Franchisee Bakeries to operate their businesses efficiently and the ability for the Franchisee Bakeries to independently make decisions that affect their financial viability (based on their particular local market conditions).

3.44. In response to the ACCC's request for further information about the monthly Technology fees paid by Franchisee Bakeries, Bakers Delight provided information on those fees.<sup>39</sup> Bakers Delight provided details that the Information Technology Services Fee payable by Franchisee Bakeries increased on 1 July 2023. Bakers Delight submits that it has been heavily subsidising the costs of information technology services for a number of years. Bakers Delight submits that the Information Technology Services fee was increased so Bakers Delight could reduce the subsidy that was being provided to Franchisee Bakeries and to redirect such funding towards maintaining and increasing the range of information technology services being provided to the Franchise system.

3.45. The ACCC does not have evidence to be satisfied that either the level of any subsidy provided or whether that subsidy has been redirected to maintaining and increasing the range of information technology services being provided to the Franchise system affects any likely public benefit.

3.46. However, as noted in paragraph 3.33, the ACCC understands that if authorisation is not granted, all Franchisee Bakeries may incur the additional ongoing costs, which in turn may result in higher costs being passed on to consumers in the form of price increases for Bakers Delight products.

3.47. For this reason, the ACCC accepts that the Proposed Conduct would be likely to result in some limited public benefits in the form of cost savings on the additional ongoing payments that the Franchisee Bakeries would avoid paying to Bakers Delight, any which in turn may not be passed onto consumers.

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<sup>39</sup> See Bakers Delight submission dated 21 February 2024 on the [public register](#), [p 3]

## ACCC conclusion on public benefit

3.48. The ACCC considers that the Proposed Conduct would be likely to result in public benefits by avoiding additional technology fees and costs to the Franchisee Bakeries, and which in turn may not be passed onto consumers.

## Public detriments

3.49. 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>40</sup>*

3.50. A number of the matters considered by interested parties (including the concerns raised by some of the Franchisee Bakeries in response to the ACCC's draft determination) would not be, in the ACCC's assessment, causally connected to the Proposed Conduct in that they would be likely to exist or not be materially different in the future with as against the future without the Proposed Conduct. These issues are the requirement to purchase a new EFTPOS system as part of the implementation of the new POS system, the cost of the new EFTPOS system compared to other alternatives, the increase in technology fees in July 2023 and the other features of the new POS system.

3.51. The ACCC considers that, because these potential public detriments lack a causal connection to the Proposed Conduct, they are unlikely to materially affect whether the ACCC is satisfied of the test in section 90(7) of the Act.

3.52. Bakers Delight submits that the Proposed Conduct is not likely to result in any measurable detriments to the public. Potential public detriments identified by Bakers Delight include:

- increased/higher prices
- decreased intra-brand competition for Promotion Discounts
- increased technology fees to franchisees.

### *Increased/higher prices*

3.53. Bakers Delight submits that neither the Company Bakeries or Franchisee Bakeries have sufficient market power in the market for retail baked bread, pastries and other yeast raised products and the products relevant to the Proposed Conduct are limited to Promotion Discounts.<sup>41</sup>

3.54. Bakers Delight submits that the Proposed Conduct is unlikely to cause any increase in product prices set by the Bakers Delight Bakeries, as the Proposed Conduct will be setting 5 price tier deviations from the RRP for Promotion Discounts, which encapsulates the current pricing deviation practices of almost all Bakers Delight Bakeries. The Proposed Conduct will create a range of Promotion Discounts for the

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<sup>40</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>41</sup> The application for authorisation AA1000650 is available on the [public register](#), [Increased/Higher Prices].

Bakers Delight Bakeries.<sup>42</sup> Furthermore, the Company Bakeries and Franchisee Bakeries will continue to be constrained from raising prices by:<sup>43</sup>

- (i) intense competition from a large number of competitors offering the same/similar product ranges; and
- (ii) consumers, who are price sensitive, who can easily purchase product from competitors.

