



## FORM 5A

Rule 5.02(1)

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST**

Case: S ECI 2022 04261

Filed on: 21/10/2022 01:48 PM

No.

**B E T W E E N**

**FNH UNITED PTY LTD (ACN 639 802 798) and others according to the schedule**

**Plaintiffs**

-and-

**UNITED PETROLEUM FRANCHISE PTY LTD  
(ACN 127 764 989) and another according to the schedule**

**Defendants****WRIT**


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|                     |                                    |                  |  |
|---------------------|------------------------------------|------------------|--|
| Date of Document:   | 20 October 2022                    | Solicitors Code: |  |
| Filed on behalf of: | Plaintiffs                         | DX:              |  |
| Prepared by:        | Levitt Robinson Solicitors         | Telephone:       | (02) 9286 3133   |
|                     | Ground Floor, 162 Goulburn Street, | Ref:             | SAL:190004   |
|                     | SYDNEY NSW 2010                    | Email:           | <a href="mailto:slevitt@levittrobinson.com">slevitt@levittrobinson.com</a> |

Filed by their Victorian Agents:

|                                    |                           |
|------------------------------------|---------------------------|
| T.F Grundy Lawyers                 | Telephone: (03) 9909 7162 |
| Level 1, 530 Little Collins Street |                           |
| MELBOURNE VIC 3000                 |                           |

**TO THE DEFENDANT**

**TAKE NOTICE** that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

**IF YOU INTEND TO DEFEND** the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearance stated below.

**YOU OR YOUR SOLICITOR** may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

**IF YOU FAIL** to file an appearance within the proper time, the plaintiff may **OBTAIN JUDGMENT AGAINST YOU** on the claim without further notice.

**\*THE PROPER TIME TO FILE AN APPEARANCE** is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

IF the plaintiff claims a debt only and you pay that debt, namely, \$ and \$ for legal costs to the plaintiff or the plaintiff's solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court.

**FILED** *[insert date]*

Prothonotary

**THIS WRIT** is to be served within one year from the date it is filed or within such further period as the Court orders.

**SCHEDULE OF PARTIES**

**B E T W E E N**

**FNH UNITED PTY LTD (ACN 639 802 798)**

First Plaintiff

**FAHIM ISTANIKZAI**

Second Plaintiff

**JIGARKUMAR BHARATBHAI PATEL**

Third Plaintiff

**JAYDEEP DEVJIBHAI BHATTI**

Fourth Plaintiff

-and-

**UNITED PETROLEUM FRANCHISE PTY LTD  
(ACN 127 764 989)**

First Defendant

**AVI SILVER**

Second Defendant

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
 COMMERCIAL COURT  
 GROUP PROCEEDINGS LIST

No.

B E T W E E N

**FNH UNITED PTY LTD (ACN 639 802 798) and others according to the schedule**

**Plaintiffs**

-and-

**UNITED PETROLEUM FRANCHISE PTY LTD  
 (ACN 127 764 989) and another according to the schedule**

**Defendants**

**STATEMENT OF CLAIM**

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|                     |                                    |                  |  |
|---------------------|------------------------------------|------------------|--|
| Date of Document:   | 20 October 2022                    | Solicitors Code: |  |
| Filed on behalf of: | Plaintiffs                         | DX:              |  |
| Prepared by:        |                                    | Telephone:       | (02) 9286 3133   |
|                     | Levitt Robinson Solicitors         | Ref:             | SAL:190004   |
|                     | Ground Floor, 162 Goulburn Street, | Email:           | <a href="mailto:slevitt@levittrobinson.com">slevitt@levittrobinson.com</a> |
|                     | SYDNEY NSW 2010                    |                  |  |

Filed by their Victorian Agents:

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| T.F Grundy Lawyers                 | Telephone: (03) 9909 7162 |
| Level 1, 530 Little Collins Street |                           |
| MELBOURNE VIC 3000                 |                           |

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**A. The Parties**

- 1 The First Plaintiff, FNH United Pty Ltd (ACN 639 802 798) (**FNH**) is and was at all material times a company incorporated under the *Corporations Act 2001* (Cth) (**Act**) and able to sue in its corporate name.
- 2 The Second Plaintiff, Fahim Istanikzai (**Mr Istanikzai**), is and was at all material times the director of FNH and a natural person capable of suing in his own name.
- 3 The Third Plaintiff, Jigar Patel (**Mr Patel**),

(a) is and was at all material times a natural person capable of suing in his own name;  
and

(b) a trustee of the JJ Unit Trust.

4 The Fourth Plaintiff, Jaydeep Bhatti (**Mr Bhatti**),

(a) is and was at all material times a natural person capable of suing in his own name;  
and

(b) a trustee of the JJ Unit Trust.

5 The First Defendant, United Petroleum Franchise Pty Ltd (ACN 127 764 989) (**United Petroleum**):

(a) was incorporated in Victoria on 28 September 2007;

(b) is and was at all material times a proprietary company incorporated under the Act able to sue and be sued in its corporate name;

(c) was, at all material times, a corporation within the meaning of the *Competition and Consumer Act 2010* (Cth) (**CCA**);

(d) at all material times, had as its directors Eddie Hirsch and Avi Silver, who were appointed to those positions on 28 September 2007; and

(e) as at the date of filing this Statement of Claim, has 12 ordinary shares on issue, held as follows:

(i) 6 shares held by Agtan Pty Ltd (ACN 007 410 077) (**Agtan**) a company of which Avi Silver is the sole director, secretary, and shareholder; and

(ii) 6 shares held by Pribay Pty Ltd (007 410 040) (**Pribay**) a company of which Eddie Hirsch is the sole director, secretary, and shareholder.

6 The Second Defendant, Avi Silver, is and was at all material times:

(a) a director of United Petroleum; and

(b) a natural person capable of being sued.

7 United Petroleum is part of a group of companies trading under the United Petroleum brand and trademarks (**United Group**).

8 Within the United Group, United Petroleum is an operating entity that operates service stations via a network of licensed businesses operated by franchisees (**United Network**).

## **B. Group Members**

9 This is a representative proceeding brought pursuant to Part IVA of the *Supreme Court Act 1986* (Vic) (**SCA**) on behalf of the Plaintiffs and on behalf of all persons who:

- (a) at any time from 19 October 2016 and 20 October 2022 (**Relevant Period**) were or commenced to be a franchisee in the United Network pursuant to a standard form franchise agreement (**Franchise Agreement**) with United Petroleum (each person meeting this description being a **Franchisee**); and
- (b) at any time during the Relevant Period were a guarantor of a Franchisee's obligations under a Franchise Agreement with United Petroleum (each person meeting this description being a **Guarantor**).

10 The Franchisees and the Guarantors are the **Group Members** in this representative proceeding.

11 As at the commencement of this proceeding, seven or more Group Members have claims against the Defendants within the meaning of section 33C of the SCA.

**C. The Franchise Agreement, Disclosure Document, and Franchise Operations Manual**

12 During the Relevant Period United Petroleum offered prospective franchisees the right to operate a franchised service station business in the United Network pursuant to a Franchise Agreement.

**Particulars**

- (a) *An example of the standard form Franchise Agreement is the agreement between FNH, Mr Stanikzai (as guarantor), and United Petroleum executed on or about 17 April 2020.*
- (b) *An example of the standard form Franchise Agreement is the agreement between Mr Patel and Mr Bhatti in their capacities as trustees of the JJ Unit Trust, Mr Patel and Mr Bhatti in their personal capacities (as guarantors), and United Petroleum executed on or about 29 May 2018.*
- (c) *References to clauses of the standard form Franchise Agreement take their clause numbering from the agreement between Mr Patel and Mr Bhatti in their capacities as trustees of the JJ Unit Trust and United Petroleum.*
- (d) *Particulars of the standard form Franchise Agreements supplied to Group Members will be provided following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

- 13 Prior to or at the time of a Franchisee entering into a Franchise Agreement, each prospective franchisee was, or was supposed to be, provided with a copy of a document titled United Petroleum Franchise Pty Ltd Disclosure Document (**Disclosure Document**).

**Particulars**

- (a) *On or about 26 March 2020, FNH was provided with a Disclosure Document.*
- (b) *Mr Patel and Mr Bhatti were not provided with a Disclosure Document.*
- (c) *Particulars of the Disclosure Documents supplied to Group Members will be provided following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

- 14 At the time of each Franchisee entering into a Franchise Agreement, each prospective franchisee was, or was supposed to be, provided with a copy of a document titled Franchise Operations Manual (**Operations Manual**).

**Particulars**

- (a) *FNH was not provided with an Operations Manual prior to entering its Franchise Agreement.*
- (b) *Mr Patel and Mr Bhatti were not provided with an Operations Manual.*
- (c) *Particulars of the Operations Manuals supplied to Group Members will be provided following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

**D. History of the Pie Face Franchise**

- 15 On or about 3 May 1999, A.C.N. 087 384 736 Pty Ltd, then known as "Pie Face Pty Ltd" (**Original Pie Face**) was incorporated in New South Wales.
- 16 On or about 18 October 2004, A.C.N 111 409 860 Limited (**Pie Face Holdings**) was incorporated in New South Wales.
- 17 Original Pie Face operated a network of retail franchises that predominantly retailed pies and other bakery products (**Pie Face Franchise**) under the "Pie Face" brand and trademarks (**Pie Face Intellectual Property**).

**Particulars**

*Particulars of the signs, names, and marks comprising the Pie Face Intellectual*

*Property will be given in evidence and following discovery.*

- 18 Pie Face Holdings had legal title to the Pie Face Intellectual Property.
- 19 On or about 23 February 2012, Original Pie Face was served with a Creditor's Statutory Demand for Payment of Debt by the New South Wales Chief Commissioner of State Revenue.
- 20 On or about 5 April 2012, an application was filed with the Supreme Court of New South Wales for a winding-up order against Original Pie Face by the New South Wales Chief Commissioner of State Revenue.

### **Properties**

*Notification of court action relating to winding-up filed 5 April 2012, being ASIC document no. 028002054.*

- 21 On or about 18 November 2014, Steven John Sherman and Peter James Gothard (**Receivers**) were appointed as Joint Receivers over certain property of Pie Face Holdings by its first ranking secured creditor, Macquarie Capital Group Pty Ltd.
- 22 On or about 21 November 2014, Roderick Mackay Sutherland and Sule Arnautovic (**Administrators**) were appointed as Administrators of Original Pie Face under Part 5.3A of the Act.

### **Particulars**

*External Administration - Appointment of an external administrator filed 24 November 2014, being ASIC Document No. 7E6544065.*

- 23 On or about 3 December 2014 there was a concurrent meeting of creditors of Original Pie Face, Pie Face Holdings, and Pie Face Franchising Pty Ltd.

### **Particulars**

*Minutes of meeting dated 3 December 2014, being ASIC Document No. 7E6606849*

- 24 In the minutes of the meeting held on 3 December 2014, the Administrators advised creditors of Original Pie Face that:
- (a) they were continuing to trade the business of the Pie Face Group;
  - (b) as a result of a cash-flow analysis of the business of the Pie Face Group, they expected to generate weekly revenues of approximately \$250,000 per week; and
  - (c) the current operational costs of the business of the Pie Face Group was \$400,000 per week, a situation the Administrators described as a "cash-flow crisis".
- 25 On or about 30 December 2014, a meeting of creditors of Original Pie Face was held to



consider, amount other things, the execution of a Deed of Company Arrangement.

**Particulars**

*Meeting of creditors of Original Pie Face dated 30 December 2014, being ASIC document number 7E6651351.*

- 26 On or about 30 December 2014, at the meeting of creditors of Original Pie Face, it was resolved that Original Pie Face be required to execute a Deed of Company Arrangement.
- 27 On or about 30 December 2014, Original Pie Face executed a Deed of Company Arrangement appointing the Administrators, Roderick Mackay Sutherland and Sule Arnautovic to Original Pie Face under the Deed of Company Arrangement (**DOCA**).

**Particulars**

*Deed of Company Arrangement dated 30 December 2014, being ASIC Document No. 7E6640338.*

- 28 The DOCA provided a projected dividend to unsecured creditors of Original Pie Face of between 14 and 19 cents in the dollar.
- 29 On or about 29 January 2015, the Administrators lodged a Presentation of accounts and statement with ASIC for the period from 21 November 2014 to 30 December 2014.

**Particulars**

*ASIC Document No. 7E6685042.*

- 30 On or about 29 July 2015, the Administrators lodged a Presentation of accounts and statement with ASIC for the period from 30 December 2014 to 29 June 2015.

**Particulars**

*ASIC Document No. 7E7173515.*

- 31 On or about 14 January 2016, the Administrators lodged a Presentation of accounts and statement with ASIC for the period from 30 June 2015 to 29 December 2015.

**Particulars**

*ASIC Document No. 7E7615880.*

- 32 On or about 27 January 2016, Roderick Mackay Sutherland resigned as Administrator of Original Pie Face.

- 33 On or about 28 January 2016, Sule Arnautovic lodged a Presentation of accounts and statement with ASIC for the period from 30 December 2015 to 27 January 2016.

**Particulars**

*ASIC Document No. 028786635.*

- 34 On or about 28 January 2016, Sule Arnautovic issued a Formal Report and Notice of Meeting of Creditors pursuant to s 445(f) of the Act to creditors of Original Pie Face.
- 35 On or about 12 February 2016, there was a meeting of the creditors of Original Pie Face.

**Particulars**

*Minutes of a meeting of creditors of Pie Face Pty Ltd (subject to Deed of Company Arrangement) held on 12 February 2016 and lodged on 24 February 2016, bearing ASIC Document No. 7E7725940.*

- 36 At the meeting held on 12 February 2016, the Sule Arnautovic advised:
- (a) of a proposed variation to the DOCA to provide an altered timetable for the Deed Contributions to be made by Original Pie Face under the DOCA, whereby Original Pie Face would not make further Deed Contributions until 1 August 2016;
  - (b) that the proposed variation will yield the best return to creditors when compared to a liquidation; and
  - (c) that if the Company were to be eventually wound up, there would be no financial return to priority employees (save for the Fair Entitlements Guarantee) or ordinary unsecured creditors, even after providing for potential actions that may be available to a liquidator.
- 37 At the meeting held on 12 February 2016, the resolution to amend the DOCA was carried.
- 38 On or about 9 March 2016, the DOCA was varied.

**Particulars**

*Deed of Variation of Deed of Company Arrangement dated 9 March 2016 being ASIC Document No. 7E7776643.*

- 39 On or about 4 July 2016, Sule Arnautovic lodged a Presentation of accounts and

statement with ASIC for the period from 30 December 2015 to 29 June 2016.

### Particulars

*ASIC Document No. 7E8116622.*

- 40 On or about 31 October 2016, Christopher John Palmer of O'Brien Palmer was appointed as a Receiver and Manager of Original Pie Face by the principal secured creditor of Original Pie Face.
- 41 On or about 10 November 2016, Sule Arnautovic issued a Formal Report and Notice of Meeting of Creditors to creditors of Original Pie Face pursuant to section 445F of the Act.
- 42 On or about 18 November 2016, there was a meeting of creditors of Original Pie Face, at which the creditors passed resolutions:
- (a) terminating the DOCA; and
  - (b) resolving that Original Pie Face be wound up and that Sule Arnautovic be appointed as Liquidator of Original Pie Face.

