

7-Eleven Stores Pty. Ltd.

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Secretary

Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate

By Email: corporations.joint@aph.gov.au

12 September 2008

Dear Committee

7-Eleven is an Australian family owned business operating since 1977 and has been substantially a franchised business for all those years. We have been a strong advocate of Franchising as an effective business model, and have been active in Franchise Council of Australia activities to promote a strong and healthy method of business development that benefits both Franchisors and Franchisees. We have strong beliefs in the benefit that a strong Franchise model brings to our business, and work in concert with our Franchisees to develop a strong and healthy business that they find profitable and generally enjoy operating within. One of the benefits of operating ethically with Franchisees is a strong and healthy brand, which appeals to new franchisees and the end consumer and we operate in this manner. We welcomed the original introduction of the Franchising Code as we believed it qualified the methods and processes that we had operated in for the first 20 years of our operation. We do however believe, from operating daily within the Code, that there are genuine opportunities to improve it for both Franchisors and Franchisees.

Franchising Code of Conduct Submissions

I submit in response to the Parliamentary Joint Committee on Corporations and Financial Services' (**Committee**) invitation to submit to it, a submission as part of its review of the Franchising Code of Conduct that:

- 1 One key item that affects our particular business concerns some confusion that has been generated as a consequence of the introduction of the Oilcode, which in many of our operations now supersedes the Franchise Code. Our business involves the franchising of convenience stores that are promoted and managed using our trade mark, "7-Eleven" and in accordance with our System. We franchise convenience stores (**Stores**) some of which sell fuel on our behalf. Of our 370 Stores, 187 do not sell fuel. Until the Oilcode was enacted our franchising business was particularly regulated by the Franchising Code only. Our business and the business of some of our Franchisees who own non-fuel stores are regulated by the Franchising Code, those with Fuel stores are regulated by the Oilcode and those with a mix of fuel and non-fuel Stores, are regulated by a combination of the Oilcode or the Franchising Code, dependent on the store.

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- 2 Our business has been generally adversely affected by the introduction of the Oilcode because it has added a layer of complexity and administration to our business at commensurate cost by causing it, and some of our Franchisees, to need to comply with both of the statutory regimes (being the Franchising Code and the Oilcode) where previously they were only required to comply with the Franchising Code. The Franchising Code and the Oilcode are similar in many ways which should be expected considering that the Oilcode was drafted using the Franchising Code as a model.
- 3 Given the above facts and:
- (a) the protection afforded to our Franchisees by the Franchising Code;
 - (b) that the bulk of our and our Franchisee's franchise business income is generated by non-fuel sales, including from our fuel Stores;
 - (c) the impost on 7-Eleven's business created by the imposition of the 2 Codes including the requirements on it to: produce 2 different disclosure documents and comply with different renewal and termination procedures without creating any greater protection for our Franchisees or positive effect in the market including improving or maintaining competition;
 - (d) the Government's apparent intention to reduce the layers of required compliance and the commensurate cost of compliance;
 - (e) that our Franchisees have no ownership of or proprietary interest in our Store premises, equipment or fuel sold from our Stores; and
 - (f) the actual purpose of the Franchising Code being to: "regulate the conduct of participants in franchising towards other participants in franchising",

I submit that the Franchising Code be amended to allow all our franchises, including those from which our Franchisees retail fuel on a commission agency basis, to be controlled only by the Franchising Code. Such an amendment will not be contrary to the purpose of the Franchising Code and need not be contrary to the Oilcode. Alternatively, the Oilcode could be amended to carve out its application to franchises such as ours.

- 4 I have attached for your information and consideration 7-Eleven's submission to the Committee that is conducting a review of the Oilcode, and a letter of advice from the Australian Consumer and Competition Commission relating to the relationship of the Oilcode and the Franchise Code.
- 5 Whether or not the Government is willing to regulate to allow our franchises to collectively be regulated under the Franchising Code rather than both it and the Oilcode, I submit that it amend the Franchising Code as below discussed.

