



Determination

Applications for authorisation

lodged by

BP Australia Pty Ltd & Ors

in respect of

aspects of a proposed retail convenience,
shopper docket discount and
customer loyalty partnership between
BP, BP Resellers and Woolworths

Date: 14 December 2017

Authorisation numbers:
A91580, A91581, A91582

Commissioners:

Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Keogh

Summary

BP, Woolworths and BP Resellers (**the Applicants**) sought authorisation to implement certain provisions in agreements in order to offer fuel discounts and benefits to consumers under Woolworths' Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program.

This conduct forms part of a wider proposed commercial arrangement between BP and Woolworths, under which BP also proposes to acquire Woolworths' network of service stations.

Public benefits

Customers clearly value fuel-related discounts, so the ACCC considers that this conduct is capable of resulting in public benefits, particularly for price sensitive consumers who use shopper docket.

Woolworths currently offers shopper docket discounts at its network of service stations. If the Proposed Acquisition goes ahead, these sites will be retained as shopper docket redemption sites and BP intends to add further sites such that in total it is proposed that there would be approximately an additional 200 redemption sites.

The ACCC considers that this additional availability of redemption sites, with potentially greater uptake of the discounts, is a relevant public benefit which is likely to result from the Proposed Conduct. The expected greater uptake is reflected in the agreement between BP, BP Resellers and Woolworths to fund shopper docket discounts at a higher overall level than Woolworths has previously funded. The extent of this benefit is, however, uncertain as the ACCC considers that those consumers who most value the shopper docket discounts are likely to already use them, although they will have access to these discounts at a broader range of sites.

The Proposed Conduct is also likely to result in public benefits from increased opportunities for consumers to earn and redeem benefits under the Woolworths Rewards Loyalty Program and from transaction cost savings associated with implementation of the shopper docket scheme and loyalty program.

Potential for anti-competitive effect and public detriment

However, offering shopper docket fuel discounts or similar cents per litre fuel discounts under loyalty programs can also have an anti-competitive effect in some circumstances – particularly if the discounts offered are at a level that is unable to be matched by otherwise efficient fuel retailers.

Having a number of fuel retailers in a market is important in providing ongoing competition and keeping fuel prices at efficient levels. If efficient fuel retailers are unable to compete with large discount offers by the Applicants (particularly where such discounts are funded, at least in part, from Woolworths' non-fuel business), they may decide to no longer compete for price sensitive customers or may exit the industry altogether.

This may result in the Applicants facing less competition, and in these circumstances having the ability to reduce their discount offers and/or increase their fuel prices to the detriment of consumers.

In 2012 - 2013, during a period when large supermarket shopper docket fuel discounts were offered (ranging from 8 cents per litre up 40 cents per litre), the ACCC investigated whether such large discounts were anti-competitive and potentially in breach of the *Competition and Consumer Act 2010 (CCA)*. To address the ACCC's concerns, in 2013 Woolworths (and Coles) provided court enforceable undertakings under section 87B of the CCA to limit fuel discounts linked to supermarket purchases to a maximum of 4 cents per litre.

Conditional authorisation

The ACCC considers that while the Proposed Conduct is likely to result in public benefits, these benefits would be likely to be outweighed by detriments from reduced competition in fuel retailing over time if the parties make fuel discount offers in excess of 4 cents per litre or if Woolworths contributes in excess of 2 cents per litre to fund those discounts.

As a result, the ACCC has decided to grant authorisation to BP, Woolworths and BP Resellers to implement Woolworths' Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program at BP owned and operated service stations and certain BP Reseller service stations on condition that BP and Woolworths not offer fuel discounts under these arrangements that exceed 4 cents per litre in aggregate for a single fuel purchase, and that Woolworths' funding of any fuel discount offers does not exceed 2 cents per litre.

Length of authorisation

In respect of the aspects of the Proposed Conduct relating to 'Transitional Dealings' between BP and Woolworths (in the period following completion of the Proposed Acquisition during which some Woolworths sites may not have transferred to BP and in which Woolworths and BP may be considered competitors), the ACCC grants conditional authorisation until 31 January 2019.

The ACCC otherwise grants conditional authorisation to the Applicants in respect of the Proposed Conduct until 31 January 2028.

Separate assessment of Proposed Acquisition

The Proposed Conduct forms part of a wider proposed commercial arrangement between BP and Woolworths, under which BP seeks to acquire Woolworths' network of 531 retail service station sites, and 12 sites in development. The Proposed Conduct will only occur if BP's Proposed Acquisition of Woolworths' network of service stations is completed.

The ACCC commenced a separate informal merger review of the Proposed Acquisition on 15 March 2017. On 10 August 2017 the Commission released a Statement of Issues outlining the Commission's preliminary views on the Proposed Acquisition. On 14 December 2017 the ACCC announced that it intends to oppose the proposed acquisition. If the acquisition goes ahead (for example if the Federal Court permits it) the authorisation would allow participating BP service stations to participate in Woolworths Shopper Docket Discount Scheme and the Woolworths Rewards Loyalty Program, but only if they comply with the conditions of the authorisation.

