



Statement of reasons

Notifications lodged by
7-Eleven Australia Pty Limited and 7-Eleven Stores Pty Limited
in respect of
proposed resale price maintenance conduct in relation to eCommerce
sales

Notification numbers: RPN10000459 and RPN1000460

11 August 2022

Commissioners: Keogh
Brakey
Rickard

Summary

The Australian Competition and Consumer Commission (**ACCC**) has decided not to object to the resale price maintenance (**RPM**) notifications lodged by 7-Eleven Australia Pty Limited and 7-Eleven Stores Pty Limited (collectively, **7-Eleven**) on 29 July 2022.

7-Eleven proposes that, for the next 6 years, whenever it supplies a product to the operator of a 7-Eleven branded store, it will specify the price at which the store operator must resell the product if the sale occurs through an eCommerce platform (the **RPM Conduct**). eCommerce platforms will include, for example, 'Pay & Go' services where the customer scans and pays for a product through a mobile phone app, and digital screen food ordering services through self-service kiosks. The RPM Conduct will not apply to over the counter sales in-store.

7-Eleven advises that the RPM Conduct is necessary because of technical limitations in its IT system's ability to process different prices for the same product sold through its proposed eCommerce platforms in different stores. 7-Eleven proposes to engage in the RPM Conduct until its IT system is replaced and is able to efficiently process different prices for the same product, which it expects to occur in 6 years or less.

When assessing RPM notifications, the decision for the ACCC is whether to take steps to remove the protection from legal action by revoking the notifications. The ACCC can only revoke a notification if it is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely public detriment from the conduct.

Based on the information provided by 7-Eleven, including confidential internal documents, the ACCC considers that 7-Eleven would be unlikely to launch its eCommerce initiatives in the short-to-medium term without the RPM Conduct.

The ACCC also considers that the RPM Conduct is likely to result in some, moderate, public benefits through providing more choice and convenience for consumers through improving 7-Eleven's service offering, promoting competition with other fuel, food and grocery retailers and increasing the efficiency of 7-Eleven store operations through freeing up resources, particularly staff resources.

The ACCC considers that the public detriment likely to result from the RPM Conduct will be minimal. Competition from other fuel, food and grocery retailers is likely to constrain 7-Eleven's ability to use the RPM Conduct to raise retail prices. Further, there is currently a very low level of discounting among 7-Eleven franchisees and 7-Eleven would be unlikely to offer products for sale via its proposed eCommerce platforms at all without the RPM Conduct. The RPM Conduct is also limited to a maximum duration of 6 years.

The ACCC may revisit this assessment at any time and take steps to remove the protection provided by the notifications.

The RPM Conduct notified by 7-Eleven is different to other RPM conduct the ACCC has considered. 7-Eleven's proposed RPM Conduct is not aimed at addressing concerns that resellers who do not invest in high service could free ride on the investments of resellers that do by setting lower prices. Rather, 7-Eleven seeking to engage in RPM Conduct in respect of eCommerce sales is due to the limitations of its IT systems.

The likely benefits and detriments resulting from RPM conduct will be assessed on a case-by-case basis. Accordingly, the ACCC's decision in this matter should not be seen as indicative of its views about RPM conduct more broadly. The ACCC considers that under many circumstances, RPM is likely to result in significant public detriments, particularly where the parties concerned have higher market shares, or in markets where there is not vigorous competition. RPM will often not result in sufficient public benefits to offset the detriment from potentially higher prices. The ACCC will require any party seeking legal immunity for RPM conduct to provide substantial evidence to demonstrate that the extent of public detriment will be limited and there are clear public benefits.