Termination – 3 Strikes

- 6 The Franchising Code should be amended to include a provision in like terms to section 36(1)(g) of the Oilcode which would allow Franchisors to terminate a franchise agreement without complying with section 21 of the Franchising Code in circumstances where a Franchisee: "breaches the franchise agreement, otherwise than by behaviour described in section 23(a) to (f), at least 3 times."
- 7 The statutory purpose of the Franchising Code is above set out and relates to regulating participants in franchising. The High Court has to some extent enlarged that purpose by stating that the purpose of the Franchising Code includes being: "to regulate the conduct of persons in the franchising industry in order to **improve business practices**".

- 8 Both the regulated purpose and the extended purpose would be advanced if the termination provisions of the Franchising Code are amended as above suggested. The amendment would also not unfairly impose any greater obligations on Franchisees. The below discussion might assist you better understand the application of this aspect of the Franchising Code in practice.
- 9 The Franchising Code by regulating the conduct of the parties to franchising, affects the parties' freedom to contract by imposing on them compulsory norms of conduct. However, the Franchising Code is not said to intend to allow Franchisees to breach franchise agreements, the basis of the relationship the Code is apparently designed to protect, with almost impunity which it currently allows and fosters.
- 10 For example, if a Franchisee is obliged under a franchise agreement to pay money by way of royalty to its Franchisor on "day 1" but does not, then, absent a finding of fraud which is problematic, the Franchisor's remedy under the Franchising Code for the breach is to advise the Franchisee about it and give it a "reasonable time to remedy it failing which the franchise agreement will terminate"; section 21 of the Franchising Code. The Franchising Code does not stipulate a timeframe within which the breach needs to be remedied. It only states the Franchisor does not have to allow more than 30 days for it to be remedied. That requirement could liberally be interpreted to mean that Franchisors must allow 30 days notice for remedy; which I doubt is the intention. But, this would mean the Franchisor could expect payment of the Royalty on "day 31" at best.
- 11 The Franchisor is obliged to act reasonably towards its Franchisees (or risk breaching the unconscionable conduct provisions of the *Trade Practices Act 1974* (Cth) (**TPA**) so it could be expected that it will give its Franchisee at least 5 days to remedy the default of not paying its royalty (in the above example). The Franchisee can remedy its default on day 5 but immediately breach the franchise agreement in the same regard, or it may have already again breached the agreement in the same way within the "remedy period", and continue for the life of the agreement to so breach the franchise agreement with impunity provided that it remedies each individual breach within the reasonable time allowed. If longer periods say of 30 days are given to the Franchisee to remedy the breach, the problem is exasperated.
- 12 The current "remedy regime" allows Franchisees to flaunt the franchise agreements putting greater pressure on the relationship between Franchisee and Franchisor without "improving their business practices". It actually sponsors bad behaviour and bad business practices. The Franchising Code, rather than assisting the parties to franchising, becomes a weapon against Franchisors reasonably attempting to enforce franchise agreements. Uncertainty then prevails. The above proposed amendment will provide certainty and help Franchisees understand that they must meet their obligations.
- 13 The above proposed amendment is reasonable considering:
- (a) the purpose, and extended purpose, of the Franchising Code;
 - (b) the protection Franchisees have under the Franchising Code before entering franchise agreements, and subsequently; and
 - (c) the need for the relationship between the Franchisee and Franchisors to be managed in a balanced fashion.
- 14 Alternatively, the Franchising Code should be amended to include non-payment of money by the Franchisee to the Franchisor required under a franchise agreement to be a "special circumstance" under section 23 of the Franchising Code allowing immediate termination of the franchise agreement.