### Particulars

*Minutes of a meeting of creditors of Original Pie Face held on 18 November 2016, being ASIC Document No. 7E8582694.*

- 43 The minutes of the meeting record that, at the meeting on or about 18 November 2016, Sule Arnautovic advised the meeting, *inter alia* of:
- (a) reasons for the failure of the DOCA;
  - (b) appointment of the Receiver and Manager to Original Pie Face;
  - (c) the nature and amount of the debt of Original Pie Face to the secured creditor and the reason for the appointment of the Receiver and Manager; and
  - (d) potential recoveries available to the Liquidator, including but not limited to preference claims against unsecured creditors and insolvent trading claims against the director and the ultimate holding company of Original Pie Face.
- 44 On or about 18 November 2016, the DOCA was terminated and Sule Arnautovic was appointed as Liquidator of Original Pie Face under a Creditors' Voluntary Winding Up.

### Particulars

- (a) *Notice of termination of deed of company arrangement dated 23 November 2016, being ASIC Document No. 7E8551604.*

(b) *Notice of special resolution to wind up a company dated 23 November 2016, being ASIC Document No. 7E8551625.*

45 On or about 28 November 2016, Liam Thomas Bailey was appointed as a Receiver and Manager to Original Pie Face.

46 On or about 16 December 2016, Sule Arnautovic lodged a Presentation of accounts and statement for Original Pie Face for the period from 30 June 2016 to 18 November 2016.

#### **Particulars**

*ASIC Document No. 7E8628987.*

47 On or about 22 December 2016, Christopher John Palmer lodged a Report as to affairs for Original Pie Face for the period up to 31 October 2016 (**December 2016 Report**).

#### **Particulars**

*ASIC Document No. 7E8650086.*

48 The December 2016 Report estimated the unsecured creditors of Original Pie Face to be owed \$51,049,604.23.

49 On or about 13 April 2017, a member of the United Group acquired the Pie Face Franchise and the Pie Face Intellectual Property.

#### **Particulars**

*Particulars of the acquisition of the Pie Face Franchise and the Pie Face Intellectual Property will be given in evidence and following discovery.*

50 Following the acquisition of the Pie Face Franchise and the Pie Face Intellectual Property, United Petroleum began installing the Pie Face Franchise into sites throughout the United Network run by Franchisees, including the branding, logos, and trade marks forming part of the Pie Face Intellectual Property, and installing freezers, ovens, and stock cabinets designed for Pie Face stock (each such site a **Pie Face Site**).

#### **Particulars**

(a) *Prior to FNH taking possession of the Cranbourne South Site on or about 17 April 2020, United Petroleum installed a Pie Face Franchise by installing branding, logos, signs, and trademarks forming part of the Pie Face Intellectual Property in the Cranbourne South Site, and fitting out the site with freezers, ovens, and stock cabinets designed for Pie Face stock.*

- (b) *The installation of Pie Face fit out for the Wallan Site operated by Mr Patel and Mr Bhatti occurred in or about March 2020.*
- (c) *Particulars of the installation of Pie Face fit out to sites operated by Franchisees will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

51 United Petroleum did not seek the consent or agreement of Franchisees to install the Pie Face Franchise into sites in the United Network that then became Pie Face Sites.

52 Franchisees were not offered a choice by United Petroleum as to whether or not they would operate a Pie Face Site.

**E. Amounts paid by the Lead Plaintiffs - FNH**

53 On or about 17 April 2020, FNH entered into a Franchise Agreement with United Petroleum (**FNH Franchise Agreement**).

54 FNH paid the following amounts on the following dates to United Petroleum in consideration for entering into the FNH Franchise Agreement:

- (a) \$159,500 as an initial Franchise Fee, including GST;
- (b) \$6,600 as a training fee, including GST; and
- (c) \$50,000 as a bank guarantee with the Commonwealth Bank of Australia in favour of United Petroleum on or about 15 April 2020;
- (together, the **FNH Upfront Costs**).

55 FNH also paid \$300,000 in goodwill and \$74,902.95 for store stock to the previous franchisee, being K P Groups Pty Ltd (**the FNH Takeover Costs**).

**Particulars**

*K P Groups Pty Ltd was paid the FNH Takeover Costs on or about 17 April 2020.*

56 Pursuant to the FNH Franchise Agreement, FNH acquired the right to operate a fuel reselling business at 1-3 Cameron Street, Cranbourne Victoria 3977 trading as United Petroleum Cranbourne South (the **Cranbourne South Site**).

**Particulars**

*Item 9 of Schedule 1 of the FNH Agreement.*

57 Pursuant to the FNH Franchise Agreement, Mr Istanikzai is and was at all material times

a guarantor of FNH's obligations under the FNH Agreement.

### Particulars

*Clause 35.2 of the FNH Franchise Agreement.*

58 Throughout the duration of the FNH Franchise Agreement, FNH incurred and paid the following fees to United Petroleum:

- (a) the Franchise Service Fee;
- (b) the Equipment Support Fee;
- (c) the Software Support Fee; and
- (d) the Insurance Fee,

(together, the **FNH Ongoing Costs**).

### Particulars

*(a) The Franchise Service Fee is defined in Item 11 of the Schedule to the FNH Franchise Agreement to be \$536.68 per day (inclusive of GST), which amount can be increased in accordance with clause 17.8 of the FNH Franchise Agreement.*

*(b) The Equipment Support Fee is defined in Item 15 of the Schedule to the FNH Franchise Agreement to be \$35 (inclusive of GST) per day.*

*(c) The Software Support Fee is defined in Item 16 of the Schedule to the FNH Franchise Agreement to be \$8.73 (inclusive of GST) per day.*

*(d) The Insurance Fee is defined in Item 24(a) of the FNH Franchise Agreement to be \$3.30 (inclusive of GST) per day.*

*(e) Further particulars of the amounts comprising the FNH Ongoing Costs throughout the term of the FNH Franchise Agreement will be given in evidence.*

### F. Amounts paid by the Lead Plaintiffs – the JJ Trustees

59 On or about 29 May 2018, Mr Patel and Mr Bhatti in their capacities as trustees of the JJ Unit Trust (**the JJ Trustees**) entered into a Franchise Agreement with United Petroleum (**JJ Agreement**).

60 Pursuant to the JJ Franchise Agreement, Mr Patel and Mr Bhatti acquired the right to operate a fuel reselling business at Lots 11-14 High Street, Wallan, Victoria

3756, trading as United Wallan (**Wallan Site**).

### Particulars

#### *Item 5 of Schedule 1 of the JJ Franchise Agreement.*

- 61 The JJ Trustees paid the following amounts to United Petroleum in consideration for entering into the JJ Franchise Agreement:
- (a) \$159,500 as an initial Franchise Fee, including GST;
  - (b) \$6,600 as a training fee, including GST; and
  - (c) \$50,000 as a bank guarantee with the Commonwealth Bank of Australia in favour of United Petroleum;
- (together, the **JJ Upfront Costs**).
- 62 The JJ Trustees also paid the former franchisee to take over the Wallan Site, being Alpha N Omega Family Trust ABN 61 344 360 081 (**the JJ Takeover Costs**).

### Particulars

- (a) *The JJ Takeover Costs included \$320,000 in goodwill, of which \$135,000 was paid to United to discharge a loan to the Alpha N Omega Family Trust;*
  - (b) *The JJ Takeover Costs included \$48,353.88 for store stock;*
  - (c) *The JJ Takeover Costs included \$225 in legal fees; and*
  - (d) *Further particulars of the JJ Takeover costs will be given in evidence.*
- 63 Throughout the duration of the JJ Franchise Agreement and while operating the Wallan Site, the JJ Trustees incurred and paid the following fees to United Petroleum:
- (a) the Franchise Service Fee;
  - (b) the Equipment Support Fee;
  - (c) the Software Support Fee; and
  - (d) the Insurance Fee,
- (together, the **JJ Ongoing Costs**).

### Particulars

- (a) *The Franchise Service Fee is defined at Item 12 of the Schedule to the JJ Franchise Agreement to be \$545.48 per day (inclusive of GST), which amount can be increased in accordance with clause 17.8.*
- (b) *The Equipment Support Fee is defined at Item 15 of the Schedule to the JJ*

*Franchise Agreement to be \$35.00 per day (inclusive of GST).*

(c) *The Software Support Fee is defined at Item 16 of the Schedule to the JJ Franchise Agreement to be \$5.53 per day (inclusive of GST).*

(d) *The Insurance Fee is defined at Item 24 of the Schedule to the JJ Franchise Agreement to be \$22.50 per day (inclusive of GST).*

(e) *Further particulars of the JJ Ongoing Costs throughout the term of the JJ Franchise Agreement will be given in evidence.*

64 Mr Patel is and at all material times was a guarantor in his personal capacity under the JJ Franchise Agreement.

**Particulars**

*Item 4 of Schedule 1 of the JJ Franchise Agreement.*

65 Mr Bhatti is and at all material times was a guarantor in his personal capacity under the JJ Franchise Agreement.

**Particulars**

*Item 4 of Schedule 1 of the JJ Franchise Agreement.*

**G. Amounts paid by Group Members – Franchisees**

66 Throughout the Relevant Period, Franchisees paid:

- (a) upfront costs to United Petroleum as consideration for entering into their respective Franchise Agreements (**Franchisee Upfront Costs**);
- (b) previous Franchisees for goodwill and store stock when taking over their franchises in the United Network (**Franchisee Takeover Costs**); and
- (c) fees to United Petroleum incurred pursuant to their Franchise Agreements (**Franchisee Ongoing Costs**).

**Particulars**

*Particulars of the Franchisee Upfront Costs, Franchisee Takeover Costs, and the Franchisee Ongoing Costs incurred by Franchisees throughout the term of their respective Franchise Agreements will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*



### G.1. Operating a Pie Face Site

67 During the Relevant Period, the utility bills to operate a Pie Face Site in the United Network were higher than the utility costs previously were in those sites, due to the energy consumption requirements of the ovens, freezers, and stock required to be used for Pie Face stock (**Pie Face Utility Costs**).

#### Particulars

- (a) *Particulars of the Pie Face Utility Costs associated with the Cranbourne South Site operated by FNH will be provided in evidence.*
- (b) *Particulars of the Pie Face Utility Costs associated with the Wallan Site operated by the JJ Trustees will be provided in evidence.*
- (c) *Particulars of the Pie Face Utility Costs associated with the sites operated by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*
- (d) *A reference to Pie Face "stock" is a reference to pies and other bakery products sold under the signs, names, and trademarks comprising the Pie Face Intellectual Property.*

68 During the Relevant Period, United Petroleum required Franchisees who operated Pie Face Sites to employ members of staff in the handling and retailing of Pie Face stock (**Pie Face Team Members**).

#### Particulars

- (a) *Particulars of the Pie Face Team Members employed by FNH will be provided in evidence.*
- (b) *Particulars of the Pie Face Team Members employed by the JJ Trustees will be provided in evidence.*
- (c) *Particulars of the Pie Face Team Members employed by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*
- (d) *A reference to Pie Face "stock" is a reference to pies and other bakery products sold under the branding and trademarks comprising the Pie Face*

*Intellectual Property.*

- 69 During the Relevant Period, United Petroleum required Franchisees who operated Pie Face Sites to establish accounts with particular suppliers of Pie Face stock (**Pie Face Suppliers**).

**Particulars**

- (a) *FNH and the JJ Trustees were required by United Petroleum to establish accounts with suppliers of Pie Face stock including but not limited to:*
- (i) *Countrywide Food Service Distributors (Pie Face branded pies and bakery products);*
  - (ii) *Show Travel FILM (STF) Services International Pty Ltd (ACN 630 164 359) (Pie Face branded sandwiches);*
  - (iii) *Bean Alliance Group Pty Ltd (ACN 629 492 440) (Pie Face branded coffee beans);*
  - (iv) *PFD Food Services Pty Ltd (Pie Face branded water, boxes, bags, napkins, stickers, tomato sauce, and cleaning chemicals); and*
  - (v) *UCC Coffee Australia Limited trading as Espresso Mechanics (coffee machine and cleaning materials).*
- (b) *Particulars of the suppliers with whom Franchisees were required to establish accounts will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*
- (c) *A reference to Pie Face "stock" is a reference to pies and other products sold under the signs, names, and trademarks comprising the Pie Face Intellectual Property.*

- 70 During the Relevant Period, United Petroleum required Franchisees who operated Pie Face Sites to contact their local council for a site visit and complete a food premises licence application (or transfer the existing food premises licence), as well as to undertake (and pay for) a food safety supervisor course (the costs associated with the course being the **Pie Face Course Costs**).

**Particulars**

- (a) *On behalf of FNH, on or about 6 April 2020, Mr Istanikzai signed a*

*Request to Transfer a Food Premises with the City of Casey Council from KP Groups Pty Ltd at a cost of \$785.*

- (b) *On behalf of FNH, on or about 3 December 2020 Mr Istanikzai completed a food premises licence application.*
- (c) *On behalf of FNH, on or about 11 April 2020 Mr Istanikzai completed a food safety supervisor course at a cost of \$210.00.*
- (d) *On or about 6 April 2020, Mr Patel contacted Mitchell Shire Council for a site visit, which occurred on or about 9 April 2020.*
- (e) *On or about 9 April 2020, the site was converted by Mitchell Shire Council from pack food selling (Class 3) to open food selling (class 2).*
- (f) *On or about 19 May 2020, Mr Bhatti completed a food safety supervisor course at a cost of \$86.*
- (g) *Particulars of the council site visits, food premises licence applications, and food safety supervisor courses undertaken by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

71 During the Relevant Period, United Petroleum required Franchisees who operated Pie Face Sites to purchase uniforms consisting of a Pie Face jacket, Pie Face cap, and chef's hat to be worn by Pie Face Team Members (the costs associated with such purchases being the **Pie Face Uniform Costs**).

#### **Particulars**

- (a) *Particulars of the Pie Face Uniform Costs incurred by FNH will be provided in evidence.*
- (b) *Particulars of the Pie Face Uniform Costs incurred by the JJ Trustees will be provided in evidence.*
- (c) *Particulars of the Pie Face Uniform Costs incurred by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

72 During the Relevant Period, United Petroleum required Franchisees who operated Pie

Face Sites to have a minimum number of Pie Face Team Members working shifts at certain times.

**Particulars**

- (a) *Particulars of the shifts required to be worked by Pie Face Team Members employed by FNH will be given in evidence.*
- (b) *Particulars of the shifts required to be worked by Pie Face Team Members employed by the JJ Trustees will be given in evidence.*
- (c) *Particulars of the shifts required to be worked by Pie Face Team Members employed by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

73 During the Relevant Period, United Petroleum required Franchisees who operated Pie Face Sites to display an accreditation and training certificate certifying that they had completed a "Pie Face Operations" training program and had been awarded compliance in customer service, safe food handling, hygiene, baking, coffee, retail presentation standards and Uber Eats operations.

**Particulars**

- (a) *At the Cranbourne South Site, FNH was required to, and did, display an accreditation and training certificate.*
- (b) *At the Wallan Site, the JJ Trustees were required to, and did, display an accreditation and training certificate.*
- (c) *Particulars of the accreditation and training certificates displayed by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

74 By reason of the matters pleaded at paragraphs 67 to 73 above, Franchisees who operated Pie Face Sites incurred operating costs that were not incurred by Franchisees who did not operate Pie Face Sites (the **Pie Face Overheads**).