The notifications

1. 7-Eleven Australia Pty Limited and 7-Eleven Stores Pty Limited¹ (collectively, **7-Eleven**) lodged Resale Price Maintenance (**RPM**) notifications RPN1000459 and RPN1000460, on 29 July 2022. The legal protection provided by the notifications will automatically commence on 12 August 2022 (i.e. 14 days after valid lodgement).
2. 7-Eleven operates a network of franchised and corporate owned stores that sell groceries, takeout food and beverages, dairy products, non-food merchandise and in some cases petrol. 7-Eleven contracts, including with third-party merchandise suppliers, for the supply of goods to 7-Eleven's network of franchised and corporate stores in Australia and for the supply of warehousing, pick and logistics services. As at 29 July 2022 7-Eleven's network of stores in Australia comprised 737 stores. Of these, 549 were franchised by 7-Eleven to third parties and 188 were corporate stores operated by a related entity.
3. 7-Eleven has proposed that during the timeframe described at paragraph 4 below, whenever it supplies a product to an operator of a 7-Eleven branded store (be they franchised or corporate stores), 7-Eleven specifies a price at which the store operator must resell the product to a customer where the sale is made via an 'eCommerce platform' (the **RPM Conduct**).
4. The timeframe is defined by 7-Eleven as a period commencing if, and when, the ACCC allows the notifications to stand and ending 6 years from the date of commencement.
5. An eCommerce platform is defined by 7-Eleven as:
 - a customer-facing technology that allows customers to purchase a product directly (i.e. without the assistance of an employee), and
 - which operates using technology that does not allow store operators to manually alter the price charged to the customer for the product being purchased.
6. The first eCommerce platform 7-Eleven intends to launch is a 'Pay & Go' service that would enable customers to purchase products in-store by using a mobile phone app to scan and pay for the products through the app, without going to a physical checkout.
7. Other eCommerce platforms or initiatives 7-Eleven is considering implementing include:
 - Digital Screen food ordering – this would allow customers to order and pay for food through a digital self-service kiosk in store

¹ 7-Eleven Stores Pty Limited is an Australian private company with a license to operate and franchise 7-Eleven branded stores in Australia from 7-Eleven Inc., which is domiciled in the United States of America.

- ‘Micro Market’ stores – these stores would be unstaffed and checkout-free; and customers would be automatically charged when removing a product from the shelf (provided they have pre-registered their payment information)
 - proprietary eCommerce platform – 7-Eleven proposes to build its own platform which would enable customers to purchase products online (through ‘click and collect’ or delivery)
 - third-party marketplaces – customers would be able to use third-party apps to order and pay for products to be delivered from 7-Eleven branded stores, and
 - future initiatives – 7-Eleven may implement other eCommerce initiatives in the future.
8. The RPM Conduct will not apply to sales made by the operators of 7-Eleven stores to customers who pay for their purchase at the physical checkout in store.

The prior notifications

9. On 28 January 2022, 7-Eleven lodged notifications for similar RPM conduct to that the subject of the current notifications (the **prior notifications**), although they differ in that there was no time limit to the proposed conduct.
10. In response to questions from the ACCC, 7-Eleven advised that it was only intending to engage in the conduct the subject of the prior notifications for up to 6 years. That is, until the point in time where it had upgraded to new IT systems (as discussed below).
11. 7-Eleven has requested that the ACCC not progress its consideration of the prior notifications and instead consider the current notifications. As the ACCC has decided to allow the current notifications to stand, the ACCC expects that once the current notifications come into force on 12 August 2022, then 7-Eleven would withdraw the prior notifications. Unless stated otherwise, all references to notifications in this Statement of Reasons are in relation to the current notifications, RPN1000459 and RPN1000460.

7-Eleven’s rationale for the RPM Conduct

12. 7-Eleven submits that the purpose of the RPM Conduct is to grow digital sales across the 7-Eleven network, including from 7-Eleven’s franchised and corporate stores, in circumstances where 7-Eleven expects sustained growth in the digital economy at the expense of sales to consumers who are physically present in a store at the time of the sale and who use the physical checkout in the store to purchase products.²
13. 7-Eleven submits the limitations of its current Enterprise Resource Planning (**ERP**) system which is used to process sales mean that allowing store operators to set their own prices for products sold via eCommerce platforms would create a resource burden that makes this commercially unfeasible.³ Therefore, without the RPM Conduct, 7-Eleven submits that it would not be able to offer products for sale by store operators to customers through eCommerce platforms.⁴

² 7-Eleven submission in support of the notifications, Attachment C, p.6.