The ACCC's assessment of the proposed rollout of Woolworths' Shopper Docket Discount Scheme and Loyalty Program was conducted separately to the assessment of the proposed acquisition. These two assessments have been undertaken separately because Woolworths and BP applied for authorisation of some aspects of the proposed transaction under one legal process and sought clearance for BP to acquire Woolworths' petrol stations under another. As required by the competition law, the

ACCC did not take into account any detriments or any benefits resulting from the proposed acquisition (if it were to proceed) as part of its assessment of the authorisation applications.

For more information about the merger review please see the [ACCC public register](#).

Defined terms

The Applicants – means collectively BP Australia Pty Ltd, Woolworths Limited and BP Resellers.

BP – means BP Australia Pty Ltd ACN 004 085 616 and its Related Bodies Corporate.

BP Commission Agent – means an agent of BP who operates a BP branded site on behalf of BP, but does not set the prices of fuel or non-fuel offerings.

BP COCO sites – means BP branded retail petrol sites owned and operated by BP Australia Pty Ltd.

BP Resellers – means the third party dealers, distributors, or other site operators who re-sell fuel under the BP brand. Privately Owned Site Agreements govern the terms between BP and BP Resellers for the operation of these sites. Of the 1,400 BP branded sites in Australia, 1,053 are operated by BP Resellers.

Commercial Alliance – means the long-term strategic partnership between BP and Woolworths incorporating the Metro@BP convenience partnership, the extension of the Woolworths Shopper Docket Discount Scheme to some BP branded sites and the extension of the Woolworths Rewards Loyalty Program to all BP branded sites.

In-store fuel offers – means fuel discounts tied to in-store purchases at BP's retail convenience stores.

Price Competitiveness Arrangements (PCA) – means agreements between BP and Woolworths which would operate for a period of time after commencement of the Commercial Alliance. These price competitiveness obligations constrain BP's price setting at former Woolworths sites, and those BP sites which are added to the Shopper Docket Discount Scheme. In effect, they seek to constrain the potential upper limits of BP's prices in certain circumstances.

Proposed Acquisition – means the proposed acquisition by B P Australia Pty Ltd of Woolworths' retail fuel business which, as at the date of this Determination, includes 531 Sites and at least 12 sites under development located throughout Australia.

Proposed Conduct – means the conduct for which the Applicants seek authorisation, namely certain aspects of the Commercial Alliance, being the implementation of the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program, and for Transitional Dealings.

Privately Owned Sites Agreements (BP Reseller Agreements) – means the agreements which govern BP's commercial relationships with BP Resellers. Privately Owned Sites Agreements are the agreements under which BP agrees to supply BP Resellers with fuel and other goods and services, and license BP Resellers to operate their sites under the BP brand.

Transitional Dealings – means dealings between BP and Woolworths that occur during a transitional period following completion of BP's Proposed Acquisition of Woolworths' network of retail service stations in which some Woolworths sites may not have transferred to BP and, as a result of which, Woolworths and BP may be considered competitors.

Woolworths – means Woolworths Limited ACN 000 014 675 and its Related Bodies Corporate.

Woolworths Shopper Docket Discount Scheme – means a scheme where shopper dockets from Woolworths' supermarkets and other retail outlets can be redeemed for discounts on BP fuel at certain BP COCO and BP Reseller sites.

Woolworths Rewards Loyalty Program - means a contract or arrangement (program) between Woolworths and its customers (members) which provides members with points, tokens, discounts or benefits of any kind as a result of members being members of the program or acquiring goods or services from specified suppliers (including Woolworths).

Applications for authorisation

1. On 28 April 2017, BP Australia Pty Ltd (**BP**), on behalf of itself, current and future resellers of BP fuel (**BP Resellers**), and Woolworths Limited (**Woolworths**), (together, the **Applicants**), lodged applications for authorisation¹ (A91580, A91581 and A91582) with the ACCC.
2. On 10 May 2017, the Applicants submitted revised forms and further information to clarify aspects of the application, and a supporting submission.
3. The Applicants seek authorisation to engage in conduct implementing certain aspects of a proposed retail convenience, shopper docket discount and customer loyalty partnership between BP, BP Resellers and Woolworths for a period of 10 years.
4. On 29 August 2017, the ACCC issued a draft determination proposing to grant conditional authorisation for 10 years, with the exception of aspects of the Proposed Conduct relating to 'Transitional Dealings', for which the ACCC proposed to grant conditional authorisation for a period of one year.
5. A conference was not requested following the draft determination.
6. To allow the Applicants more time to respond to the draft determination, on 18 October 2017 the ACCC decided to extend the statutory timeframe in which to make a final determination until 15 December 2017.