**Particulars**

*The Pie Face Overheads included the Pie Face Utility Costs, the Pie Face Uniform Costs, the costs of employing Pie Face Team Members, and the Pie Face Course*

*Costs.*

- 75 During the Relevant Period, United Petroleum directed Franchisees operating Pie Face Sites on how to display, retail, and sell Pie Face stock (**Pie Face Site Directions**).

**Particulars**

- (a) *Particulars of the Pie Face Site Directions given to FNH by United Petroleum will be given in evidence.*
- (b) *Particulars of the Pie Face Site Directions given to the JJ Trustees by United Petroleum will be given in evidence.*
- (c) *Particulars of the Pie Face Site Directions given to Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*
- (d) *A reference to Pie Face "stock" is a reference to pies and other products sold under the signs, names, and trademarks comprising the Pie Face Intellectual Property.*

- 76 During the Relevant Period, United Petroleum audited compliance of Pie Face Sites with the Pie Face Site Directions (**Pie Face Audits**).

**Particulars**

- (a) *Particulars of the Pie Face Audits experienced by FNH will be given in evidence.*
- (b) *Particulars of the Pie Face Audits experienced by the JJ Trustees will be given in evidence.*
- (c) *Particulars of the Pie Face Audits experienced by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

**G.2. Pie Face Wastage**

- 77 During the Relevant Period, United Petroleum ordered Pie Face stock from Pie Face Suppliers, in quantities determined by United Petroleum, to be sent to Franchisees operating Pie Face Sites (**Allocated Pie Face Stock**).

**Particulars**

- (a) *Particulars of the Allocated Pie Face Stock allocated to FNH will be given in evidence and following discovery.*
- (b) *Particulars of the Allocated Pie Face Stock allocated to the JJ Trustees will be given in evidence and following discovery.*
- (c) *Particulars of the Allocated Pie Face Stock allocated to Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*
- (d) *A reference to Pie Face "stock" is a reference to pies and other products sold under the branding and trademarks comprising the Pie Face Intellectual Property.*

78 Franchisees who operated Pie Face Sites, including FNH and the JJ Trustees were required to pay Pie Face Suppliers for the Allocated Pie Face Stock in accordance with the terms stipulated by the Pie Face Suppliers.

#### **Particulars**

*Particulars of the terms stipulated by the Pie Face Suppliers will be given in evidence.*

79 Franchisees did not order the Allocated Pie Face Stock allocated to them by United Petroleum.

80 Franchisees who operated Pie Face Sites, including FNH and the JJ Trustees, had no control over the type or amount of the Allocated Pie Face Stock allocated to them by United Petroleum.

81 The Allocated Pie Face Stock received by Franchisees was regularly 'short-dated' with a limited shelf during which the Allocated Pie Face Stock had to be sold before its expiry date.

#### **Particulars**

*Particulars of the dates Allocated Pie Face Stock was received by Franchisees and the expiry dates for that stock will be given in evidence and following discovery.*

82 During the Relevant Period, payment for Allocated Pie Face Stock that was not sold by the expiry date by Franchisees who operated Pie Face Sites was not reimbursed by United Petroleum.

83 Allocated Pie Face Stock that was not sold by the expiry date by Franchisees

who operated Pie Face Sites was disposed of and recorded as 'wastage' by those Franchisees (**Pie Face Wastage**).

**Particulars**

- (a) *Particulars of the Pie Face Wastage incurred by FNH will be given in evidence.*
- (b) *Particulars of the Pie Face Wastage incurred by the JJ Trustees will be given in evidence.*
- (c) *Particulars of the Pie Face Wastage incurred by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

84 The Pie Face Wastage caused Franchisees to suffer loss.

**Particulars**

- (a) *Particulars of the costs of the Pie Face Wastage incurred by FNH will be given in evidence.*
- (b) *Particulars of the costs of the Pie Face Wastage incurred by the JJ Trustees will be given in evidence.*
- (c) *Particulars of the costs of the Pie Face Wastage incurred by Franchisees who operated Pie Face Sites will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

85 At all material times during the Relevant Period, United Petroleum had access to information for Pie Face Sites that recorded the actual amount of Allocated Pie Face Stock being sold by Franchisees operating those sites.

**Particulars**

*At all material times, United had access to the "point of sale" system operated by all sites in the United Network, which system showed what stock was being sold by individual Franchisees in the United Network, including the Allocated Pie Face Stock.*

86 By reason of the matters pleaded above, at all material times during the Relevant Period, United Petroleum was in a position to assess whether or not Franchisees

operating Pie Face Sites could reasonably be expected to sell, and were selling, the Allocated Pie Face Stock.

87 At all material times during the Relevant Period, United Petroleum had access to reports known as 'wastage reports' by Franchisees that recorded how much of the Allocated Pie Face Stock was being disposed of as wastage.

88 At all material times during the Relevant Period, as well as prior to the acquisition of the Pie Face Franchise, United Petroleum had access to profit and loss statements for Franchisees that demonstrated the detrimental effect of the Allocated Pie Face Stock and the Pie Face Overheads on the business of Franchisees.

#### H. **Allocated Retail Stock**

89 During the Relevant Period, United Petroleum required Franchisees to establish relationships with approved suppliers of general retail stock such as food, drinks, and other items to be sold as part of the retail offering of the site (**Retail Suppliers**).

##### **Particulars**

*Particulars of the Retail Suppliers will be given in evidence and following discovery.*

90 During the Relevant Period, United Petroleum ordered retail stock from Retail Suppliers, in quantities determined by United Petroleum, to be sent to Franchisees to be sold (**Allocated Retail Stock**).

##### **Particulars**

(a) *Particulars of the product types, quantities, cost, and dates of the Allocated Retail Stock allocated to FNH will be provided in evidence and following discovery.*

(b) *Particulars of the product types, quantities, cost, and dates of the Allocated Retail Stock allocated to the JJ Trustees will be provided in evidence and following discovery.*

(c) *Particulars of the product types, quantities, cost, and dates of the Allocated Retail Stock allocated to Franchisees will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

91 Franchisees did not order the Allocated Retail Stock.

92 Franchisees, including FNH and the JJ Trustees, had no control over the type or amount of the Allocated Retail Stock allocated to them by United Petroleum.



- 93 The Allocated Retail Stock received by Franchisees was regularly 'short-dated' with a limited shelf during which the Allocated Retail Stock had to be sold before its expiry date.

**Particulars**

*Particulars of the dates Allocated Retail Stock was received by Franchisees and the expiry dates for that stock will be given in evidence and following discovery.*

- 94 Franchisees were required to pay Retail Suppliers for the Allocated Retail Stock unless they received approval from their relevant area manager to refuse the Allocated Retail Stock.
- 95 During the Relevant Period, payment for Allocated Retail Stock that was not sold before the expiry date by Franchisees was not reimbursed by United Petroleum.
- 96 Allocated Retail Stock that was not sold by the expiry date by Franchisees was disposed of and recorded as 'wastage' (**Retail Stock Wastage**).

**Particulars**

- (a) *Particulars of the Retail Stock Wastage incurred by FNH will be provided in evidence and following discovery.*
- (b) *Particulars of the Retail Stock Wastage incurred by the JJ Trustees will be provided in evidence and following discovery.*
- (c) *Particulars of the Retail Stock Wastage incurred by Franchisees will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

- 97 The Retail Stock Wastage caused Franchisees to suffer loss.

**Particulars**

- (a) *Particulars of the costs of the Retail Stock Wastage incurred by FNH will be given in evidence.*
- (b) *Particulars of the costs of the Retail Stock Wastage incurred by the JJ Trustees will be given in evidence.*
- (c) *Particulars of the costs of the Retail Stock Wastage incurred by Franchisees will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*

- 98 At all material times during the Relevant Period, United Petroleum had access to information for sites in the United Network that recorded the actual amount of Allocated Retail Stock being sold by Franchisees.

**Particulars**

*At all material times, United Petroleum had access to the "point of sale" system operated by all sites in the United Network, which system showed what stock was being sold by Franchisees in the United Network, including the Allocated Retail Stock.*

- 99 By reason of the matters pleaded above, at all material times during the Relevant Period, United Petroleum was in a position to assess whether or not Franchisees could reasonably be expected to sell the Allocated Retail Stock, and were actually selling the Allocated Retail Stock.
- 100 At all material times during the Relevant Period, United Petroleum had access to reports known as 'wastage reports' by Franchisees that recorded how much of the Allocated Retail Stock was being disposed of as wastage.
- 101 At all material times during the Relevant Period, United Petroleum had access to profit and loss statements for Franchisees that demonstrated the detrimental effect of the Allocated Retail Stock on the business of Franchisees.

**I. United Petroleum's obligation to comply with the Franchising Code**

- 102 By reason of United Petroleum undertaking the installation of the Pie Face Franchise into Pie Face Sites, there was an implied agreement between United Petroleum on the one part and Franchisees on the other part whereby United Petroleum granted to Franchisees the right to use the Pie Face Intellectual Property to sell Pie Face stock at Pie Face Sites (the **Implied Franchise Agreement**).
- 103 The Implied Franchise Agreement provided Franchisees the right to carry on a business of offering and supplying goods in Australia (being Pie Face products) within the meaning of clause 5(1)(a)(iii) and clause 5(1)(b) of Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Cth)* (**Franchising Code**).
- 104 By reason of the Pie Face Site Directions, the Pie Face Audits, and the Allocated Pie Face Stock, the right to carry on the business of offering and supplying Pie Face products granted by the Implied Franchise Agreement was the carrying on of a business under a system or marketing plan substantially determined, controlled, or suggested by United Petroleum within the meaning of clause 5(1)(b) of the Franchising Code.

- 105 The operation of the business of offering and supplying Pie Face products under the Implied Franchise Agreement was substantially or materially associated with the Pie Face Intellectual Property, being a trade mark, advertising or a commercial symbol: (i) owned, used or licensed by United Petroleum; or (ii) specified by United Petroleum within the meaning of clause 5(1)(c) of the Franchising Code.
- 106 Before starting or continuing the business of offering and supplying Pie Face stock under the Implied Franchise Agreement, Franchisees had to agree to pay to United Petroleum a fee, being an agreed payment within the meaning of clause 5(1)(d)(iii) of the Franchising Code.

### Particulars

*The agreement to pay a fee based on a percentage of average monthly gross revenue arises from clause 17.8 of the Franchise Agreement in circumstances where United Petroleum calculated the fee payable by Franchisees in part from revenue derived from the sale of Pie Face products.*

- 107 By reason of the matters in paragraphs 102 to 106 above, the Implied Franchise Agreement was a *franchise agreement* within the meaning of the Franchising Code.
- 108 At all material times, the Franchising Code was an applicable industry code within the meaning of section 51ACB of the CCA in relation to the entry into the Implied Franchise Agreement by United Petroleum.
- 109 By reason of the matters in paragraphs 102 to 106 above, United Petroleum was required to create a Disclosure Document that complies with clause 8 of Division 2 of the Franchising Code (**Franchise Disclosure Document**).
- 110 The purpose of the Franchise Disclosure Document was to:
- (a) give a prospective franchisee, or a franchisee proposing to:
    - (i) enter into a franchise agreement; or
    - (ii) renew a franchise agreement; or
    - (iii) extend the term or scope of a franchise agreement;
 information from the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and
  - (b) give a franchisee current information from the franchisor that is material to the running of the franchised business.

### Particulars

*Clause 8(2) of Schedule 1 to the Franchising Code.*

- 111 The contents of the Franchise Disclosure Document were required to be in accordance with Annexure 1 to the Franchising Code.

**Particulars**

*Clause 8(3) of Schedule 1 to the Franchising Code.*

- 112 Pursuant to the Franchising Code, United Petroleum was required to give Franchisees operating Pie Face Sites, at least 14 days before they enter into a franchise agreement (such as the Implied Franchise Agreement), or an agreement to enter into a franchise agreement (such as the Implied Franchise Agreement); or make a non-refundable payment (whether of money or of other valuable consideration) to United Petroleum or an associate of United Petroleum in connection with the proposed franchise agreement:
- (a) a copy of the Franchising Code; and
  - (b) a copy of the Franchise Disclosure Document; and
  - (c) a copy of the franchise agreement, in the form in which it is to be executed.

**Particulars**

*Clause 9 of Schedule 1 to the Franchising Code.*

- 113 At no time during the Relevant Period did United Petroleum provide Franchisees operating Pie Face Sites with a copy of the Franchising Code or a Franchise Disclosure Document for the Implied Franchise Agreement or a copy of the Implied Franchise Agreement, in the form in which is to be executed.
- 114 By reason of United Petroleum failing to provide Franchisees operating Pie Face Sites with a copy of the Franchising Code and the Franchise Disclosure Document for the Implied Franchise Agreement or a copy of the Implied Franchise Agreement, in the form in which it is to be executed, United Petroleum breached the Franchise Code and thereby contravened section 51ACB of the CCA (a **Franchising Code Breach**).
- 115 Pursuant to the Franchising Code, United Petroleum was not to:
- (a) enter into a franchise agreement (such as the Implied Franchise Agreement); or
  - (b) receive a non-refundable payment (whether of money or of other valuable consideration) under a franchise agreement (such as the Implied Franchise Agreement);

unless United Petroleum had received from a franchisee or prospective franchisee a

written statement that the franchisee or prospective franchisee had received, read and had a reasonable opportunity to understand the Franchise Disclosure Document and the Franchising Code.

### Particulars

#### *Clause 10(1) of Schedule 1 to the Franchising Code.*

- 116 At no time prior to entering an Implied Franchise Agreement with a Franchisee or prospective Franchisee who operated or was to operate a Pie Face Site, or receiving non-refundable payments from franchisees who operated Pie Face Sites under an Implied Franchise Agreement, did United Petroleum receive from Franchisees a written statement that the Franchisee had received, read and had a reasonable opportunity to understand the Franchise Disclosure Document and the Franchising Code.
- 117 By entering into Implied Franchise Agreements with Franchisees who operated or were to operate a Pie Face Site without receiving a written statement that those Franchisees had received, read, and had a reasonable opportunity to understand the Franchise Disclosure Document and the Franchising Code, United Petroleum breached the Franchising Code and thereby contravened section 51ACB of the CCA (a **Franchising Code Breach**).
- 118 Pursuant to the Franchising Code, before a franchise agreement (such as the Implied Franchise Agreement) is entered into, United Petroleum was required to have received from the prospective franchisee:
- (a) signed statements, that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business, by:
    - (i) an independent legal adviser; or
    - (ii) an independent business adviser; or
    - (iii) an independent accountant; or
  - (b) for each kind of statement not received under paragraph (a), a signed statement by the prospective franchisee that the prospective franchisee:
    - (i) has been given that kind of advice about the proposed franchise agreement of franchised business; or
    - (ii) has been told that that kind of advice should be sought but has decided not to seek it,
- (together, the **Clause 10(2) Statements**).
- 119 At no time during the Relevant Period prior to entering Implied Franchise Agreements

with Franchisees was United Petroleum provided with Clause 10(2) Statements by those Franchisees.

120 By entering into Implied Franchise Agreements with Franchisees without being provided with Clause 10(2) Statements by those Franchisees, United Petroleum breached the Franchising Code and contravened section 51ACB of the CCA (also a **Franchising Code Breach**).