³ 7-Eleven documents in support of the notifications, Schedule 4, Annexure F, p.3; Annexure L, p.4; Annexure Q, p.2.

⁴ 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.1

14. 7-Eleven states that its ERP system is currently configured to accommodate no more than 2 price points per product in each state, except for its new Far North Queensland store/s where 3 price points per product are accommodated.⁵
15. 7-Eleven currently offers between 60 and 100 promotions per month which are advertised and implemented in individual 7-Eleven branded stores.⁶ Each time a promotion is offered, a 7-Eleven staff member must manually load into the ERP system the new promotional price for each relevant product, as well as the new promotional price for many possible combinations of products if relevant (for instance, “any 3 products for \$11”).⁷ 7-Eleven submits that this manual process is resource-intensive, and results in price inputting errors which have been the subject of complaints from franchisees.⁸ 7-Eleven estimates that it takes approximately 120 hours to set up its promotional program each month.⁹
16. 7-Eleven submits the resource burden would be commercially unfeasible, and the scope of errors would increase, if it allowed franchisees to set their own prices for eCommerce sales store-by-store – rather than just changes to the two price “books” offered in each state, each promotion would necessitate a manual change to every relevant product in every store’s price book, while the scope for error would increase considerably.¹⁰ It argues that, without the RPM Conduct, there would be substantial administrative burden arising from the need for 7-Eleven to continually vary the price for each product advertised on the eCommerce platforms, based on inputs from each store operator; and administering promotions (including manually correcting pricing data errors) would become more complicated.¹¹
17. 7-Eleven also submits that other technological systems which integrate with its ERP system have been set up to account for the ERP’s functional limitations. 7-Eleven considers those systems’ capacity to manage more than 2 price points per product in each state is untested; and those systems may experience serious delay or faults if it introduced more price points in order to allow for store-specific pricing.¹²
18. In response to the ACCC’s requests for further information in respect of the prior notifications, 7-Eleven provided the ACCC with confidential internal documents in support of their submissions about the resource burden associated with administering its promotional program using the ERP system, and the costs and complexities that would arise if 7-Eleven were to allow store-specific pricing for eCommerce transactions with the current limitations of its ERP system.

Pricing for sales made at the checkout

19. 7-Eleven currently supplies products to stores with barcodes that, upon scanning, will display the maximum recommended resale price set by 7-Eleven in its ERP system.¹³

⁵ 7-Eleven submits its costs are higher in Far North Queensland (see 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, pp.3-4).

⁶ 7-Eleven documents in support of the notifications, Schedule 4, Annexure F, p.7; Annexure L, p.4

⁷ 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.4.

⁸ 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, pp.4 and 7; Annexure Q, p.2.

⁹ 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.4.

¹⁰ 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.4.

¹¹ 7-Eleven submission in support of the notifications, Attachment C, p.5; 7-Eleven documents in support of the notifications, Schedule 4, Annexure Q, p.2.

¹² 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.4.

¹³ 7-Eleven submission in support of the notifications, Attachment C, pp.4-5.

However, store operators can charge a different price by manually overriding the price in the ERP system at the physical checkout using generic price stickers.¹⁴

20. 7-Eleven has provided information to the ACCC that indicates that only a very small percentage of sales are products that are discounted by store operators below 7-Eleven's maximum recommended resale price.¹⁵ This includes data about individual store sales provided in response to an information request from the ACCC in relation to the prior notifications. 7-Eleven submits that those sales are likely to occur where a store operator wishes to move stock which is nearing its use-by date. In those cases, the store operator would usually place the discounted stock in a basket with signage to indicate that the stock is discounted.¹⁶
21. 7-Eleven submits that the RPM Conduct will not affect the ability of store operators to continue to offer discounts on products sold at the checkout.¹⁷ However, store operators will have to make clear that such discounts are only available when the customer purchases the products at the checkout (and not via an eCommerce platform).¹⁸