Good Faith

- 15 Subject to the below discussion, given the applicability of section 51AD and the prohibitions against unconscionable conduct in the TPA and the law generally about parties' rights to terminate contracts when they are breached, there is no requirement for the Government to include a duty of "good faith" in the Franchising Code.
- 16 What does "good faith" mean? What does "good faith" mean in relation to the relationship between Franchisee and Franchisor? How would the inclusion of a section in the Franchising Code obliging Franchisees and Franchisors to act towards each other in "good faith" promote the purpose of the Franchising Code? The ability to and adequacy of any answers to these questions may be determinative of the first question; should a duty of "good faith" be introduced into the Franchising Code. The below discussion should assist in this regard.
- 17 The parties to franchising are obliged, as corporations, under the TPA and by the general law to not act unconscionably towards each other. Part of the considerations the Court can take into account when deciding whether the prohibition in the TPA on unconscionable conduct has been breached is the extent to which the "defendant" acted to protect its "legitimate interests" and in "good faith". However, "good faith" is not a defined term in the TPA and any consideration of how a party acts to protect its "legitimate interests" is likely to be a component of any test of "good faith".
- 18 Including a general requirement for Franchisees and Franchisors to act generally in "good faith" towards each other will not assist their relationship and will not enhance the Franchising Code particularly because there is no concluded definition of "good faith" in the TPA or apparently at law. Further the general application of a term of "good faith" is problematic. If the Government elects to include in the Franchising Code a duty of "good faith" then it should only do so if:
- (a) it is imposed in a way that does not derogate from otherwise lawful terms of franchise agreements but only to assist the parties exercise them;
 - (b) the duty applies equally to Franchisees and Franchisors;
 - (c) the duty is defined in some way. For example, "good faith means the Franchisee and Franchisor cooperating to achieve the objects of the franchise agreement honestly and in compliance with reasonable standards of conduct" (adopted from Sir Anthony Mason "Contract, good faith and equitable standards in fair dealing" (2000) 116 LQR66 (2000)); and
 - (d) the duty applies to discreet aspects of the Franchisee/Franchisor relationship and not generally. For example, "the prospective Franchisee and the Franchisor will negotiate in good faith in relation to the renewal of the franchise agreement".
- 19 I recognise that the above suggestions do not remove all of the ambiguity surrounding the duty of "good faith" or prevent the inclusion of such a duty from adding another layer of uncertainty or imprecision to the Franchising Code and the relationship between the parties. However, restricting the application of any imposition of good faith to discreet aspect/s of the relationship will mitigate against that uncertainty or imprecision.

Disclosure and Dispute Resolution

- 20 The current mediation and disclosure requirements in the Franchising Code have in certain instances invited Franchisees to use litigation proceedings, or the threat of them, as a form of commercial blackmail in recognition that the Franchisor is at an immediate disadvantage in relation to such proceedings because it has to include the details of it in its Disclosure Document which both Franchisees and Franchisors know affects the Franchisor's brand

and probably its market position, and can affect the goodwill of other associated franchisees. Unscrupulous Franchisees can use those concerns as leverage to extract settlements or concessions from Franchisors.