121 Pursuant to the Franchising Code, United Petroleum was required to give a copy of the information statement set out in Annexure 2 of the Franchising Code to prospective franchisees.

### **Particulars**

#### *Clause 11 of Schedule 1 to the Franchising Code.*

122 At no time during the Relevant Period, prior to entering into Implied Franchise Agreements, did United Petroleum provide Franchisees with the information statement set out in Annexure 2 of the Franchising Code.

123 By entering into Implied Franchise Agreements with Franchisees without providing those Franchisees with the information statement set out in Annexure 2 of the Franchising Code, United Petroleum breached the Franchising Code and thereby contravened s 51ACB of the Franchising Code (also a **Franchising Code Breach**).

### **J. Oilcode Disclosure Documents**

#### **J.1 United Petroleum's Disclosure Document obligations under the Oilcode 2006 and Oilcode 2017**

124 Further or alternatively, each Franchise Agreement and Implied Franchise Agreement was a fuel re-selling agreement within the meaning of the *Competition and Consumer (Industry Codes—Oilcode) Regulation 2006* (Cth) (**Oilcode 2006**) (as in force prior to 1 April 2017) and *Competition and Consumer (Industry Codes—Oil) Regulations 2017* (Cth) (**Oilcode 2017**) (as in force from 1 April 2017).

125 Prior to 1 January 2015, the Oilcode 2006 was a mandatory industry code relating to franchising and an applicable industry code within the meaning of section 51AD of the CCA (as then in force) in relation to the entry by United Petroleum into any Franchise Agreement and Implied Franchise Agreement.

126 Between 1 January 2015 to 1 April 2017, the Oilcode 2006 was a mandatory industry code relating to franchising and an applicable industry code within the meaning of section 51ACB of the CCA (as then in force) in relation to the entry by United Petroleum into any Franchise Agreement and Implied Franchise Agreement.

127 From 1 April 2017, the Oilcode 2017 was a mandatory industry code relating to franchising and an applicable industry code within the meaning of section 51ACB of the CCA in relation to the entry by United Petroleum into any Franchise Agreement and Implied Franchise Agreement.

128 At all relevant times, United Petroleum was required to create a Disclosure Document that complies with Subdivision A of the Oilcode 2006 (being a Disclosure Document within the meaning of the Oilcode 2006) or the Oilcode 2017 (being a Disclosure Document within the meaning of the Oilcode 2017) (**Oilcode Disclosure Document**).

**Particulars**

*Clause 13 of Schedule 1 of the Oilcode 2006.*

*Clause 13 of Schedule 1 of the Oilcode 2017.*

129 The purpose of an Oilcode Disclosure Document prepared in accordance with Subdivision A of the Oilcode 2006 and Subdivision A of the Oilcode 2017 is:

- (a) to allow a supplier to give a person adequate information to help the retailer make a reasonably informed decision about an agreement; or
- (b) to give a retailer current information that is relevant to the operation of the retailer's retail business.

**Particulars**

*Clause 14 of Schedule 1 of the Oilcode 2006.*

*Clause 14 of Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

130 At all relevant times, United Petroleum was required to give its current Oilcode Disclosure Document to a person who proposes to the supplier to become a retailer in relation to the supplier, or a person to whom the supplier has consented to be the transferee in relation to a fuel re-selling agreement.

**Particulars**

*Clause 16 of Schedule 1 of the Oilcode 2006.*

*Clause 16 of Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

- 131 At all material times, United Petroleum was required to prepare an updated Oilcode Disclosure Document in relation to any Franchise Agreement and Implied Franchise Agreement that was in force at the end of a financial year, and do so not later than 3 months after the end of the financial year.

#### **Particulars**

*Clause 13(2) of Schedule 1 of the Oilcode 2006.*

*Clause 13(2) of Schedule 1 of the Oilcode 2017.*

### **J.2. Content of the Disclosure Document – Long Form**

- 132 For those Franchise Agreements and Implied Franchise Agreements that specified a duration of at least 5 years, the Oilcode Disclosure Document:
- (a) must be in accordance with Annexure 1; and
  - (b) must be in the form, in the order, and with the numbering, set out in Annexure 1; and
  - (c) must use the same titles as in Annexure 1 (**Long Form Oilcode Disclosure Document**).

#### **Particulars**

*Clause 15(1) of Schedule 1 of the Oilcode 2006.*

*Clause 15(1) of Schedule 1 of the Oilcode 2017.*

- 133 For any trade mark used to identify, and for any patent, design or copyright that is significant and material to, the fuel re-selling agreement (defined as the **intellectual property**), the Long Form Oilcode Disclosure Document required to be kept by United Petroleum required it to contain:
- (a) a description of the intellectual property; and
  - (b) details of the retailer's rights and obligations in connection with the use of the intellectual property; and
  - (c) whether the intellectual property is registered in Australia, and if so, the registration date, registration number and place of registration; and
  - (d) any judgment or pending proceedings that could significantly affect ownership or use of the intellectual property, including:



- (i) name of court or tribunal; and
  - (ii) matter number; and
  - (iii) summary of the claim or judgment; and
- (e) if the intellectual property is not owned by the supplier — who owns it; and
- (f) details of any agreement that significantly affects the supplier's rights to use, or to give others the right to use, the intellectual property, including:
- (i) the parties to the agreement; and
  - (ii) the nature and extent of any limitation; and
  - (iii) the duration of the agreement; and
  - (iv) the conditions under which the agreement may be terminated.

#### **Particulars**

*Clause 7.1 of Annexure 1 to Schedule 1 of the Oilcode 2006.*

*Clause 7.1 of Annexure 1 to Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

- 134 For the supplier's requirements for supply of goods or services to a retailer, the Long Form Oilcode Disclosure Document required to be kept by United Petroleum required it to disclose details of any requirement for the retailer to maintain a level of inventory or acquire an amount of goods or services.

#### **Particulars**

*Clause 9.1(a) of Annexure 1 to Schedule 1 of the Oilcode 2006.*

*Clause 9.1(a) of Annexure 1 to Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

- 135 For the supplier's requirements for supply of goods or services to a retailer, the Long Form Oilcode Disclosure Document required to be kept by United Petroleum required it to disclose details of ownership by the supplier or an associate of the supplier of an interest in any supplier from which the retailer may be required to acquire goods or services.

### Particulars

*Clause 9.1(c) of Annexure 1 to Schedule 1 of the Oilcode 2006.*

*Clause 9.1(c) of Annexure 1 to Schedule 1 of the Oilcode 2017.*

*The initial reference to a supplier is a reference to United Petroleum, while “any supplier” is a reference to any supplier of goods or services.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

- 136 For the supplier’s requirements for the supply of goods or services to a retailer, the Long Form Oilcode Disclosure Document required to be kept by United Petroleum required it to disclose details of the obligation of the retailer to accept goods or services from the supplier.

### Particulars

*Clause 9.1(d) of Annexure 1 to Schedule 1 of the Oilcode 2006.*

*Clause 9.1(d) of Annexure 1 to Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

- 137 For the supplier’s requirements for the supply of goods or services to a retailer, the Long Form Oilcode Disclosure Document required to be kept by United Petroleum required it to disclose details of whether the supplier may change the range of goods or services, and if so, to what extent.

### Particulars

*Clause 9.1(i) of Annexure 1 to Schedule 1 of the Oilcode 2006.*

*Clause 9.1(i) of Annexure 1 to Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

- 138 The Long Form Oilcode Disclosure Document required to be kept by United Petroleum required it to contain a summary of the conditions of the fuel re-selling agreement that deal with obligations of a retailer (or references to the relevant conditions of the fuel re-selling agreement) for, *inter alia*, the following matters:

- (a) training before and during operating the fuel re-selling business;

- (b) complying with standards or operating manuals;
- (c) using intellectual property;
- (d) marketing;
- (e) participation requirements for retailer, directors, management or employees; and
- (f) inspections and audit.

#### **Particulars**

*Clauses 16.1 (d), (f), (g), (l), (n), and (p) of Annexure 1 to Schedule 1 of the Oilcode 2006.*

*Clauses 16.1 (d), (f), (g), (n), and (p) of Annexure 1 to Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

### **J.3 Content of the Oilcode Disclosure Document – Short Form**

139 For those Franchise Agreements and Implied Franchise Agreements that specified a duration of less than 5 years, the Oilcode Disclosure Document:

- (a) must be in accordance with Annexure 2; and
- (b) must be in the form, in the order, and with the numbering, set out in Annexure 2; and
- (c) must use the same titles as in Annexure 2, (**Short Form Oilcode Disclosure Document**).

#### **Particulars**

*Clause 15(2) of Schedule 1 of the Oilcode 2006.*

*Clause 15(2) of Schedule 1 of the Oilcode 2017.*

140 For any trade mark used to identify, and for any patent, design or copyright that is significant and material to, the fuel re-selling agreement (defined as the **intellectual property**), the Short Form Oilcode Disclosure Document required to be kept by United Petroleum required it to contain:

- (a) a description of the intellectual property; and
- (b) details of the retailer's rights and obligations in connection with the use of the intellectual property; and

- (c) whether the intellectual property is registered in Australia, and if so, the registration date, registration number and place of registration; and
- (d) any judgment or pending proceedings that could significantly affect ownership or use of the intellectual property, including:
  - (i) name of court or tribunal; and
  - (ii) matter number; and
  - (iii) summary of the claim or judgment; and
- (e) if the intellectual property is not owned by the supplier — who owns it; and
- (f) details of any agreement that significantly affects the supplier's rights to use, or to give others the right to use, the intellectual property, including:
  - (i) the parties to the agreement; and
  - (ii) the nature and extent of any limitation; and
  - (iii) the duration of the agreement; and
  - (iv) the conditions under which the agreement may be terminated.

#### **Particulars**

*Clause 4.1 of Annexure 2 to Schedule 1 of the Oilcode 2006.*

*Clause 4.1 of Annexure 2 to Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

141 The Short Form Oilcode Disclosure Document required to be kept by United Petroleum was required to contain a summary of the conditions of the fuel re-selling agreement that deal with obligations of a retailer (or references to the relevant conditions of the fuel re-selling agreement) for, *inter alia*, the following matters:

- (a) training before and during operating the fuel re-selling business;
- (b) complying with standards or operating manuals;
- (c) using intellectual property;
- (d) marketing;

- (e) participation requirements for the retailer, directors, management or employees; and
- (f) inspections and audit.

#### **Particulars**

*Clauses 9.1 (d), (f), (g), (l), (n), and (p) of Annexure 2 to Schedule 1 of the Oilcode 2006.*

*Clauses 9.1 (d), (f), (g), (n), and (p) of Annexure 2 to Schedule 1 of the Oilcode 2017.*

*A reference to a supplier is a reference to United Petroleum.*

*A reference to a retailer is a reference to a Franchisee or prospective Franchisee.*

#### **J.4 Associates of United Petroleum**

- 142 Eddie Hirsch was at all material times during the Relevant Period an associate of United Petroleum within the meaning of clause 4 of Schedule 1 to the Oilcode 2006 and clause 4 of Schedule 1 to the Oilcode 2017.

#### **Particulars**

*Eddie Hirsch:*

- (a) *is a director of United Petroleum; and*
- (b) *directly or indirectly owns, controls, or holds with power to vote, at least 15% of the issued voting shares in United Petroleum.*

- 143 Avi Silver was at all material times during the Relevant Period an associate of United Petroleum within the meaning of clause 4 of Schedule 1 to the Oilcode 2006 and clause 4 of Schedule 1 to the Oilcode 2017.

#### **Particulars**

*Avi Silver:*

- (a) *is a director of United Petroleum; and*
- (b) *directly or indirectly owns, controls, or holds with power to vote, at least 15% of the issued voting shares in United Petroleum.*

- 144 At all material times during the Relevant Period, Eddie Hirsch had an indirect interest in Pie Face Bakery Pty Ltd (**Pie Face Bakery**).

#### **Particulars**

- (a) *Pie Face Pty Ltd (ACN 109 372 358) is a wholly-owned subsidiary of Pie Face International Pty Ltd, a company whose shareholders include Pribay, a company of which Eddie Hirsch is the sole director, secretary, and shareholder, holding 6 ordinary shares in Pie Face International Pty Ltd.*
- (b) *Pie Face Bakery is a wholly-owned subsidiary of Pie Face Pty Ltd.*

145 At all material times during the Relevant Period, Avi Silver had an indirect interest in Pie Face Bakery.

#### **Particulars**

- (a) *Pie Face Pty Ltd (ACN 109 372 358) is a wholly-owned subsidiary of Pie Face International Pty Ltd, a company whose shareholders include Agtan, a company of which Avi Silver is the sole director, secretary, and shareholder, holding 6 ordinary shares in Pie Face International Pty Ltd.*
- (b) *Pie Face Bakery is a wholly-owned subsidiary of Pie Face Pty Ltd.*

#### **J.5 Contraventions of the Oilcode – Long Form Oilcode Disclosure Document**

146 In contravention of clause 15(1) of Schedule 1 of the Oilcode 2006, and clause 15(1) of Schedule 1 of the Oilcode 2017, the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not disclose (each of the contraventions in paragraphs 146-152 being a **Long Form Oilcode Disclosure Omission**):

- (a) a description of the Pie Face Intellectual Property;
- (b) details of a Franchisee's rights and obligations in connection with the use of the Pie Face Intellectual Property; and
- (c) whether the Pie Face Intellectual Property is registered in Australia, and if so, the registration date, registration number and place of registration; and
- (d) any judgment or pending proceedings that could significantly affect ownership or use of the Pie Face Intellectual Property, including:
  - (i) name of court or tribunal; and
  - (ii) matter number; and
  - (iii) summary of the claim or judgment; and
- (e) if the Pie Face Intellectual Property was not owned by United Petroleum — who owns it; and
- (f) details of any agreement that significantly affects United Petroleum's rights to

use, or to give others the right to use, the Pie Face Intellectual Property, including:

- (i) the parties to the agreement; and
- (ii) the nature and extent of any limitation; and
- (iii) the duration of the agreement; and
- (iv) the conditions under which the agreement may be terminated.

**Particulars**

*Particulars of the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

- 147 In contravention of clause 15(1) of Schedule 1 of the Oilcode 2006, and clause 15(1) of Schedule 1 of the Oilcode 2017, the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not disclose details of any requirement for a Franchisee to maintain or acquire the Allocated Retail Stock or the Allocated Pie Face Stock.

**Particulars**

*Particulars of the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

- 148 In contravention of clause 15(1) of Schedule 1 of the Oilcode 2006, and clause 15(1) of Schedule 1 of the Oilcode 2017, the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not disclose details of ownership by United Petroleum or an associate of United Petroleum, such as Eddie Hirsch and Avi Silver, of an interest in Pie Face Pty Ltd and Pie Face Bakery, being a supplier of products from which a Franchisee may be required to acquire goods or services, such as the Allocated Pie Face Stock.

**Particulars**

*Particulars of the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

- 149 In contravention of clause 15(1) of Schedule 1 of the Oilcode 2006, and clause 15(1) of Schedule 1 of the Oilcode 2017, the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not disclose details of

the obligation of a Franchisee to maintain a level of inventory or acquire an amount of goods or services, such as the Allocated Retail Stock and the Allocated Pie Face Stock.