3.55. Bakers Delight submits that competitors are unlikely to increase prices in response to the Proposed Conduct due to the same constraining factors. As a result, Bakers Delight submits that the Proposed Conduct is not intended, and is not expected, to result in any increases to the price of products sold at the Bakers Delight Bakeries.<sup>44</sup>

#### *Decreased intra-brand competition for Promotion Discounts*

3.56. Bakers Delight submits that intra-brand competition may be lessened as Bakers Delight Bakeries are restricted to compete using fixed price tiers for Promotion Discounts. However, Bakers Delight submits that Promotion Discounts are a relatively small subset of products that Bakers Delight Bakeries sell, and only comprise a portion of the total sales of Bakers Delight Products. Bakers Delight also submits that sales of Promotion Discounts would not be large enough to constitute a material loss in potential price competition in any relevant market, including intra-brand competition.<sup>45</sup>

3.57. Bakers Delight submits that the Franchisee Bakeries can continue to set any price for individual products and there is considerable competition over the price of other products instead of Promotion Discounts.<sup>46</sup>

#### *Increased technology fees to franchisees*

3.58. Bakers Delight submits that the technology fees and costs payable by the Franchisee Bakeries may increase due to the implementation of the new POS system, which may then be passed on to consumers by way of increases in the prices of Bakers Delight product. The technology fees and costs may also increase due to a number of factors, including:<sup>47</sup>

- (i) Inflation. The fee for the existing POS system has also increased, so the technology fees for the Bakers Delight Bakeries will increase regardless of the change in POS system.
- (ii) The additional features and improvements that will be derived from the POS system including integrated payment gateway, more secure payment options, better layout and user interface and more customer support from the supplier. Furthermore, the supplier of the POS system is a multinational company so it can better facilitate Bakers Delight's global business and expansion plans and be implemented in other jurisdictions.

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<sup>42</sup> The application for authorisation AA1000650 is available on the [public register](#), [Increased/Higher Prices].

<sup>43</sup> The application for authorisation AA1000650 is available on the [public register](#), [Increased/Higher Prices].

<sup>44</sup> The application for authorisation AA1000650 is available on the [public register](#), [Increased/Higher Prices].

<sup>45</sup> The application for authorisation AA1000650 is available on the [public register](#), [Cartel conduct – decreased intra-brand competition for Promotion Discounts].

<sup>46</sup> The application for authorisation AA1000650 is available on the [public register](#), [Cartel conduct – decreased intra-brand competition for Promotion Discounts].

<sup>47</sup> The application for authorisation AA1000650 is available on the [public register](#), [Increased Technology Fees to Franchisees].



- (iii) Increase in fees that are not related to the POS system implementation, such as increases in the salary of Bakers Delight's Information Technology Services team employees which would also impact the costs of the existing POS system.

3.59. Bakers Delight also submits that the increased fee is not solely caused by the implementation of the new POS system. It is noted that the technology fees and costs will be increased regardless of the Proposed Conduct taking place and that if the Proposed Conduct does not occur then the technology fees may be further increased to set up the additional Promotion Discount records in the new POS system.<sup>48</sup>

3.60. The ACCC has considered the following public detriments:

- higher prices charged to consumers across the Bakers Delight network
- cost controls limiting a franchisee's ability to make independent decisions affecting their financial viability.

### **Higher prices charged to consumers across the Bakers Delight network**

3.61. The ACCC notes that the Proposed Conduct would eliminate the scope for the Company Bakeries and Franchisee Bakeries to set their own individual prices for Promotion Discounts in the new POS system. The ACCC considers that the Proposed Conduct would be likely to lead to a public detriment if it leads to customers paying more for Promotion Discounts. However, based on the information before it, the ACCC considers that this public detriment is likely to be limited due to the following factors:

- Competition from other manufacturers and retail sellers of fresh baked bread, bread-based products and pastry-based products are likely to constrain Bakers Delight's ability to use the Proposed Conduct to raise retail prices.
- As a franchise model, Bakers Delight's incentives are likely tied to the Franchisee Bakeries remaining competitive and able to adapt to their local market conditions.
- The unrestricted ability of the Franchisee Bakeries to deviate on all individual products is not affected by the Proposed Conduct, which accounts for a greater portion of products sold at the Bakers Delight Bakeries.
- As noted in paragraph 3.26, Bakers Delight customers are typically loyal to one Bakers Delight Bakery and there is very little intra-brand competition between the Company Bakeries and Franchisee Bakeries.

3.62. Further, as noted in paragraphs 3.58 and 3.59, increases in technology fees and costs for the Bakers Delight Bakeries are likely to occur for a number of factors, both with and without the Proposed Conduct. The ACCC also accepts Bakers Delight's submissions that the Franchisee Bakeries will face additional ongoing technology fees and costs, in the form of an \$25 per month increase, associated with the implementation of pricing records in the new POS system if the Proposed Conduct is not authorised. Accordingly, the ACCC considers that the Proposed Conduct is not likely to result in a public detriment in the form of higher prices for consumers due to increases in technology costs and fees that are passed onto to the Franchisee Bakeries.