- 21 The Government should include a requirement that breaches of the Franchising Code or franchise agreements must be subject to mediation under the Code before judicial proceedings, except for urgent injunctions, are commenced.
- 22 The Government should remove the requirement for Franchisors to disclose the details of litigation they have been involved in except where the Franchisor has lost the litigation and been criticised by the Court for its actions.
- 23 The Government would benefit by commissioning a study into the true nature of, and any real growth in numbers of disputes in the franchise industry, and then adopt appropriate regulations to suit. But, in the meantime, it should deny Franchisees the benefit of the obligations on the Franchisor of disclosing undecided, unsound or speculative litigation brought against them. The below example may assist it understand some of the issues surrounding the “dispute regime” in the Franchising Code and the effect of disclosure.
- 24 It is a matter of public record that a group of our Franchisees approached the Small Business Commissioner with a variety of claims concerning our operation, several years ago. The claims were never substantiated and never seriously prosecuted by the small group. It did however damage our reputation and the goodwill value of all other franchisees. What generally instigated the dispute was our determining that one franchisee (controlled and owned by the President of the “Association”) had definitive financial irregularities in his business by not declaring significant sales for which 7-Eleven is entitled to a “royalty”, and we asked him to explain the issue. He could not. We then suggested to him that he simply sell his franchise business and leave the system, recovering his goodwill value, even though we had grounds to immediately terminate his Franchise Agreement for breach relating to fraudulent activities; Section 23 of the Franchising Code. Initially he refused and generated a dispute, on other claimed issues, which I believe was mis-using some apparent protections in the Franchising Code as a pressure tactic on us as the Franchisor. Eventually he sold the Franchise and departed our system. The incident though leaves a residual stain on our brand and franchise system. I genuinely believe that many franchisors rush to settle mediation of even spurious claims to protect their brands, as the balance of protection seems to now be in imbalance between Franchisor and Franchisee. 7-Eleven genuinely advocates strong protection for Franchisees and vigorous prosecution of unscrupulous Franchisors, however, attaining an equitable balance is a challenge for the Committee and Government from its further review of the Franchise Code.
- 25 7-Eleven is a strong advocate of clear and timely disclosure of all issues in the Franchising process. However we have a real concern that although the Franchising Code is well intentioned in relation to disclosure by Franchisors, in practical terms, the quantity of documentation for Franchisees to digest and receive advice on, goes beyond measures which assist the parties to the franchise relationship. The disclosure requirements are so large that Franchisees could not be expected to review all of the disclosed material despite them needing to certify that they have; section 11 of the Franchising Code.
- 26 The costs to the Franchisee of obtaining advice which must involve a full review of the disclosure material, may act in practice as a restraint on Franchisees obtaining the independent legal, accounting and/or business advice which appears contrary to the object of the Code in that regard.
- 27 The quantity and breadth of the disclosure regime may benefit from a full review, with the intention of streamlining and reducing it to digestible levels or, the obligation to disclose should be reduced to a requirement only that Franchisors provide a summary of the now

required information, and particular information on request for it from prospective Franchisees.

- 28 Perhaps the proposed duty of “good faith” could be incorporated into this obligation. For example, “the Franchisor must provide prospective Franchisees with a summary of the “disclosure information” prepared in good faith considering the cost and location of the franchise”.

***Master Education Services Pty Ltd v Ketchell* [2008] HCA 38 (27 August 2008)**

- 29 Considering the various contests in the *Ketchell* case as finally decided by the High Court, the Government should amend the Franchising Code to give certainty to the participants in the franchise industry about what parts of the Franchising Code must be strictly complied with.
- 30 For example, does section 10 of the Franchising Code (the requirement for disclosure by Franchisors) need to be strictly complied with. Or, will a failure by a Franchisor to comply with it sound only in a remedy available under section 51AD of the TPA which remedy will be adjusted on a subjective measure of the “damages” caused by such a breach by a Franchisor. Or, as the High Court stated: “permit the Franchisee to seek such relief as is appropriate to the circumstances of the case”; paragraph 39 *Ketchell*.
- 31 I am available to discuss this submission.

7-ELEVEN STORES PTY LTD



WARREN WILMOT
CHIEF EXECUTIVE OFFICER

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Manager
Petroleum Refining and Retail Section
Department of Resources, Energy and Tourism

By Email: oilcodereview@ret.gov.au

2 April 2008

Dear Panel

Oilcode Submissions

I submit in response to the Department of Resources, Energy and Tourism's (**RET**) invitation to submit to it a submission as part of its review of the Oilcode that:

- 1 Our business involves the franchising of convenience stores that are promoted and managed using our trade mark, "7-Eleven" and in accordance with our System. We have franchised convenience stores that sell fuel on our behalf and many others that do not sell fuel. Until the Oilcode was enacted our Franchising business was controlled, as appropriate, by the Franchising Code of Conduct (a compulsory code enacted under section 51AE of the *Trade Practices Act 1974*). Our business (because we have "fuel and non-fuel stores"), and the business of some of our Franchisees, is now controlled by both the Oilcode and the Franchising Code.
- 2 In relation to our stores that sell our fuel, we are a large independent fuel supplier who sells fuel as the principal on "commission agency" terms under "fuel re-selling agreements" as those terms are defined in the Oilcode and as the term "commission agents" is used in the ACCC's report titled "Petrol Prices and Australian Consumers – Report of the ACCC Inquiry Into the Price of Unleaded Petrol" (**Report**). We are not a refiner or wholesaler of fuel.
- 3 Our fuel re-selling agreements form part of a wider agreement in relation to our core business being the franchising of convenience stores for the sale of non-fuel items. Our franchising business is distinguished from the references in the RET's Issues Paper and the Report to "franchising" as it relates to the sale of fuel. The sale of non-fuel items provides the bulk of our Franchisee's income. The sale of our fuel arguably benefits our Franchisees more by introducing customers to their convenience store business than the commission they receive from the sale of our fuel. Similarly, our convenience store business benefits us more than our "fuel business". This is generally recognised in the Report which states: "Returns for some petrol retailers are driven more from non-petrol revenue (convenience stores for example) and this influences their approach to selling petrol"; paragraph 1 of the Overview in the Report.

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- 4 The purpose of the Oilcode is to: “regulate the conduct of suppliers, distributors and retailers in the petroleum marketing industry”; section 2.
- 5 RET’s review of the Oilcode is said in its, “Issues Paper: Trade Practices (Industry Codes – Oilcode) Regulations 2006 Review” (**Issues Paper**) to focus on whether “the Oilcode has successfully achieved its objectives to:
- [a] establish standard contractual terms and conditions for wholesale supplier-fuel retailer re-selling agreements for both franchise and commission agency arrangements;
 - [b] introduce a nationally consistent approach to terminal gate pricing (**TGP**) arrangements and improved transparency in wholesale pricing and allow access for all customers, including small businesses, to petroleum products at TGP; and
 - [c] establish an independent, downstream petroleum Dispute Resolution Scheme (**DRS**) including the appointment of a Dispute Resolution Adviser (**DRA**) to provide the industry with a cost-effective alternative to taking action in the courts.”

The Issues Paper also refers to the Report. (I note that these stated objectives differ from the statutory “purpose” of the Oilcode.)

- 6 The Oilcode may have established “standard contractual terms for fuel re-selling agreements”. However, the question remains whether the “one size fits all” approach to such agreements is appropriate considering the differences between the methods for or the arrangements under which fuel is retailed. This is particularly relevant considering the differences between fuel franchise and commission agency arrangements, and the effect the Franchising Code would otherwise have on 7-Eleven and its Franchisees.
- 7 Our relationship with our Franchisees in relation to the sale of fuel is not affected by the TGP schemes, except to the extent the schemes set a benchmark against which we can presumably test the price at which we purchase fuel, because we purchase all of the fuel sold by our Franchisees and retains ownership of it until it is sold by our Franchisees (commission agents) to consumers.
- 8 7-Eleven’s business has been adversely affected by the introduction of the Oilcode because it has added a layer of complexity and administration to the business at commensurate cost by causing it, and some of its Franchisees, to need to comply with 2 different statutory regimes being the Franchising Code of Conduct and the Oilcode where as previously it was only required to comply with the Franchising Code (in that regard we were not required to comply with the former *Petroleum Retail Marketing Franchise Act 1980* because we were (and are not) a fuel franchisor for that purpose.
- 9 Therefore, because 7-Eleven, as principal in the commission-agent relationship, owns the fuel its agents sell and 7-Eleven sets the price at which it is sold, it is almost immaterial to the retail fuel industry whether the Oilcode applies to the relationship between 7-Eleven and its Franchisees. However, we contribute to the retail fuel industry as a bulk purchaser of wholesale fuel which we may be able to negotiate to purchase at a lower rate than otherwise is available because of the volume we purchase which, as is recognised in the Report, aids competition.
- 10 Paragraph 6.2 of the Report sets out the apparent purposes of the Oilcode which differs again from the statutory purpose and the “objectives” referred to in the Issues Paper. Paragraph 6.2.2 of the Report discusses the minimum standards set by the Oilcode. Each of such standards are otherwise included in the Franchising Code but for the requirement for the term of the relevant agreement needing to be for at least 5 years (which requirement satisfies my above comment about the Oilcode “almost” being immaterial in relation to our

business and the retail fuel industry). However, that requirement can be avoided in any event under the Oilcode.