**Particulars**

*Particulars of the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

- 150 In contravention of clause 15(1) of Schedule 1 of the Oilcode 2006, and clause 15(1) of Schedule 1 of the Oilcode 2017, the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not disclose details of whether United Petroleum may change the range of goods or services supplied to Franchisees, which United Petroleum did by means of the Allocated Retail Stock and the Allocated Pie Face Stock.

**Particulars**

*Particulars of the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

- 151 In contravention of clause 15(1) of Schedule 1 of the Oilcode 2006, and clause 15(1) of Schedule 1 of the Oilcode 2017, the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not contain a summary of the conditions of the fuel re-selling agreement that deal with obligations of a Franchisee (or references to the relevant conditions of the fuel re-selling agreement) for, *inter alia*, the following matters:

- (a) the requirement for a Franchisee operating a Pie Face Site to have its employees train in the handling, retailing, merchandising, and sale of Pie Face products during operation of the fuel re-selling business;
- (b) the requirement for a Franchisee to comply with standards and operating manuals with respect to the handling, retailing, merchandising, and sale of Allocated Retail Stock;
- (c) the requirement for a Franchisee operating a Pie Face Site to comply with standards and operating manuals with respect to the handling, retailing, merchandising, and sale of Pie Face stock, including but not limited to the Allocated Pie Face Stock;
- (d) the requirement for a Franchisee operating a Pie Face Site to use the Pie Face Intellectual Property;



- (e) the requirement for a Franchisee operating a Pie Face Site to engage in marketing of Pie Face products;
- (f) participation requirements for a Franchisee operating a Pie Face Site in the handling, retailing, merchandising, and sale of Pie Face products for the Franchisee, its directors, management or employees, including compliance with the Pie Face Store Directions and the need to employ Pie Face Team Members; and
- (g) inspections and audits of a Franchisee operating a Pie Face Site, including but not limited to the Pie Face Audits.

### **Particulars**

*Particulars of the Long Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

152 In contravention of clause 13(2) of Schedule 1 to the Oilcode 2006, and in contravention of clause 13(2) of Schedule 1 to the Oilcode 2017, United Petroleum failed to prepare an updated Long Form Oilcode Disclosure Document in relation to Franchise Agreements and Implied Franchise Agreements that were in force at the end of a financial year.

153 By reason of United Petroleum's failure to prepare an updated Long Form Oilcode Disclosure Document in relation to Franchise Agreements and Implied Franchise Agreements that were in force at the end of a financial year, United Petroleum engaged in the Long Form Oilcode Disclosure Omissions pleaded at paragraphs 146 to 152 above each year that United Petroleum failed to prepare an updated Long Form Oilcode Disclosure Document.

154 In the premises of paragraphs 146 to 152 above, United Petroleum breached section 51AD of the CCA (as then in force).

155 In the premises of paragraphs 146 to 152 above, United Petroleum breached section 51ACB of the CCA.

### **J.6 Contraventions of the Oilcode – Short Form Oilcode Disclosure Document**

156 In contravention of clause 15(2) of Schedule 1 of the Oilcode 2006, and clause 15(2) of Schedule 1 of the Oilcode 2017, the Short Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not disclose (each of the contraventions in paragraphs 156-158 being a **Short Form Oilcode Disclosure Omission**):

- (a) a description of the Pie Face Intellectual Property;

- (b) details of a Franchisee's rights and obligations in connection with the use of the Pie Face Intellectual Property;
- (c) whether the Pie Face Intellectual Property is registered in Australia, and if so, the registration date, registration number and place of registration;
- (d) any judgment or pending proceedings that could significantly affect ownership or use of the Pie Face Intellectual Property, including:
  - (i) name of court or tribunal; and
  - (ii) matter number; and
  - (iii) summary of the claim or judgment;
- (e) if the Pie Face Intellectual Property was not owned by United Petroleum — who owns it; and
- (f) details of any agreement that significantly affects United Petroleum's rights to use, or to give others the right to use, the Pie Face Intellectual Property, including:
  - (i) the parties to the agreement;
  - (ii) the nature and extent of any limitation;
  - (iii) the duration of the agreement; and
  - (iv) the conditions under which the agreement may be terminated.

### **Particulars**

*Particulars of the Short Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

157 In contravention of clause 15(2) of Schedule 1 of the Oilcode 2006, and clause 15(2) of Schedule 1 of the Oilcode 2017, the Short Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period did not contain a summary of the conditions of the fuel re-selling agreement that dealt with obligations of a Franchisee (or references to the relevant conditions of the fuel re-selling agreement) for, *inter alia*, the following matters:

- (a) the requirement for a Franchisee operating a Pie Face Site to have its employees train in the handling, retailing, merchandising, and sale of Pie Face products during operation of the fuel re-selling business;
- (b) the requirement for a Franchisee operating a Pie Face Site to comply

with standards and operating manuals with respect to the handling, retailing, merchandising and sale of Pie Face products;

- (c) the requirement for a Franchisee operating a Pie Face Site to use the Pie Face Intellectual Property;
- (d) the requirement for a Franchisee operating a Pie Face Site to engage in Pie Face marketing;
- (e) for all Franchisees, participation requirements for the Franchisee, directors, management or employees in the retailing and sale of the Allocated Retail Stock;
- (f) for Franchisees operating Pie Face Sites, participation requirements for the Franchisee, directors, management or employees in the retailing and sale of the Allocated Pie Face Stock; and
- (g) inspections and audits of a Franchisee operating a Pie Face Site in relation to compliance with the Pie Face Site Directions, including but not limited to the Pie Face Audits.

#### **Particulars**

*Further particulars of the Short Form Oilcode Disclosure Document maintained by United Petroleum during the Relevant Period will be given in evidence and following discovery.*

- 158 In contravention of clause 13(2) of Schedule 1 to the Oilcode 2006, and in contravention of clause 13(2) of Schedule 1 to the Oilcode 2017, United Petroleum failed to prepare an updated Short Form Oilcode Disclosure Document in relation to Franchise Agreements and Implied Franchise Agreements that were in force at the end of a financial year.
- 159 By reason of United Petroleum's failure to prepare an updated Short Form Oilcode Disclosure Document in relation to Franchise Agreements and Implied Franchise Agreements that were in force at the end of a financial year, United Petroleum engaged in the Short Form Oilcode Disclosure Omissions pleaded at paragraphs 156 to 158 above each year that United Petroleum failed to prepare an updated Short Form Oilcode Disclosure Document.
- 160 In the premises of paragraphs 156 to 158 above, United Petroleum breached section 51AD of the CCA (as then in force).
- 161 In the premises of paragraphs 156 to 158 above, United Petroleum breached section 51ACB of the CCA.

## **K Misleading or Deceptive Conduct**

### **K.1 Original Pie Face Profitable Franchise Representation**

162 By installing the Pie Face Franchise into sites in the United Network during the Relevant Period, United Petroleum represented to Franchisees that the Pie Face Franchise was a profitable franchise at the time that it was being franchised by Original Pie Face immediately prior to the acquisition of the Pie Face Franchise by the United Group (**the Original Pie Face Profitable Franchise Representation**).

#### **Particulars**

- (a) *The Original Pie Face Profitable Franchise Representation was implied in circumstances where a reasonable person in the position of a prospective or current Franchisee would assume from the conduct of United Petroleum in undertaking installations of the Pie Face Franchise into sites in the United Network that the Pie Face Franchise was historically a profitable franchise at the time that it was being franchised by Original Pie Face.*
- (b) *Further or in the alternative, the Original Pie Face Profitable Franchise Representation was conveyed by silence when United Petroleum undertook installations of the Pie Face Franchise into sites in the United Network, however failed to disclose and remained silent as to the financial history of the Pie Face Franchise at the time that it was being franchised by Original Pie Face in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

163 The Original Pie Face Profitable Franchise Representation was made in trade or commerce within the meaning of section 18 of Schedule 2 to the *Competition and Consumer Act 2010* (Cth), as applicable pursuant to:

- (a) section 12 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic);
- (b) section 28 of the *Fair Trading Act 1987* (NSW);
- (c) section 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas);
- (d) section 26 of the *Fair Trading Act 1989* (Qld);
- (e) section 19 of the *Fair Trading Act 2010* (WA);
- (f) section 14 of the *Fair Trading Act 1987* (SA);
- (g) section 27 of the *Consumer Affairs and Fair Trading Act* (NT);
- (h) section 7 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT); and/or

- (i) section 131 of the *Competition and Consumer Act 2010* (Cth), (individually or together the **ACL**).

- 164 The Original Pie Face Profitable Franchise Representation was a continuing representation throughout the Relevant Period.
- 165 The Original Pie Face Profitable Franchise Representation was misleading or deceptive or likely to mislead or deceive.
- 166 The Pie Face Franchise was not historically a profitable franchise at the time that it was being franchised by Original Pie Face immediately prior to the acquisition of the Pie Face Franchise by the United Group.

#### **Particulars**

- (a) *The Plaintiffs refer to the matters pleaded in paragraphs 19 to 48 above.*
- (b) *Further particulars of the profitability of the Pie Face Franchise at the time it was acquired by the United Group will be given in evidence and following discovery.*

- 167 By making the Original Pie Face Profitable Franchise Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.2 Future Pie Face Profitable Franchise Representation**

- 168 By installing the Pie Face Franchise into sites in the United Network during the Relevant Period, United Petroleum represented to Franchisees that the Pie Face Franchise being franchised to them by United Petroleum would be a profitable franchise (**the Future Pie Face Profitable Franchise Representation**).

#### **Particulars**

- (a) *The Future Pie Face Profitable Franchise Representation was implied in circumstances where a reasonable person in the position of a prospective or current Franchisee would assume from the conduct of United Petroleum in undertaking installations of the Pie Face Franchise into sites in the United Network that the Pie Face Franchise would be a profitable franchise.*
- (b) *Further or in the alternative, the Future Pie Face Profitable Franchise Representation was conveyed by silence when United Petroleum undertook installations of the Pie Face Franchise into sites in the United Network, however failed to disclose and remained silent as to the financial history of the Pie Face Franchise at the time that it was being franchised by Original Pie Face as pleaded in paragraphs 19 to 48 above in circumstances where a reasonable person in the*

*position of a prospective or current Franchisee would expect that information to be disclosed.*

- (c) *Further or in the alternative, the Future Pie Face Profitable Franchise Representation was conveyed by silence when United Petroleum undertook installations of the Pie Face Franchise into sites in the United Network, however failed to disclose and remained silent as to the actual predicted profitability of the Pie Face Franchise proposed to be franchised by United Petroleum in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

169 The Future Pie Face Profitable Franchise Representation was made in trade or commerce within the meaning of section 18 of the ACL.

170 The Future Pie Face Profitable Franchise Representation was a continuing representation throughout the Relevant Period.

171 The Future Pie Face Profitable Franchise Representation was a representation as to future matter.

172 There were no reasonable grounds to represent that the Pie Face Franchise would in future be a profitable franchise.

173 The Future Pie Face Profitable Franchise Representation was misleading or deceptive or likely to mislead or deceive.

174 By making the Future Pie Face Profitable Franchise Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

### **K.3 Original Pie Face Market Demand Representation**

175 By installing the Pie Face Franchise into sites in the United Network during the Relevant Period, United Petroleum represented to Franchisees that there was strong market demand for Pie Face products at the time that the Pie Face Franchise was being franchised by Original Pie Face immediately prior to the acquisition of the Pie Face Franchise by the United Group (**the Original Pie Face Market Demand Representation**).

#### **Particulars**

- (a) *The Original Pie Face Market Demand Representation was implied in circumstances where a reasonable person in the position of a prospective or current Franchisee would assume from the conduct of United Petroleum in undertaking installations of the Pie Face Franchise into sites in the United Network that there was strong market demand for Pie Face products at the time that the Pie*

*Face Franchise was being franchised by Original Pie Face immediately prior to the acquisition of the Pie Face Franchise by the United Group.*

- (b) *Further or in the alternative, the Pie Face Market Demand Representation was conveyed by silence when United Petroleum undertook installations of the Pie Face Franchise into sites in the United Network, however failed to disclose and remained silent as to the true market demand for Pie Face products at the time that the Pie Face Franchise was being franchised by Original Pie Face immediately prior to the acquisition of the Pie Face Franchise by United Petroleum or an associate of United Petroleum in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

- 176 The Original Pie Face Market Demand Representation was made in trade or commerce within the meaning of section 18 of the ACL.
- 177 The Original Pie Face Market Demand Representation was a continuing representation throughout the Relevant Period.
- 178 The Original Pie Face Market Demand Representation was misleading or deceptive or likely to mislead or deceive.
- 179 There was not strong market demand for Pie Face products at the time that the Pie Face Franchise was being franchised by Original Pie Face immediately prior to the acquisition of the United Group.

#### **Particulars**

- (a) *The Plaintiffs refer to the matters pleaded in paragraphs 19 to 48 above.*
- (b) *Further particulars of the market demand for Pie Face products will be given in evidence and following discovery.*

- 180 By making the Original Pie Face Market Demand Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.4 Future Pie Face Market Demand Representation**

- 181 By installing the Pie Face Franchise into sites in the United Network during the Relevant Period, United Petroleum represented to Franchisees that there would be strong market demand for Pie Face products on and from the time that the Pie Face Franchise was being franchised by United Petroleum to the prospective Franchisee (**the Future Pie Face Market Demand Representation**).

#### **Particulars**

- (a) *The Future Pie Face Market Demand Representation was implied in circumstances where a reasonable person in the position of a prospective or current Franchisee would assume from the conduct of United Petroleum in undertaking installations of the Pie Face Franchise into sites in the United Network that there would be strong market demand for Pie Face products on and from the time that the Pie Face Franchise was being franchised by United Petroleum to the prospective Franchisee.*
- (b) *Further or in the alternative, the Future Pie Face Market Demand Representation was conveyed by silence when United Petroleum undertook installations of the Pie Face Franchise into sites in the United Network, however failed to disclose and remained silent as to the actual predicted market demand for Pie Face products at the time that the Pie Face Franchise was being proposed to be franchised by United Petroleum in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

182 The Future Pie Face Market Demand Representation was made in trade or commerce within the meaning of section 18 of the ACL.

183 The Future Pie Face Market Demand Representation was a continuing representation throughout the Relevant Period.

184 The Future Pie Face Market Demand Representation was a representation as to future matter.

185 There were no reasonable grounds to represent that there would be strong market demand for Pie Face products on and from the time that the Pie Face Franchise was being franchised by United Petroleum to the prospective Franchisee.

186 The Future Pie Face Market Demand Representation was misleading or deceptive or likely to mislead or deceive.

187 By making the Future Pie Face Market Demand Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.5 Pie Face Increased Profit Representation**

188 By installing the Pie Face Franchise into sites in the United Network during the Relevant Period, United Petroleum represented to Franchisees that the cost to a Franchisee of retailing Pie Face products in the ordinary course of business would be exceeded by the revenue to be derived from retailing Pie Face products in the ordinary course of business, and so result in increased profit for Franchisees (**a Pie Face Increased Profit Representation**).