Replacement of ERP system to avoid engaging in RPM Conduct in the longer term

22. 7-Eleven submits that it has strong incentives to replace its ERP system or develop solutions to the limitations of its ERP system so that it would not need to engage in RPM Conduct in the longer term.¹⁹ To that end, the current notifications provide for 7-Eleven to engage in the RPM Conduct for 6 years.
23. 7-Eleven considers that 6 years is an appropriate period to allow it to develop solutions to the functional limitations that would allow 7-Eleven to avoid the need to engage in the RPM Conduct, given:
 - 7-Eleven's current technological roadmap includes plans to upgrade its Point of Sale (**POS**) and ERP system in a staged and systematic manner, noting the ERP system reaches its end-of-life in the 2027 financial year, and
 - the 6-year period includes a reasonable buffer to account for the possibility that 7-Eleven's plans to upgrade its ERP system are delayed beyond the 2027 financial year (which is not foreseen but is common for large-scale projects to upgrade the enterprise technology of a business of 7-Eleven's size).²⁰
24. In response to questions from the ACCC in respect of the prior notifications, 7-Eleven provided explanations for its proposed timeframe and incentive for replacing the ERP system, as follows:
 - it is in the interests of 7-Eleven to develop a replacement ERP system that would not require it to continue to engage in RPM Conduct in the longer term. 7-Eleven submits that if it does not develop a solution that allows discounting of products sold through eCommerce platforms as they gain scale, it would impact

¹⁴ However, this practice will result in the ERP system recording the products as 'generic' products and thus creates challenges for 7-Eleven's inventory reconciliation (see 7-Eleven submission in support of the notifications, Attachment C, p.5; 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.5).

¹⁵ 7-Eleven submission in support of the notifications, Attachment C, p.13; 7-Eleven documents in support of the notifications, Schedule 4, Annexure F, pp.3-5.

¹⁶ 7-Eleven submission in support of the notifications, Attachment C, p.14.

¹⁷ 7-Eleven submission in support of the notifications, Attachment C, p.13.

¹⁸ 7-Eleven documents in support of the notifications, Schedule 4, Annexure F, p.7.

¹⁹ 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, pp.1 and 7; Annexure Q, pp.3-5.

²⁰ 7-Eleven documents in support of the notifications, Schedule 4, Annexure Q, p.3.

customers' perception of 7-Eleven as a convenience retailer offering value-for-money, negatively affecting its ability to compete with other retailers. It also submits that it needs to replace the ERP system to increase efficiency in store operations and grow sales²¹, and

- 7-Eleven has decided to prioritise the upgrade of its POS system as it is currently exhibiting end-of-life constraints and preventing improvements in customer experience. 7-Eleven has also determined that it can only replace its ERP system after it has completed the replacement of its POS system. This is because the ERP and POS systems are the systems which are most critical to the operation of 7-Eleven's business; simultaneously replacing them would create a substantial risk of technological failure that, if it eventuated, would jeopardise 7-Eleven's ability to operate its business.²²

25. 7-Eleven has provided confidential internal documents to substantiate its claims about the planned upgrades to both the POS and ERP systems.

The RPM notification process and public benefit test

26. In broad terms, RPM occurs when a supplier of goods or services (for example, a manufacturer or wholesaler) specifies a minimum price below which a reseller must not on-sell, or advertise for sale, those goods or services.

27. RPM is a per se breach of the *Competition and Consumer Act 2010* (the **Act**), which means it is prohibited outright, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition. The Act allows a business to obtain protection from legal action to engage in RPM conduct by lodging a notification.

28. The legal protection provided by an RPM notification commences automatically 14 days after the notification was validly lodged, unless the ACCC issues a draft notice objecting to the notification within that period. In this case, 7-Eleven has submitted that it will commence engaging in the RPM Conduct if and when the ACCC makes a decision to allow the notifications to stand.

29. The ACCC will assess an RPM notification by applying the public benefit test in section 93(3A) of the Act. The test requires that in order to revoke a notification the ACCC must be satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the notified conduct.