- 11 Paragraph 6.3 of the Report refers to the dispute resolution procedure under the Oilcode. In that regard, the Franchising Code provides a dispute resolution procedure and a Government appointed “dispute agency” which appears to be the model for the dispute resolution procedure in the Oilcode. The Oilcode including its disclosure regime is largely modelled on the Franchising Code generally.
- 12 Our Franchisees, who are all small businesses, are also adversely affected by the addition of the Oilcode in circumstances where they own more than one Franchise one of which sells fuel under the commission agency arrangement.
- 13 Given the above facts and:
- (a) the protection afforded to our Franchisees by the Franchising Code;
 - (b) that the bulk of our and our Franchisee’s business income is generated by non-fuel sales including from our fuel sites;
 - (c) the impost on 7-Eleven’s business created by the imposition of 2 codes including the requirements to produce 2 different disclosure documents and comply with different renewal and termination procedures, without creating any greater protection for our Franchisees or positive effect in the market including improving or maintaining competition;
 - (d) the Government’s apparent intention to reduce the layers of required compliance the commensurate cost of compliance;
 - (e) that our Franchisees have no ownership of or proprietary interest in the fuel site, equipment or fuel sold from 7-Eleven’s premises; and
 - (f) the actual purpose of the Oilcode being to “regulate the conduct of suppliers, distributors and retailers in the petroleum marketing industry”,

I submit that the Oilcode be amended to allow the retail sale of fuel on commission agency basis to be controlled by the Franchising Code where the bulk of the income derived from the retail business, including the retail fuel sales, is generated by the sale of non-fuel products. Such an amendment need not be contrary to the purpose of the Oilcode.

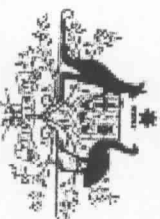
- 14 The Oilcode could be amended to reflect my above submission whilst maintaining its purpose by amending section 6(3) by the inclusion of:
- “(c) the supply of fuel is conducted under a commission agency and:
 - (i) the Franchising Code of Conduct otherwise applies to the relationship between the supplier and retailer;
 - (ii) the supplier reasonably believes the majority of the retailer’s profit generated by the operation of the fuel re-selling business will be generated by other retail activities undertaken on the fuel site by the retailer; and
 - (iii) the franchise agreement entered into under the Franchising Code of Conduct has a term of 5 years or more unless the lease of the site on which the fuel re-selling business is carried on expires before that time and the term of the lease is disclosed to the retailer before it signs the franchise agreement.”

- 15 The Oilcode could otherwise be amended to make it possible for commission agents to opt out of its requirement in circumstances where the Franchising Code otherwise applied.
- 16 I further submit that the Oilcode should be amended, whether or not it is amended as I above suggest, to allow for the termination of fuel re-selling agreements in circumstances where:
- (a) the conduct of the fuel re-selling business is or is reasonably anticipated to have a detrimental effect on the environment; and
 - (b) the supply of fuel is made under a commission agency and the supplier cannot make a reasonable profit from that supply (alternately it might be reasonable to introduce into this amendment a reference to the supplier getting a return greater than the "relevant cost", as that term is used in section 46(1AA) of the *Trade Practices Act* 1974, of it acquiring, storing and supplying the fuel).
- 17 My proposed reason for amendment set out in above paragraph 16(a) should be reflected in the Oilcode despite section 36(1)(e) of the Oilcode which allows fuel re-selling agreements to be terminated, amongst other things, in circumstances where the retailer operates the fuel re-selling business in a way that endangers the environment. My proposed amendment would not rely on the "retailer's operation" but relate to the site and environment generally and be less restricted.
- 18 I am available to discuss this submission.