### Particulars

- (a) *The Pie Face Increased Profit Representation was partly express and partly implied.*
- (b) *Insofar as it was express, on or about 3 March 2020, at an interview between Mr Istanikzai on behalf of FNH and State Manager Goran Gorgievski on behalf of United Petroleum, Mr Gorgievski told Mr Istanikzai that the installation of the Pie Face Franchise into the Cranbourne South Site would result in increased profit for FNH.*
- (c) *Further particulars of the express representations made to Franchisees about the increased profit to be derived from installation of the Pie Face Franchise will be obtained following the determination of the Plaintiffs' claims and identified common issues at an initial trial, and if and when it is necessary for a determination to be made of the individual claims of Group Members.*
- (d) *Insofar as it was implied, the Pie Face Increased Profit Representation was implied in circumstances where a reasonable person in the position of a prospective or current Franchisee would assume from the conduct of United Petroleum in undertaking installations of the Pie Face Franchise into sites in the United Network that the cost of retailing Pie Face products in the ordinary course of business would be exceeded by the revenue reasonably able to be derived from the retailing of Pie Face products in the ordinary course of business.*
- (e) *Further or in the alternative, the Pie Face Increased Profit Representation was conveyed by silence when United Petroleum undertook installations of the Pie Face Franchise into sites in the United Network, however failed to disclose and remained silent as to the likely costs of and likely revenue to be derived from retailing Pie Face products (of which it would be aware by reason of the acquisition of the Pie Face Franchise on or about 13 April 2017 from the Receivers of Original Pie Face) in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

189 The Pie Face Increased Profit Representation was made in trade or commerce within the meaning of section 18 of the ACL.

190 Insofar as the Pie Face Increased Profit Representation was a representation about a future matter, it was made without reasonable grounds within the meaning of s 4 of the

ACL.

**Particulars**

*The Plaintiffs refer to the matters pleaded in paragraphs 19 to 48 above.*

191 The Pie Face Increased Profit Representation was misleading or deceptive or likely to mislead or deceive.

192 In all cases for all Franchisees, the cost to a Franchisee of retailing Pie Face products in the ordinary course of business exceeded the revenue that could be derived from retailing Pie Face products, and so retailing Pie Face products would not result in increased profit for Franchisees.

**Particulars**

*Further particulars of the costs to Franchisees of retailing Pie Face products compared to the revenue that could be derived from retailing Pie Face products will be given in evidence and following discovery.*

193 In the alternative, in some cases for some Franchisees, the cost to a Franchisee of retailing Pie Face products in the ordinary course of business exceeded the revenue that could be derived from retailing Pie Face products, and so retailing Pie Face products would not result in increased profit for Franchisees.

**Particulars**

*Further particulars of the costs to Franchisees of retailing Pie Face products compared to the revenue that could be derived from retailing Pie Face products will be given in evidence and following discovery.*

194 By making the Pie Face Increased Profit Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

**K.6 No Minimum Inventory Representation**

195 By reason of United Petroleum's conduct in providing Franchisees with the Franchise Agreement, Disclosure Document, and Operations Manual, United Petroleum represented to Franchisees that there would not be any obligation on a Franchisee to maintain any minimum amount of inventory required to operate a site in the United Network (**No Minimum Inventory Representation**).

**Particulars**

(a) *The No Minimum Inventory Representation was implied in circumstances where a reasonable person in the position of a Franchisee would assume from being provided with and reviewing the Franchise Agreement,*

*Disclosure Document, and Operations Manual that these documents would contain all the information relevant to the operation of a site in the United Network, including if a Franchisee was required to maintain any minimum amount of inventory, such as for Pie Face products.*

- (b) *Further or in the alternative, the No Minimum Inventory Representation was conveyed by silence in circumstances where United Petroleum failed to disclose and remained silent as to the requirement for Franchisees to maintain a minimum amount of inventory, such as for Pie Face products, in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

196 The No Minimum Inventory Representation was made in trade or commerce within the meaning of section 18 of the ACL.

197 Insofar as the No Minimum Inventory Representation was a representation about a future matter, it was made without reasonable grounds within the meaning of s 4 of the ACL.

198 The No Minimum Inventory Representation was misleading or deceptive or likely to mislead or deceive.

199 In all cases for all Franchisees, Franchisees were required to maintain minimum amounts of inventory as directed by United Petroleum including, for Franchisees who operated a Pie Face Site, minimum levels of Pie Face stock by reason of the Pie Face Site Directions.

200 By making the No Minimum Inventory Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.7 No Purchase Obligation Representation**

201 By reason of United Petroleum's conduct in providing Franchisees with the Franchise Agreement, Disclosure Document, and Operations Manual, United Petroleum represented to Franchisees that there would not be any obligation on a Franchisee to acquire goods or services as directed by United Petroleum (**No Purchase Obligation Representation**).

#### **Particulars**

- (a) *The No Purchase Obligation Representation was implied in circumstances where a reasonable person in the position of a prospective Franchisee would assume from being provided with and reviewing the Franchise Agreement, Disclosure Document, and Operations Manual that these documents would contain all the*

*information relevant to the operation of a site in the United Network, including if a Franchisee was required to acquire goods or services as directed by United Petroleum.*

- (b) *Further or in the alternative, the No Purchase Obligation Representation was conveyed by silence in circumstances where United Petroleum failed to disclose and remained silent as to the requirement for Franchisees to acquire goods or services as directed by United Petroleum, in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

202 Insofar as the No Purchase Obligation Representation was a representation about a future matter, it was made without reasonable grounds within the meaning of s 4 of the ACL.

203 The No Purchase Obligation Representation was misleading or deceptive or likely to mislead or deceive.

204 In all cases for all Franchisees, Franchisees were obliged to acquire goods or services as directed by United Petroleum, being the obligation to acquire the Allocated Retail Stock and the Allocated Pie Face Stock.

205 By making the No Purchase Obligation Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.8 No Related Party Supplier Representation**

206 By reason of United Petroleum's conduct in providing Franchisees with the Franchise Agreement, Disclosure Document, and Operations Manual, United Petroleum represented to Franchisees that there would not be any obligation on a Franchisee to acquire goods or services from a supplier controlled by an associate of United Petroleum within the meaning of clause 4 of Schedule 1 to the Oilcode 2006 and clause 4 of Schedule 1 to the Oilcode 2017, and/or section 11 of the Act, unless they were disclosed as such in these documents (**No Related Party Supplier Representation**).

#### **Particulars**

- (a) *The No Related Party Supplier Representation was implied in circumstances where a reasonable person in the position of a prospective Franchisee would assume from being provided with and reviewing the Franchise Agreement, Disclosure Document, and Operations Manual that these documents would contain all the information relevant to the operation of a site in the United Network, including if a Franchisee was to be required to acquire goods or*

*services from an associate of United Petroleum.*

- (b) *Further or in the alternative, the No Related Party Supplier Representation was conveyed by silence in circumstances where United Petroleum failed to disclose and remained silent as to the requirement for Franchisees to acquire goods or services from an associate of United Petroleum, in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

207 The No Related Party Supplier Representation was made in trade or commerce within the meaning of section 18 of the ACL.

208 Insofar as the No Related Party Supplier Representation was a representation about a future matter, it was made without reasonable grounds within the meaning of s 4 of the ACL.

209 The No Related Party Supplier Representation was misleading or deceptive or likely to mislead or deceive.

210 In all cases for all Franchisees, Franchisees who operated a Pie Face Site were required to acquire goods or services from an associate of United Petroleum, being Pie Face Bakery.

211 By making the No Related Party Supplier Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.9 No Range Change Representation**

212 By reason of United Petroleum's conduct in providing Franchisees with the Franchise Agreement, Disclosure Document, and Operations Manual, United Petroleum represented to Franchisees that it would not require them to provide goods or services that did not form part of the range of goods or services described by those documents (**No Range Change Representation**).

#### **Particulars**

- (a) *The No Range Change Representation was implied in circumstances where a reasonable person in the position of a prospective Franchisee would assume from being provided with and reviewing the Franchise Agreement, Disclosure Document, and Operations Manual that these documents would contain all the information relevant to the operation of a site in the United Network, including if United Petroleum would change the range of goods or services required to be supplied by the Franchisee.*
- (b) *Further or in the alternative, the No Range Change Representation was conveyed*

*by silence in circumstances where United Petroleum failed to disclose and remained silent as to whether United Petroleum would significantly change the range of goods or services required to be supplied by the Franchisee, in circumstances where a reasonable person in the position of a prospective Franchisee would expect that information to be disclosed in the Franchise Agreement, Disclosure Document, and Operations Manual.*

- 213 At all material times, United Petroleum did intend to require Franchisees to provide goods or services that did not form part of the range of goods or services described by the Franchise Agreement, Disclosure Document, and Operations Manual.

#### **Particulars**

*The goods or services that did not form part of the range of goods or services described by the Franchise Agreement, Disclosure Document, and Operations Manual include the Pie Face Stock.*

- 214 Further or in the alternative, insofar as the No Range Change Representation was a representation about a future matter, it was made without reasonable grounds within the meaning of s 4 of the ACL.
- 215 The No Range Change Representation was misleading or deceptive or likely to mislead or deceive.
- 216 By making the No Range Change Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.10 No Business Change Representation**

- 217 By reason of United Petroleum's conduct in providing Franchisees with the Franchise Agreement, Disclosure Document, and Operations Manual, United Petroleum represented to Franchisees that United Petroleum would not significantly change the nature of their business (**No Business Change Representation**).

#### **Particulars**

- (a) *The No Business Change Representation was implied in circumstances where a reasonable person in the position of a prospective Franchisee would assume from being provided with and reviewing the Franchise Agreement, Disclosure Document, and Operations Manual that these documents would contain all the information relevant to the operation of a site in the United Network, including if United Petroleum would significantly change the nature of their business.*
- (b) *Further or in the alternative, the No Business Change Representation was conveyed by silence in circumstances where United Petroleum failed to disclose*

*and remained silent as to whether United Petroleum would significantly change the nature of their business, in circumstances where a reasonable person in the position of a prospective or current Franchisee would expect that information to be disclosed.*

- 218 The No Business Change Representation was made in trade or commerce within the meaning of the ACL.
- 219 The No Business Change Representation was a representation about a future matter.
- 220 The No Business Change Representation was a continuing representation throughout the Relevant Period.
- 221 There were no reasonable grounds within the meaning of section 4 of the ACL for United Petroleum making the No Business Change Representation.
- 222 The No Business Change Representation was misleading or deceptive or likely to mislead or deceive.
- 223 United Petroleum significantly changed the nature of their business for those Franchisees that operated Pie Face Sites by requiring them to acquire and sell Pie Face products by means of the Pie Face Franchise and the Allocated Pie Face Stock.
- 224 By making the No Business Change Representation, United Petroleum engaged in conduct in contravention of section 18 of the ACL.

#### **K.11 Causation and Reliance - FNH and Mr Istanikzai**

- 225 In their decision to enter the FNH Franchise Agreement as a Franchisee and guarantor respectively, FNH and Mr Istanikzai relied on, alone and/or in combination:
- (a) the Original Pie Face Profitable Franchise Representation;
  - (b) the Future Pie Face Profitable Franchise Representation;
  - (c) the Original Pie Face Market Demand Representation;
  - (d) the Future Pie Face Market Demand Representation;
  - (e) the Pie Face Increased Profit Representation;
  - (f) the No Minimum Inventory Representation;
  - (g) the No Purchase Obligation Representation;
  - (h) the No Related Party Supplier Representation;
  - (i) the No Range Change Representation; and
  - (j) the No Business Change Representation,

(together, the **Contravening Representations**).

226 FNH and Mr Istanikzai would not have entered into the FNH Franchise Agreement as Franchisee and guarantor respectively had United Petroleum not made the Contravening Representations.

**K.12 Causation and Reliance – the JJ Trustees**

227 In their decision to enter the JJ Franchise Agreement in their capacities as trustees and guarantors respectively, the JJ Trustees relied on, alone and/or in combination, the Contravening Representations pleaded at paragraph 225 above.

228 The JJ Trustees would not have entered into the JJ Franchise Agreement in their capacities as trustees and guarantors had United Petroleum not made the Contravening Representations.

**K.13 Causation and Reliance – Franchisees with Pie Face Sites**

229 In their decision to enter into Franchise Agreements, Franchisees with Pie Face Sites and their associated Guarantors relied on, alone and/or in combination, one or more of the Contravening Representations.

230 Franchisees with Pie Face Sites and their associated Guarantors would not have entered into their Franchise Agreements respectively had United Petroleum not made the Contravening Representations.

**L. Breach of Contract**

**L.1. The Franchise Agreement**

231 It was a term of the Franchise Agreement that the Franchisee was required to pay the Initial Franchise Fee as consideration for the rights granted by United Petroleum under the Franchise Agreement.

**Particulars**

*Clause 2.1 of the Franchise Agreement.*

*Terms otherwise not defined in this Statement of Claim are defined in the Franchise Agreement.*

232 The Initial Franchise Fee is set out in Item 10 of the Schedule to the Franchise Agreement.

**Particulars**

*The Initial Franchise Fee for FNH was \$145,000 (plus GST).*

*The Initial Franchise Fee for the JJ Trustees was \$159,500 (inclusive of GST).*



- 233 It was a term of the Franchise Agreement that United Petroleum grants to the Franchisee the right to use the System and the United Image solely in conjunction with the Franchised Business at the Licenced Area.

**Particulars**

*Clause 2.1 of the Franchise Agreement.*

*Terms otherwise not defined in this Statement of Claim are defined in the Franchise Agreement.*

- 234 The System is defined in the Franchise Agreement to mean the comprehensive retail sales system developed or owned or licenced by United Petroleum for the management of retail outlets to enable franchisees to benefit from group identification in market competition utilising the specific signs, standards, products, trade names, marks and logos of the United Image.

**Particulars**

*Clause 1.1 of the Franchise Agreement.*

- 235 The United Image is defined in the Franchise Agreement to mean the specific image created and/or acquired and/or licenced by United Petroleum for the group identification of United Outlets.

**Particulars**

*Clause 1.1 of the Franchise Agreement.*

- 236 The United Outlets are defined in the Franchise Agreement to mean the service stations and convenience sites that specialise in the sale of Motor Fuels, Other Proprietary Products and/or Shop Products that are operated and identified under the Names and Marks and are owned and operated by United Petroleum or an associate of United Petroleum; or owned and operated by a franchisee under a franchise.

**Particulars**

*Clause 1.1 of the Franchise Agreement.*

- 237 Shop Products is defined in the Franchise Agreement to mean any products or services the range and type of which are specified as "Shop Products" in the Franchise Operations Manual but excludes Other Proprietary Products and Motor Fuels.

**Particulars**

*Clause 1.1 of the Franchise Agreement.*

*Terms otherwise not defined in this Statement of Claim are defined in the*

*Franchise Agreement.*

238 Motor Fuels do not include Pie Face branded products.

**Particulars**

*Terms otherwise not defined in this Statement of Claim are defined in the Franchise Agreement.*

239 Other Proprietary Products do not include Pie Face branded products.

**Particulars**

*Terms otherwise not defined in this Statement of Claim are defined in the Franchise Agreement.*

240 At no time during the Relevant Period did the Franchise Operations Manual specify Pie Face branded products as Shop Products.

241 Shop Products do not include Pie Face branded products.

242 The United Image does not include images associated with Pie Face.

**Particulars**

*Particulars of the images associated with Pie Face that comprise the Pie Face Intellectual Property will be given in evidence and following discovery.*

243 The System, defined in the Franchise Agreement, does not include the sale of Pie Face branded products.

244 The Franchised Business is defined in the Franchise Agreement to mean the business of operating the Franchise from the Licenced Area.