### **Cost controls limiting a franchisee's ability to make independent decisions affecting their financial viability**

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<sup>48</sup> The application for authorisation AA1000650 is available on the [public register](#), [Increased Technology Fees to Franchisees].

- 3.63. Most franchisee operators in Australia are small businesses. In the current economic environment, the ACCC understands that small business operators are under significant pressure from inflation, high interest rates and the rising costs of inputs. The ACCC considers that putting price controls on franchisees operating small businesses is likely to increase this financial pressure and may make it more difficult for franchisees to recoup the costs of running their business.
- 3.64. The ACCC notes that the Franchising Council of Australia, a key industry association in franchising, publishes an annual 'State of Franchising' report.<sup>49</sup> The 2023 report includes the results of quarterly surveys of the franchising sector conducted by FRANdata for the Franchising Council of Australia. The recent survey from June 2023 was responded to by 65 franchise brands. According to the most recent survey results, rising interest rates and the economic environment was the top concern of respondents at 66%. This is an increase from the previous 3 quarterly surveys (being 60%, 56% and 54%). 31% of respondents also stated that financial performance was a challenge.
- 3.65. In the ACCC's experience, the profitability and viability of an individual franchisee is fundamentally dependent on the good operation and management of the system by the franchisor. When franchisees set their own prices, they take into account factors such as their financial viability as a business. The ACCC considers this ability to set their own prices to take into account their particular circumstances is important to franchisees. The introduction of the proposed price tiers under the Proposed Conduct may not provide Franchisee Bakeries with the flexibility to respond to their individual circumstances. The ACCC considers that this is a source of public detriment.
- 3.66. The ACCC also notes the 2019 parliamentary joint committee report into Fairness in Franchising, which provided examples of the impact of cost controls.<sup>50</sup> For example, the report noted that "wage theft continues to occur in many franchises: partly due to the business model franchisors operate and partly due to a range of socio-cultural problems. At times, wage theft was occurring as a way for franchisees to extract profits or service payments in order to stay afloat in a financially constrained business model (given wages are one of the greatest costs in the franchisee's control)." The committee further noted that the issue of underpayment is complex and 'partly inherent to the business models' structural breakdown of power and the imposition of cost controls.' The ACCC considers that this is a clear example that demonstrates the importance of franchisees being able to set their own prices to take into account their particular circumstances.
- 3.67. The ACCC notes that several Franchisee Bakeries provided submissions opposing the introduction of the proposed price tiering system. Key concerns in relation to the Proposed Conduct raised by the Franchisee Bakeries include:
- Promotion Discounts already come out of their margins where they run a low sale strip site that does not have massive foot traffic like bakeries in big shopping centres.
  - The proposed price tiering system will limit the ability of the Franchisee Bakeries to set prices which are more aligned with the individual region of each bakery and can be centrally controlled.
  - The proposed price tiering system limits individual Franchisee Bakeries from setting prices based on their business requirements, local markets, outgoing and

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<sup>49</sup> See Franchising Council of Australia 2023 'State of Franchising' report [here](#).

<sup>50</sup> See [Fairness in Franchising report](#), March 2019, Parliamentary Joint Committee on Corporations and Financial Services.

general overheads. The Bakers Delight Bakeries are located within a diverse range of communities, including within regional towns and capital cities as well as in major shopping centres or as stand alone stores. They all have a wide range of business expenses and community demographics all of which require flexibility in pricing to meet business requirements and community needs or limitations.

- It is very important for the success of their respective businesses that each Franchisee Bakery has the flexibility and independence to react to conditions of the region. This is because competition is from other types of bakeries, so it is important for each Franchisee Bakery to be able to offer competitive pricing to compete with these stores, and not set prices as pre-determined by Bakers Delight.

3.68. Based on these submissions, as well as its experience and specialist knowledge in regulating the Franchising Code of Conduct, the ACCC is concerned that the Proposed Conduct will limit the flexibility and ability of the Franchisee Bakeries to independently respond to local market conditions and the particular financial pressures they face. The ACCC considers that the Proposed Conduct removes the ability for the Franchisee Bakeries to set optimal prices for Promotion Discounts.

3.69. In response to the ACCC's draft determination, Bakers Delight submits that the interests of Franchisee Bakeries and Bakers Delight are aligned because Bakers Delight holds approximately 95% of the head leases for bakery premises and enters occupancy licenses with the Franchisee Bakeries for the duration of their franchises. Bakers Delight submits that if the Franchisee Bakeries fail, become insolvent or otherwise cannot continue to operate, Bakers Delight as a tenant will be responsible for occupancy costs pursuant to the head lease with the landlord. This creates significant exposure for Bakers Delight and provides added incentive for Bakers Delight to want to ensure the profitability of Franchisee Bakeries.