30. If the ACCC reasonably considers it has grounds to revoke an RPM notification because the public benefit test is not satisfied, but these grounds would not exist if particular conditions relating to the RPM conduct were complied with, the ACCC can impose conditions.

Consultation

7-Eleven's submission

31. 7-Eleven submits the following public benefits will result from the RPM Conduct:

²¹ 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.7.

²² 7-Eleven documents in support of the notifications, Schedule 4, Annexure L, p.6.

- encouraging innovation (allowing customers to purchase products faster and in more ways), which is likely to increase 7-Eleven's competitiveness against other convenience retailers
- increasing customer choice (providing customers the ability to shop without going into a store, removing the need to queue for in-store purchases or otherwise interact with store staff), and
- creating more efficiency for store operators (freeing up staff to undertake more valuable activities and enhancing profitability due to more customers and more efficient sales processes).²³

32. 7-Eleven submits that the RPM Conduct is not expected to result in any measurable public detriment, because:

- store operators rarely discount in any event. To the extent that they do, it is generally in relation to stock near its use-by date sold in dedicated areas (for example, a basket at the front of the store). Store operators can continue to discount such products when they are sold at the checkout
- 7-Eleven and store operators do not hold market power. The RPM Conduct will not lead to 7-Eleven increasing its prices due to strong competition and consumer price sensitivity
- eCommerce transactions are and will remain a small proportion of 7-Eleven's sales, and
- 7-Eleven may be able to develop a solution to the technological limitations which will avoid the need for it to engage in the RPM Conduct earlier than 6 years.²⁴

Interested party submissions

33. The ACCC invited submissions about the prior notifications from a range of potentially interested parties including competitors, consumer and small business representatives, industry groups and 7-Eleven franchisees. No submissions were received. Because the current notifications are more limited in scope than the prior notifications, and no submissions were received about the more broadly framed conduct the subject of the prior notifications, the ACCC did not seek submissions from interested parties in relation to the current notifications.

ACCC assessment

The ACCC's general approach to RPM notifications

34. Removing price competition between resellers of goods or services has the potential to result in significant consumer harm. By reducing or eliminating price competition, RPM can result in higher prices for consumers without any additional value. In some circumstances, RPM may also increase the risk of collusion between competitors.
35. The risk of public detriment from RPM conduct will usually be smaller where the relevant good or service is subject to strong rivalry from competing goods or services. In these

²³ 7-Eleven submission in support of the notifications, Attachment C, p.13-14.

²⁴ 7-Eleven submission in support of the notifications, Attachment C, p.14-16.

circumstances, the supplier would be less likely to be able to set retail prices above the competitive level.

36. In certain circumstances, RPM can result in public benefits, including by promoting competition. For example, producers of complex goods or services may seek to engage in RPM to create incentives for a reseller to invest in pre-and post-sales services such as in-store product demonstrations and training staff to be able to provide advice about the products, which is valued by consumers.
37. Without RPM, other resellers who do not invest in the same level of high service could 'free ride' on these investments by setting lower prices. Eventually, high-service resellers may not gain sufficient returns on product sales to continue to provide these services. In some cases, RPM can help to align the incentives of the retailer with those of the wholesaler, allowing them to compete more strongly with vertically integrated competitors.

ACCC's assessment of 7-Eleven's RPM notifications

38. The ACCC notes that 7-Eleven's proposed RPM Conduct differs from many RPM arrangements the ACCC has considered in the past through the authorisation and notification processes. 7-Eleven is seeking to implement RPM Conduct in respect of eCommerce sales due to the limitations of its ERP system.
39. The ACCC's assessment of the public detriments and public benefits of 7-Eleven's proposed RPM Conduct follows.

The future without the RPM Conduct

40. Based on the information provided by 7-Eleven, including internal documents about its ERP system, the ACCC considers that if 7-Eleven was unable to engage in the RPM Conduct it would be very difficult for 7-Eleven to proceed with its eCommerce initiatives in the short-to-medium term. This is because the limitations of its current ERP system, which make it very difficult to manage more than 2 price points for each product in each state, are unlikely to be resolved until the ERP system is replaced, which is currently anticipated to be around 2027.