**Particulars**

*Clause 1.1 of the Franchise Agreement.*

245 The Franchise is defined in the Franchise Agreement to mean the right to operate a business using the Intellectual Property and the rights granted under the Franchise Agreement.

**Particulars**

*Clause 1.1 of the Franchise Agreement.*

246 The Intellectual Property is defined to include but is not limited to all present and future intellectual and industrial property rights conferred by statute, at common law or in equity wherever existing, and includes the "Names and Marks" owned by or licensed to the

Franchisor.

### Particulars

*Clause 1.1 of the Franchise Agreement.*

247 The Intellectual Property does not include the Pie Face Intellectual Property.

### Particulars

*The Plaintiffs refer to the definition of "Names and Marks" in the Franchise Agreement at clause 1.1, Item 17 of the Schedule to the Franchise Agreement, and Annexure 3 to the Franchise Agreement.*

248 By reason of the matters pleaded in paragraphs 231 to 247 above, the Franchised Business does not include the business of selling Pie Face products.

249 In the premises, United Petroleum had no contractual power to require Franchisees to sell Pie Face products under the Franchise Agreement.

250 In the premises, United Petroleum had no contractual power to require Franchisees to acquire the Allocated Pie Face Stock under the Franchise Agreement.

251 In the premises, by United Petroleum:

(a) requiring Franchisees to sell Pie Face products as part of the Pie Face Franchise; and

(b) requiring Franchisees to acquire the Allocated Pie Face Stock,

United Petroleum breached the Franchise Agreement (each a **Franchise Agreement Breach**).

### **L.2. United Petroleum's obligation to seek agreement for Additional Activities**

252 It was a term of the Franchise Agreement that the Franchisee must not, other than in accordance with clause 12.14 of the Franchise Agreement, provide any services from the Licenced Area other than those services specifically contemplated under the terms of the Franchising Agreement.

### Particulars

*Clause 12.14(a) of the Franchise Agreement.*

253 It was a term of the Franchise Agreement that United Petroleum may, from time to time, specify additional activities in the Franchise Operations Manual which the Franchisee

may wish to offer at or from the Licenced Area (**Additional Activity**).

#### Particulars

##### *Clause 12.14(b) of the Franchise Agreement.*

254 It was a term of the Franchise Agreement that if United Petroleum specifies an Additional Activity which the Franchisee would like to offer from the Licenced Area, the Franchisee and United Petroleum must agree in writing:

- (a) the Additional Activity to be provided from the Licenced Area;
- (b) any fees that the Franchisee must pay to United Petroleum in relation to the grant of the right to provide the Additional Activity; and
- (c) any other conditions that apply to the provision of the Additional Activity (for instance, required training and hours of operation);

prior to the Franchisee providing the Additional Activity (being the **Additional Activity Obligations**).

#### Particulars

##### *Clause 12.14(c) of the Franchise Agreement.*

255 At no time did the Franchisees agree in writing to sell Pie Face products as part of the Pie Face Franchise, which was required pursuant to the Additional Activities Obligations.

256 In the premises, by United Petroleum requiring Franchisees to purchase and sell Pie Face products, including the Allocated Pie Face Stock, United Petroleum breached the Additional Activity Obligations (also a **Franchise Agreement Breach**).

#### **L.3. Implied terms – Duties of Co-operation and Good Faith**

257 It was an implied term of the Franchise Agreement that United Petroleum owed the Franchisee a duty of cooperation to achieve the objects of the Franchise Agreement (**Duty of Cooperation**).

#### Particulars

*The term is implied by law.*

258 United Petroleum's Duty of Cooperation included a duty to do all things necessary to enable the Franchisee to have the benefit of the Franchise Agreement.

#### Particulars

*The term is implied by law.*

259 United Petroleum's Duty of Cooperation included a duty to not act unreasonably, arbitrarily or capriciously, in disregard of the Franchisee's interests; and, or alternatively, so as to prevent or deny the Franchisee from enjoying the full benefit of the Franchise Agreement.

**Particulars**

*The term is implied by law.*

260 It was an implied term of the Franchise Agreement that United Petroleum owed the Franchisee a duty to act reasonably and in good faith towards the Franchisee (**Duty of Good Faith**).

**Particulars**

*The term is implied by law.*

261 United Petroleum's Duty of Good Faith included a duty to promote the mutual business interests of the Franchisee on the one part and United Petroleum on the other part.

**Particulars**

*The term is implied by law.*

262 The objects of, or alternatively the full benefit of, the Franchise Agreement, relevant to the content of the duties in paragraphs 257 and 260 above include the opportunity for the Franchisee to earn profits and/or income by operating the Franchised Business.

**Particulars**

*Recital A of the Franchise Agreement.*

*Recital E of the Franchise Agreement.*

263 United Petroleum requiring Franchisees to purchase the Allocated Retail Stock and Allocated Pie Face Stock was not expressly or impliedly authorised by the Franchise Agreement.

264 In the premises, United Petroleum requiring its Franchisees to acquire and sell the Allocated Retail Stock and Allocated Pie Face Stock constituted a breach of United Petroleum's Duty of Cooperation (a **Franchise Agreement Breach**).

265 In the premises, United Petroleum requiring its Franchisees to acquire and sell the Allocated Retail Stock and Allocated Pie Face Stock constituted a breach of United Petroleum's Duty of Good Faith (also a **Franchise Agreement Breach**).

**M. Unconscionable Conduct**

266 During the Relevant Period, United Petroleum required Franchisees to purchase the

Allocated Retail Stock.

**Particulars**

*The Plaintiffs repeat paragraph 90 above.*

267 During the Relevant Period, United Petroleum required Franchisees to purchase the Allocated Pie Face Stock.

**Particulars**

*The Plaintiffs repeat paragraph 77 above.*

268 United Petroleum and other members of the United Group obtained rebates from suppliers for ordering the Allocated Retail Stock and the Allocated Pie Face Stock, including from the Retail Suppliers and the Pie Face Suppliers.

**Particulars**

*Particulars of the rebates obtained by United Petroleum and the United Group will be given in evidence and following discovery.*

269 The prices of the Allocated Retail Stock and Allocated Pie Face Stock were set by agreement between United Petroleum on the one part and the Retail Suppliers and the Pie Face Suppliers on the other.

270 The prices of Allocated Retail Stock and Allocated Pie Face Stock were set at a level so as to maximise the rebate that could be obtained by United Petroleum and the United Group without having regard to the legitimate interests of the Franchisees.

271 During the Relevant Period, the volume of Allocated Retail Stock and Allocated Pie Face Stock that United Petroleum required Franchisees to purchase regularly exceeded what could be reasonably sold by Franchisees, as evidenced by the Retail Stock Wastage and the Pie Face Wastage.

272 The purpose of United Petroleum allocating the Allocated Retail Stock and Allocated Pie Face Stock to Franchisees despite the ongoing Retail Stock Wastage and Pie Face Wastage was to maximise the amount of profit that could be gained by United Petroleum and the United Group through rebates from the suppliers of that stock, including Retail Suppliers and Pie Face Suppliers (in addition to the profit obtained through production of Pie Face stock by Pie Face Bakery that also became part of the Allocated Pie Face Stock).

273 The effect of United Petroleum requiring Franchisees to acquire the Allocated Retail Stock and Allocated Pie Face Stock was to cause Franchisees to incur costs for

products they did not order or need.

- 274 The effect of United Petroleum requiring Franchisees to acquire the Allocated Retail Stock and Allocated Pie Face Stock was to reduce the cash flow available to Franchisees.
- 275 The effect of United Petroleum requiring Franchisees to acquire the Allocated Retail Stock and Allocated Pie Face Stock was to reduce the revenue earned by Franchisees.
- 276 The effect of United Petroleum requiring Franchisees to acquire the Allocated Retail Stock and Allocated Pie Face Stock was to reduce the profit able to be earned by Franchisees.
- 277 In the premises of paragraphs 266 to 276 above, the Allocated Retail Stock and Allocated Pie Face Stock was detrimental to Franchisees but benefitted United Petroleum and the United Group.
- 278 The effect of United Petroleum requiring Franchisees to sell Allocated Retail Stock and Allocated Pie Face Stock was to shift the cost of the overheads and business risk associated with the sale of Allocated Retail Stock and Allocated Pie Face Stock from United Petroleum to Franchisees.
- 279 By reason of the matters pleaded in paragraphs 85 to 88 above, United Petroleum was aware of the matters pleaded in paragraphs 273 to 276 above throughout the Relevant Period yet continued to require Franchisees to acquire the Allocated Retail Stock and Allocated Pie Face Stock.
- 280 In the premises, the effect of United Petroleum requiring Franchisees to acquire the Allocated Retail Stock and Allocated Pie Face Stock was to provide United Petroleum and the United Group with a revenue stream benefitting United Petroleum at the expense of Franchisees.
- 281 By reason of the matters pleaded in paragraphs 266 to 280 above, United Petroleum conducted the business of the United Network in a manner that prioritised increasing the profit to be obtained by United Petroleum and the United Group, including from the Pie Face Franchise, to the disregard of the legitimate interests of Franchisees.

**N. Contravention of section 21 of the ACL**

- 282 By reason of the matters pleaded in each of paragraphs 270 to 281 above (separately or in any combination), United Petroleum engaged in conduct that was, in all the circumstances, unconscionable:

(a) in trade or commerce;

- (b) in connection with the supply or possible supply of services to Franchisees within the meaning of section 21 of the ACL; and
- (c) in contravention of section 21 of the ACL,  
(that conduct being the **Pie Face Unconscionable Conduct**).

#### **Particulars**

- (a) *United Petroleum was in a bargaining position of strength compared to the Plaintiffs and Group Members within the meaning of s 22(1)(a) of the ACL;*
- (b) *The Plaintiffs and Group Members were required to sell Allocated Retail Stock and Allocated Pie Face Stock, comply with the Pie Face Site Directions, employ Pie Face Team Members, incur the costs of the Pie Face Overheads or risk termination of their business, all of which were not reasonably necessary for the protection of the legitimate interests of United Petroleum within the meaning of s 22(1)(b) of the ACL;*
- (c) *The Plaintiffs and Group Members were required to purchase the Allocated Retail Stock and Allocated Pie Face Stock from suppliers approved by United Petroleum, which was not reasonably necessary for the protection of the legitimate interests of United Petroleum within the meaning of s 22(1)(b) of the ACL;*
- (d) *By reason of the Pie Face Site Directions and the Pie Face Audits, which could lead to a termination of the Franchise Agreement, pressure and unfair tactics were used on the Plaintiffs and Group Members by United Petroleum in relation to the supply or possible supply of goods or services under the Franchise Agreement within the meaning of s 22(1)(d) of the ACL;*
- (e) *By reason of the Franchising Code Breaches, United Petroleum failed to comply with the requirements of an applicable industry code within the meaning of s 22(1)(g) of the ACL;*
- (f) *By reason of the Short Form Oilcode Disclosure Omissions and the Long Form Oilcode Disclosure Omissions, United Petroleum failed to comply with the requirements of an applicable industry code within the meaning of s 22(1)(g) of the ACL;*
- (g) *United Petroleum unreasonably failed to disclose to the Plaintiffs and*



*Group Members prior to entry into Franchise Agreements United Petroleum's requirement for the Plaintiffs and Group Members to sell the Allocated Retail Stock and Allocated Pie Face Stock, comply with the Pie Face Site Directions, incur the Pie Face Overheads and employ Pie Face Team Members, within the meaning of s 22(1)(i)(i) of the ACL;*

- (h) United Petroleum unreasonably failed to disclose to the Plaintiffs and Group Members the risk that the Allocated Retail Stock and Allocated Pie Face Stock, the Pie Face Overheads, the employment of Pie Face Team Members and compliance with the Pie Face Site Directions could result in the Plaintiffs and Group Members suffering financial loss, being a risk that United Petroleum should have foreseen would not be apparent to the Plaintiffs and Group Members within the meaning of s 22(1)(i)(ii) of the ACL;*
- (i) United Petroleum unreasonably failed to disclose to the Plaintiffs and Group Members the risk that a failure to comply with the Pie Face Site Directions could result in the Franchise Agreement being terminated, being a risk that United Petroleum should have foreseen would not be apparent within the meaning of s 22(1)(i)(ii) of the ACL;*
- (j) By failing to comply with the Additional Activities Obligation and committing the Franchise Agreement Breaches, United Petroleum failed to comply with the Franchise Agreements between it and Franchisees within the meaning of s 22(1)(j)(iii) of the ACL;*
- (k) The Franchise Agreement did not permit United Petroleum to require that the Plaintiffs and Group Members: acquire the Allocated Retail Stock; acquire the Allocated Pie Face Stock; employ Pie Face Team Members; and comply with Pie Face Site Directions, however United Petroleum required the Plaintiffs and Group Members to do so after they entered their respective Franchise Agreements within the meaning of s 22(1)(j)(iv) of the ACL; and*
- (l) By reason of the matters pleaded above, United Petroleum failed to act in good faith within the meaning of s 22(1)(l) of the ACL.*

**O. Restitution - Unauthorised Fines**

283 During the Relevant Period, United Petroleum monitored the purchase and sale of stock by

Franchisees from Retail Suppliers.

**Particulars**

*From time to time, employees of United Petroleum would conduct stocktakes of stock being sold by Franchisees and compare it to the stock those Franchisees had purchased from Retail Suppliers to ensure that only stock purchased from Retail Suppliers was being sold by those Franchisees.*

- 284 United Petroleum issued fines to Franchisees who were identified as having sold stock purchased from suppliers other than Retail Suppliers (**Unauthorised Fines**).

**Particulars**

*Particulars of the amount and frequency of the issue of Unauthorised Fines will be given in evidence and following discovery.*

- 285 Franchisees paid the Unauthorised Fines.

**Particulars**

*Particulars of the Unauthorised Fines paid by Franchisees will be given in evidence and following discovery.*

- 286 United Petroleum had no contractual right under a Franchise Agreement to issue the Unauthorised Fines.

- 287 In the premises, Franchisees who paid Unauthorised Fines are entitled to restitution of the Unauthorised Fines paid by those Franchisees from United Petroleum.

**P. Avi Silver**

- 288 At all material times and throughout the Relevant Period, the Second Defendant, Avi Silver:

- (a) was a director of United Petroleum; and
- (b) along with Eddie Hirsch, had ultimate control over United Petroleum and the United Group.

- 289 Avi Silver, along with Eddie Hirsch, was ultimately responsible for:

- (a) negotiating the acquisition of the Pie Face Franchise on behalf of the United Group; and
- (b) installing the Pie Face Franchise into sites in the United Network.

- 290 At all material times Avi Silver was aware, or alternatively ought to have been aware, of the financial history of the Pie Face Franchise at the time of its acquisition by the United

Group.