7-ELEVEN STORES PTY LTD



WARREN WILMOT
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7-Eleven Pty Ltd ("7-Eleven") and the Trade Practices (Industry Codes – Oilcode) Regulations 2006 ("the Oilcode")

Dear Mark,

I refer to our meeting on the 16th January 2007 and subsequent discussions in relation to 7-Eleven and the Oilcode which is due to commence on the 1st March 2007. I thank you for the opportunity to comment on the application of the fuel re-selling agreement provisions of the *Trade Practices (Industry Codes – Oilcode) Regulations 2006* (the Oilcode) to 7-Eleven's current arrangements with its franchisees.

On 25th January 2007 you provided us with a copy of the 7-Eleven Store Agreement (the Agreement) which includes a consigned fuel addendum (the fuel addendum) that applies where the franchisee to the agreement retails fuel.

You have requested that we provide a view as to whether, when the Agreement includes the fuel addendum, 7-Eleven is required to comply with both the Franchising Code of Conduct (the FCC) and the Oilcode. You have also asked that we provide a view as to when, in relation to existing agreements that include the fuel addendum, 7-Eleven's disclosure obligations under the Oilcode commence.

As mentioned in our telephone conversations of 8th February 2007 and 15th February 2007, I am writing to provide a view in relation to these issues.

While I am pleased to provide the following comments, please note that they are not exhaustive and do not constitute legal advice.

Based on the information provided, it is our view, that the Oilcode but not the FCC is likely to apply to the Agreement where it includes the fuel addendum. After the commencement of the Oilcode on 1st March 2007, 7-Eleven is required to comply with its disclosure obligations under the Oilcode as and when they arise.

Specifically, I provide the following comments.



The Oilcode, apart from Part 2, applies to fuel re-selling agreements. In order for an agreement to be a fuel re-selling agreement under the Oilcode, the agreement must meet the criteria set out in s. 5(1) of the Oilcode.

Staff consider that the relevant difference between a franchise agreement and a fuel re-selling agreement under the Oilcode is that under s. 5(1)(b)(i) of the Oilcode, a fuel re-selling agreement must be an agreement in which a person ('the supplier') grants to another person ('the retailer') the right to carry on a business of offering, supplying or distributing motor fuel in Australia.

As the FCC currently applies to the Agreement and the fuel addendum (which forms part of the Agreement) requires the 7-Eleven franchisee to retail fuel, staff consider that the Agreement (where it includes the fuel addendum) is likely to meet the requirements of a fuel re-selling agreement under s. 5(1) of the Oilcode and that the fuel re-selling agreement provisions of the Oilcode will therefore apply to the Agreement (where it includes the fuel addendum).

In accordance with reg. 5(3)(b) of the FCC, staff consider that the FCC will cease to apply to the Agreement (where it includes the fuel addendum) as of 1st March 2007. However, under s. 6(2) of the Oilcode, where the Agreement includes the fuel addendum, the Oilcode will apply to other retail activities included in the Agreement or undertaken on the same site by the franchisee for 7-Eleven. As such, where the Agreement includes the fuel addendum, 7-Eleven will need to supply the prospective franchisee with disclosure documents in accordance with the Oilcode

Where the franchisee does not retail motor fuel, the FCC will continue to apply to the agreement and consequently 7-Eleven will need to supply the franchisee with disclosure documents in accordance with the FCC.

In relation to existing arrangements, after the commencement of the Oilcode on 1st March 2007, 7-Eleven is required to comply with its obligations under the Oilcode as and when they arise.

I would like to thank you again for the opportunity to comment on the application of the Oilcode to 7-Eleven's arrangement with its franchisees. If you require further clarification with regard to any of the comments in this letter please do not hesitate to contact myself on (03) 9290 1927 or Rhys Benny on (03) 9290 1821.

Yours Sincerely



Konrad Chaitalewski
National Manager
Codes Unit

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