Public detriments

41. RPM conduct eliminates the scope for resellers to offer discounts on the recommended retail price. This will result in a clear public detriment if it leads to customers paying more for relevant products. However, in this instance, the ACCC considers that any public detriment likely to result from the RPM Conduct will be minimal. The RPM Conduct will prevent franchisees offering discounts for products sold on eCommerce platforms. The ACCC considers this is likely to flow on to impact decisions by store operators about offering discounts for over the counter sales in some cases. This is because in order to offer a different price over the counter, the store operator would need to place a different sticker on the product. While store operators are currently required to do this, with the RPM Conduct in place they would need to display two prices for any product they wished to discount via over the counter sales. One price for sales through eCommerce platforms, and another for over the counter sales.
42. However, it is likely that store operators would continue their current practice of offering discounts on products that are close to the use-by date and sold over the counter. The ACCC notes that such products are generally placed in a specific area of the store to indicate that the products are discounted (as discussed at paragraph 20 above).

43. Therefore, while individual franchisees' ability to discount products to drive or respond to competition in their local areas is removed in respect of eCommerce sales and the administrative burden in doing so is increased in respect of discounting some over the counter sales, the ACCC considers that the extent of the public detriment is likely to be limited due to the following factors:

- in setting prices for eCommerce transactions, and setting maximum recommended resale prices for over the counter sales, 7-Eleven will continue to be constrained by competing fuel, food and grocery retailers
- there is currently a very low level of discounting among 7-Eleven franchisees, and most franchisees adopt the maximum recommended resale price specified by 7-Eleven. The types of circumstances in which 7-Eleven submits that discounting is most common (e.g. products near use-by dates) is not affected by the RPM Conduct, nor by the additional administrative burden in offering discounts on over the counter sales noted above
- In respect of eCommerce sales, having regard to the likely future without the RPM Conduct, the RPM Conduct is likely to increase competition between retailers
- having regard to the likely future without the RPM Conduct, 7-Eleven would be unlikely to offer products for sale via its proposed eCommerce platforms at all without the RPM Conduct, and
- 7-Eleven will only engage in the RPM Conduct for a limited period of time until it can upgrade its ERP system – that is, 6 years or potentially less if it develops solutions to the limitations of its ERP system sooner. The time limit on the notifications should encourage it to develop this upgrade within 6 years.

Public benefits

44. The ACCC considers that 7-Eleven's eCommerce initiatives, which are unlikely to proceed in the short-to-medium term without the RPM Conduct, are likely to result in some, moderate, public benefits through:

- providing more choice and convenience for consumers through improving 7-Eleven's service offering
- promoting competition with other retailers, and
- increasing the efficiency of 7-Eleven store operations through freeing up resources, particularly staff resources.

Balance of public benefits and detriments

45. The ACCC considers that the likely benefit from 7-Eleven's RPM Conduct will outweigh the likely public detriment from the conduct. While the likely public benefits from the RPM Conduct are likely to be modest, the public detriment is likely to be minimal.

Decision

46. For the reasons set out in this Statement of Reasons, the ACCC is satisfied that the likely benefit to the public from the RPM Conduct will outweigh the likely detriment to the public from the RPM Conduct. Therefore, based on the information currently before the ACCC, the test to revoke the notifications in section 93(3A) of the Act is not met. The

legal protection provided by the notifications will automatically commence on 12 August 2022.

47. The notifications relate only to product sales through 7-Eleven's eCommerce platforms (described in paragraphs 5 to 7 above), and do not extend to sales made at the physical checkout in 7-Eleven branded stores.

Review of the notifications

48. While no further action is proposed at this time, the ACCC may revisit this assessment at any time. Should the ACCC come to the view that the likely benefits to the public from the RPM Conduct will not outweigh the likely detriments, the ACCC may take steps to remove the protection provided by the notifications.