**Particulars**

*The knowledge arises by reason of negotiating the acquisition of the Pie Face Franchise.*

*The knowledge includes but is not limited to knowledge that:*

- (i) Original Pie Face was placed into administration;*
- (ii) at the time it was placed into administration, Original Pie Face was experiencing negative cash flow as referred to at paragraph 24 above;*
- (iii) the DOCA between Original Pie Face and its creditors had failed as referred to at paragraph 44 above;*
- (iv) Receivers were appointed to Original Pie Face;*
- (v) Original Pie Face was placed into liquidation; and*
- (vi) at the time that Receivers were appointed to Original Pie Face, it was estimated to owe unsecured creditors over \$50 million, as referred to at paragraph 48 above.*

291 At all material times and throughout the Relevant Period, Avi Silver was aware of the contents of the Franchise Agreement, Disclosure Document and the Operations Manual.

**Particulars**

*The knowledge arises by reason of his ultimate control of United Petroleum and the United Group as pleaded at paragraph 288 above.*

292 At all material times and throughout the Relevant Period, Avi Silver was aware that those documents made no reference to the Pie Face Franchise, the Pie Face Site Directions, the Pie Face Audits, the Pie Face Overheads, the Allocated Pie Face Stock, the Allocated Retail Stock, the Pie Face Wastage, or the Retail Stock Wastage.

**Particulars**

*The knowledge arises by reason of the matters pleaded at paragraph 291 above*

293 At all material times and throughout the Relevant Period, Avi Silver was responsible for negotiating the rebates from suppliers to the United Group, which rebates were received each time United Petroleum ordered (or supplied in the case of Pie Face Bakery) the Allocated Retail Stock and the Allocated Pie Face Stock.

**Particulars**

*The knowledge arises by reason of his ultimate control of United Petroleum and the United Group as pleaded at paragraph 288 above*

- 294 At all material times and throughout the Relevant Period, Avi Silver had access to information for Pie Face Sites that recorded the actual amount of Allocated Pie Face Stock being sold by individual Franchisees operating those sites.

**Particulars**

*By reason of his directorship of United Petroleum, Avi Silver had access to the information to which United Petroleum had access, including the "point of sale" system operated by all sites in the United Network, which system showed what stock was being sold by individual Franchisees in the United Network, including the Allocated Pie Face Stock.*

- 295 At all material times and throughout the Relevant Period, Avi Silver in a position to assess whether or not Franchisees operating Pie Face Sites could reasonably be expected to sell, and were selling, the Allocated Pie Face Stock.

**Particulars**

*The knowledge arises by reason of his ultimate control of United Petroleum and the United Group as pleaded at paragraph 288 above.*

- 296 At all material times and throughout the Relevant Period, Avi Silver had access to reports known as 'wastage reports' of individual Franchisees that recorded how much of the Allocated Pie Face Stock, and Allocated Retail Stock, was being disposed of as wastage.

**Particulars**

*By reason of his directorship of United Petroleum, Avi Silver had access to the information to which United Petroleum had access, which information included wastage reports of individual Franchisees.*

- 297 At all material times and throughout the Relevant Period, as well as prior to the acquisition of the Pie Face Franchise, Avi Silver had access to profit and loss statements for individual Franchisees.

**Particulars**

*By reason of his directorship of United Petroleum, Avi Silver had access to the information to which United Petroleum had access, which information included profit and loss statements for individual Franchisees.*

298 Avi Silver was aware of the Retail Stock Wastage, Pie Face Wastage, and the Pie Face Overheads that demonstrated the detrimental effect of the Allocated Retail Stock, the Allocated Pie Face Stock, and the Pie Face Franchise on the business of Franchisees.

**Particulars**

*The knowledge arises by reason of the matters pleaded in paragraphs 294 to 297 above.*

- 299 Despite the matters pleaded at paragraphs 290 to 298 above, throughout the Relevant Period, Avi Silver continued to:
- (a) cause United Petroleum to install the Pie Face Franchise into sites in the United Network;
  - (b) cause United Petroleum to maintain the Pie Face Franchise within sites in the United Network when new franchisees took over those sites, including when the previous Franchisee had been terminated for failure to comply with Pie Face Site Directions or a Pie Face Audit;
  - (c) cause United Petroleum to order Pie Face stock from Pie Face Suppliers, and retail stock from Retail Suppliers, or manufacture Pie Face stock through the Pie Face Bakery, and allocate it to Franchisees by means of the Allocated Retail Stock and the Allocated Pie Face Stock, in order to benefit the United Group through additional rebates from Retail Suppliers and Pie Face Suppliers, as well as additional sales through Pie Face Bakery;
  - (d) cause United Petroleum to require Franchisees to pay for the Allocated Pie Face Stock and Allocated General Stock (including short-dated Allocated Pie Face Stock and short-dated Allocated Retail Stock);
  - (e) cause United Petroleum to require Franchisees who operated Pie Face Sites to comply with the Pie Face Site Directions; and
  - (f) cause United Petroleum to undertake the Pie Face Audits, which would result in Franchisees having their Franchise Agreements terminated if they did not comply with the Pie Face Site Directions.
- 300 Avi Silver was aware that the following representations were made:
- (a) the Original Pie Face Profitable Franchise Representation; and/or
  - (b) the Future Pie Face Profitable Franchise Representation; and/or
  - (c) the Original Pie Face Market Demand Representation; and/or
  - (d) the Future Pie Face Market Demand Representation; and/or

- (e) the Pie Face Increased Profit Representation; and/or
- (f) the No Minimum Inventory Representation; and/or
- (g) the No Purchase Obligation Representation; and/or
- (h) the No Related Party Supplier Representation; and/or
- (i) the No Range Change Representation; and/or
- (j) the No Business Change Representation.

#### **Particulars**

*The knowledge arises by reason of the matters pleaded at paragraph 288 and 289 above.*

- 301 Avi Silver had actual knowledge (or wilful blindness towards) the facts that made the representations pleaded in paragraph 300 (individually or in any combination) misleading or deceptive, or likely to mislead or deceive.

#### **Particulars**

*The knowledge arises by reason of the matters pleaded at paragraph 288 and 289 above.*

- 302 By reason of the matters pleaded in paragraphs 288 to 301 above, Avi Silver was involved in the contraventions of United Petroleum pleaded at paragraphs 162 to 224 above within the meaning of section 2 of the ACL, and the Plaintiffs and Group Members are entitled to recover the amount of their loss or damage from Avi Silver pursuant to s 236 of the ACL.
- 303 By reason of the matters pleaded in paragraphs 288 to 298 above, Avi Silver had actual knowledge (or wilful blindness towards) the circumstances in paragraphs 266 to 281 above which made the conduct of United Petroleum pleaded at paragraphs 270 to 281 above unconscionable within the meaning of s 21 of the ACL.

#### **Particulars**

*The knowledge arises by reason of the matters pleaded at paragraph 288 and 289 above.*

- 304 By reason of the matters pleaded in paragraph 299 above, Avi Silver was involved in the contraventions of United Petroleum pleaded at paragraph 282 above within the meaning of section 2 of the ACL, and the Plaintiffs and Group Members are entitled to recover the amount of their loss or damage from Avi Silver pursuant to s 236 of the ACL.

#### **Q. Loss and Damage**

**Q.1. Loss and Damage – FNH and Mr Istanikzai**

305 By reason of the:

- (a) Short Form Oilcode Disclosure Omissions;
- (b) Contravening Representations;
- (c) Pie Face Unconscionable Conduct;
- (d) Franchise Agreement Breaches;
- (e) Franchising Code Breaches;

individually and/or together, FNH and Mr Istanikzai suffered loss and damage, being:

- (a) entry into the FNH Franchise Agreement as Franchisee and Guarantor respectively;
- (b) the FNH Upfront Costs;
- (c) the FNH Incidental Costs;
- (d) the FNH Takeover Costs;
- (e) the FNH Ongoing Costs;
- (f) the costs of the Retail Stock Wastage;
- (g) the costs of the Pie Face Course;
- (h) the costs of the Pie Face Wastage;
- (i) the costs associated with Pie Face Team Members;
- (j) the costs associated with the General Overheads; and
- (k) the costs associated with the Pie Face Overheads.

306 Mr Istanikzai's loss extends to:

- (a) loss of income; and
- (b) loss of superannuation arising from loss of earnings.

307 Mr Istanikzai's loss and damage includes non-economic loss within the meaning of s 87D of the CCA, including for:

- (a) pain and suffering;
- (b) anxiety; and
- (c) depression.

**Particulars**

*Particulars of Mr Istanikzai's non-economic loss will be provided in the Plaintiffs'*

*lay and expert evidence.*

**Q.2. Loss and Damage – the JJ Trustees**

308 By reason of the:

- (a) Short-Form Oilcode Disclosure Omissions;
- (b) Contravening Representations;
- (c) Franchise Agreement Breaches;
- (d) Pie Face Unconscionable Conduct;
- (e) Franchising Code Breaches;

individually and/or together, the JJ Trustees suffered loss and damage, being:

- (a) entry into the JJ Agreement;
- (b) the JJ Upfront Costs;
- (c) the JJ Incidental Costs;
- (d) the JJ Takeover Costs;
- (e) the JJ Ongoing Costs;
- (f) the costs of the Retail Stock Wastage;
- (g) the costs of the Pie Face Course;
- (h) the costs of the Pie Face Wastage;
- (i) the costs associated with Pie Face Team Members;
- (j) the costs associated with the General Overheads; and
- (k) the costs associated with the Pie Face Overheads.

**Q.3. Loss and Damage – Franchisees who had Pie Face Sites**

309 By reason of the:

- (a) Short-Form Oilcode Disclosure Omissions and/or Long Form Oilcode Disclosure Omissions;
- (b) Contravening Representations;
- (c) Franchise Agreement Breaches;
- (d) Franchise Code Breaches;
- (e) Pie Face Unconscionable Conduct;

individually and/or together, Franchisees who had Pie Face Sites suffered loss and



damage, being:

- (a) entry into their Franchise Agreements;
- (b) the Upfront Costs;
- (c) the Incidental Costs;
- (d) the Takeover Costs;
- (e) the Ongoing Costs;
- (f) the costs of the Retail Stock Wastage;
- (g) the costs of the Pie Face Course;
- (h) the costs of the Pie Face Wastage;
- (i) the costs associated with Pie Face Team Members;
- (j) the costs associated with the General Overheads; and
- (k) the costs associated with the Pie Face Overheads.

#### **Particulars**

*Further particulars of the loss and damage suffered by Franchisees who had Pie Face Sites will be provided following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when necessary for a determination.*

#### **Q.4. Loss and Damage – Franchisees who did not have Pie Face Sites**

310 By reason of the Allocated Retail Stock, Franchisees who did not have Pie Face Sites suffered loss and damage, being the Retail Stock Wastage.

#### **Particulars**

*Further particulars of the loss and damage suffered by the Franchisees who did not have Pie Face Sites will be provided following the determination of the Plaintiffs' claims and identified common issues at an initial trial and if and when necessary for a determination.*

#### **R. Common Questions**

311 The following common questions of fact or law arise in these proceedings.

##### **R.1. The Franchising Code**

312 Whether United Petroleum engaged in any of the Franchising Code Breaches.

##### **R.2. The Oilcode 2006 and Oilcode 2017**

313 Whether United Petroleum engaged in any of the Short Form Oilcode Disclosure Omissions.

314 Whether United Petroleum engaged in any of the Long Form Oilcode Disclosure Omissions.

**R.3. Misleading or deceptive conduct**

315 Whether United Petroleum made the Original Pie Face Profitable Franchise Representation.

316 Whether United Petroleum made the Future Pie Face Profitable Franchise Representation.

317 Whether United Petroleum made the Original Pie Face Market Demand Representation.

318 Whether United Petroleum made the Future Pie Face Market Demand Representation.

319 Whether United Petroleum made the Pie Face Increased Profit Representation.

320 Whether United Petroleum made the No Minimum Inventory Representation.

321 Whether United Petroleum made the No Purchase Obligation Representation.

322 Whether United Petroleum made the No Related Party Supplier Representation.

323 Whether United Petroleum made the No Range Change Representation.

324 Whether United Petroleum made the No Business Change Representation.

325 Whether any of these representations were made in trade or commerce.

326 Whether any of these representations were misleading or deceptive or likely to mislead or deceive.

327 Whether the making of any of these representations constitute a breach of section 18 of the ACL.

**R.4. Breach of Contract**

328 Whether United Petroleum owed any of the Franchisees an Additional Activities Obligation.

329 Whether United Petroleum breached its Additional Activities Obligation.

330 Whether United Petroleum owed any of the Franchisees a Duty of Cooperation.

331 Whether United Petroleum breached its Duty of Cooperation.

332 Whether United Petroleum owed any of the Franchisees a Duty of Good Faith.

333 Whether United Petroleum breached its Duty of Good Faith.

334 Whether United Petroleum engaged in any of the Franchise Agreement Breaches.

**R.5. Unconscionable conduct**

335 Whether United Petroleum engaged in the Pie Face Unconscionable Conduct.

**R.6. Restitution**

336 Whether Franchisees have a right to restitution from United Petroleum in respect of the Unauthorised Fines.

**R.7. Loss and Damage**

337 What are the categories or heads of loss and damage that a Group Member could be compensated for?

338 What are the categories or heads of loss and damage that a Guarantor could be compensated for?



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**Stewart Alan Levitt, Senior Partner**  
**Levitt Robinson Solicitors**

**Dated: 20 October 2022**

1. Place of trial—  
*(If no place of trial is specified, trial will be in Melbourne.)*
2. Mode of trial— *Judge of the Court sitting alone.*
3. This writ was filed for the Plaintiffs by T.F Grundy Lawyers of Level 1, 530 Little Collins Street, Melbourne Victoria 3000, as agent for Levitt Robinson Solicitors of Ground Floor, 162 Goulburn Street, Sydney NSW 2010.
4. The address of the First Plaintiff is—  
9 Charmouth Place  
Narre Warren, VIC 3805
5. The address of the Second Plaintiff is—  
9 Charmouth Place  
Narre Warren, VIC 3805
6. The address of the Third Plaintiff is—  
5 Coe Street  
Mernda VIC 3754
7. The address of the Fourth Plaintiff is—  
1 Gallagher Way  
Mernda VIC 3754
6. The address for service of the plaintiff is—  
The Victorian town agents for Levitt Robinson Solicitors  
T.F. Grundy Lawyers  
Level 1, 530 Little Collins Street  
MELBOURNE VIC 3000  
  
C/- Levitt Robinson Solicitors  
Ground Floor, 162 Goulburn Street  
Surry Hills NSW 2010
7. The email address for service of the Plaintiffs is—  
[slevitt@levittrobinson.com](mailto:slevitt@levittrobinson.com);  
[sdoherty@levittrobinson.com](mailto:sdoherty@levittrobinson.com);  
[moraha@levittrobinson.com](mailto:moraha@levittrobinson.com)
8. The address of the First Defendant is—  
600 Glenferrie Road  
Hawthorn, VIC 3122
9. The address of the Second Defendant is—  
59 Hopetoun Road  
Toorak, VIC 3142

**SCHEDULE OF PARTIES**

**BETWEEN**

**FNH UNITED PTY LTD (ACN 639 802 798)**

First Plaintiff

**FAHIM ISTANIKZAI**

Second Plaintiff

**JIGARKUMAR BHARATBHAI PATEL**

Third Plaintiff

**JAYDEEP DEVJIBHAI BHATTI**

Fourth Plaintiff

-and-

**UNITED PETROLEUM FRANCHISE PTY LTD  
(ACN 127 764 989)**

First Defendant

**AVI SILVER**

Second Defendant