3.70. Based on the ACCC's experience and specialist knowledge as a regulator of the Franchising Code of Conduct, the ACCC understands that there are several other measures a franchisor may take to mitigate this exposure (such as the use of Director guarantees required to be provided by franchisees). In these circumstances, the ACCC is not persuaded that Bakers Delight's submissions overcome the ACCC's concerns about the impact of the Proposed Conduct has on limiting the ability of the Franchisee Bakeries to make independent pricing decisions.

3.71. For the reasons outlined above, the ACCC considers that the Proposed Conduct is likely to result in a public detriment by limiting the important ability of the Franchisee Bakeries to make independent decisions affecting their financial viability (based on their particular local market conditions) in relation to Promotion Discounts. The ACCC considers this to be a significant public detriment.

### **ACCC conclusion on public detriment**

3.72. The ACCC considers that the Proposed Conduct is likely to result in a significant public detriment in the form of limiting Franchisee Bakeries in their important ability to make independent decisions affecting their financial viability (based on their particular local market conditions).

## Balance of public benefit and detriment

- 3.73. The ACCC's assessment of whether it is satisfied that the likely public benefits of the Conduct would outweigh the likely public detriments requires a balancing exercise.<sup>51</sup>
- 3.74. The ACCC considers that the Proposed Conduct is likely to result in some public benefits in the form of the Franchisee Bakeries avoiding additional technology fees and costs, which in turn avoids those costs being passed onto consumers.
- 3.75. The ACCC considers that the Proposed Conduct is likely to result in a significant public detriment by limiting the Franchisee Bakeries in their ability to make independent decisions affecting their financial viability (based on their particular local market conditions).
- 3.76. On balance, for the reasons outlined in this final determination, the ACCC is not satisfied that the Proposed Conduct would be likely to result in a public benefit that would outweigh any likely detriment to the public from the Proposed Conduct.

## 4. Determination

### The application

- 4.1. On 30 August 2023, Bakers Delight lodged application AA1000650 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 4.2. Bakers Delight seek authorisation of the Proposed Conduct on its own behalf,<sup>52</sup> as the franchisor of the Bakers Delight retail baker businesses and the owner of the Company Owned Bakeries, as well as on behalf of current and future franchisees of the Franchisee Bakeries.<sup>53</sup>
- 4.3. Bakers Delight seeks authorisation for:
- As part of the introduction of the new POS system, Bakers Delight proposes to implement price limits, as part of a price tiering system, on all Promotion Discounts sold in the Bakers Delight Bakeries.
  - Bakers Delight proposes to limit the price that Bakers Delight Bakeries will be able to charge for Promotion Discounts to five tiers of pricing. One price tier would be a recommended retail price (**RRP**) set by Bakers Delight, one price tier would be below that RRP and the remaining price tiers would be above that RRP.
  - In setting these price tiers, Bakers Delight proposes that the price tiers will be standard price increments from the RRP, and larger increments will apply where the RRP for a product is higher.
  - Once the price tiers are set for all Promotion Discounts in the new POS system, Bakers Delight proposes that the Bakers Delight Bakeries will only be able to select one of the pre-configured price tiers for each Promotion Discount.

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<sup>51</sup> *Australian Competition and Consumer Commission v Australian Competition Tribunal (2017) 254 FCR 341, at [7] (Besanko, Perram and Robertson JJ).*

<sup>52</sup> Authorisation is not sought on behalf of the related entities and associates of Bakers Delight Holdings Ltd: see application for authorisation available on the [public register](#). [2].

<sup>53</sup> Franchisee details are provided in Schedule 4 of the application for authorisation available on the [public register](#) (as at the date of the Application).

- Bakers Delight proposes that, in the initial implementation of the price tiers, it would set the five tiers to reflect existing pricing patterns for Promotion Discounts across the Bakeries Delight Bakeries.
- The Proposed Conduct is also intended to cover future changes to the rationale for setting individual price tiers, the spread of the price tiers and include Promotion Discounts not currently listed in a confidential list provided to the ACCC as part of the application for authorisation.

(the **Proposed Conduct**).

- 4.4. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 4.5. 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 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.
- 4.6. For the reasons outlined in this final determination, the ACCC is not 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.
- 4.7. Accordingly, the ACCC has decided to deny authorisation. In accordance with subsection 90(1)(b) of the Act the application is dismissed.
- 4.8. This determination is made on 14 March 2024. Any application to the Australian Competition Tribunal for review of the determination must be made on or before 4 April 2024.