Proposed Conduct

7. The Applicants propose to enter into a commercial alliance involving Woolworths, BP owned and operated service stations (**BP COCO sites**) and BP Resellers (**Commercial Alliance**).
8. The Commercial Alliance will, relevantly, include:
 - a. a shopper docket discount scheme, in which shopper dockets from Woolworths' supermarkets and other retail outlets can be redeemed for discounts on BP fuel at certain BP COCO and BP Reseller sites (**Woolworths Shopper Docket Discount Scheme**)
 - b. a customer loyalty partnership, in which BP will join the Woolworths Rewards Loyalty Program, allowing customers to earn and redeem Woolworths Rewards points at BP COCO and participating BP Reseller sites (**Woolworths Rewards Loyalty Program**).²

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010 (the CCA)*. Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available on the ACCC's website in the *Guidelines for Authorisation of conduct (non-merger)*.

² BP & Ors, Submission to the ACCC, 10 May 2017, page 4.

9. The Applicants seek authorisation to implement the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program, and for Transitional Dealings (together, the **Proposed Conduct**). Specifically, authorisation is sought in relation to:
- a. the Woolworths Shopper Docket Discount Scheme, for arrangements between BP and BP Resellers concerning the fuel discounts to be allowed to consumers at BP Reseller sites, and third line forcing conduct in respect of the supply of goods or services to consumers or BP Resellers
 - b. the Woolworths Rewards Loyalty Program, for arrangements between BP and BP Resellers concerning the fuel discounts and other benefits to be allowed to consumers at participating BP Reseller sites, funding arrangements between Woolworths and BP in respect of loyalty program points earned or redeemed by members of the Woolworths Rewards Loyalty Program, and third line forcing conduct in respect of the supply of goods or services to consumers or BP Resellers
 - c. dealings between BP and Woolworths that occur during a transitional period following completion of BP's Proposed Acquisition of Woolworths' network of retail service stations in which some Woolworths sites may not have been transferred to BP and, as a result of which, Woolworths and BP will or may be competitors during this period.
10. Under the Proposed Conduct, BP will offer participation in the Woolworths Rewards Loyalty Program to all BP Resellers. However, BP will only offer participation in the Shopper Docket Discount Scheme to certain BP Resellers, which have not been identified to the ACCC.
11. The Applicants submit that BP's intentions in establishing the process to select which BP Resellers will become shopper docket redemption sites were to ensure that BP receives the benefit of the substantial funding it has contributed, while also ameliorating BP Reseller concerns by adopting a fair and transparent approach that avoids preferring BP COCO sites over BP Reseller sites where possible.³
12. Both the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program will be exclusive: the Commercial Alliance provides that BP and Woolworths will not enter into any other shopper docket discount scheme during the term of the Commercial Alliance, and relevant BP Resellers will not participate in any third party loyalty programs.⁴ As a result, BP COCO and BP Reseller sites that currently participate in the Virgin Australia Velocity Frequent Flyer Scheme loyalty partnership (**Velocity Program**) will be required to terminate that participation upon entering into the Woolworths Rewards Loyalty Program.
13. The parties propose that, for a period of time after commencement of the Commercial Alliance, former Woolworths sites and participating BP sites must meet certain fuel price competitiveness requirements (Price Competitive Arrangements) (**PCAs**). These PCAs impose restrictions on BP's price setting at

³ BP & Ors, Submission to the ACCC, 28 July 2017, page 11.

⁴ BP & Ors, Submission to the ACCC, 10 May 2017, pages 24 and 28.

certain sites that effectively set the potential upper limits of its prices in certain circumstances, but do not limit BP's discretion to discount prices.⁵

14. The Applicants submit that the Proposed Conduct is a necessary element of the proposed acquisition by BP of Woolworths' network of retail service stations in Australia (**Proposed Acquisition**) (see paragraph 27 for further discussion). The Proposed Acquisition is subject to an ACCC informal merger review, but is not part of the Proposed Conduct for which authorisation is sought.

The Applicants⁶

BP Australia

15. BP is a refiner-marketer of petrol, diesel and automotive liquid petroleum gas (**LPG**) (referred to collectively as fuel or fuels). BP's business includes:
 - the retail supply of fuel through a network of approximately 347 BP branded sites that are owned or leased by BP or a related company and operated by BP (of which, 316 are BP COCO sites and 31 are 'Commission Agent' sites)
 - the wholesale supply of fuel and lubricants to approximately 1,053 independently-owned and operated sites which resell fuel under the BP brand (BP Reseller sites).⁷

BP Resellers

16. BP Resellers are third party dealers, distributors, or other site operators who re-sell fuel under the BP brand. The Applicants submit that BP Resellers conduct their business independently of BP and, in particular, retail absolute discretion over their retail fuel pricing.⁸
17. The commercial relationships between BP and BP Resellers are governed by Privately Owned Sites Agreements or similar agreements (**BP Reseller Agreements**) under which BP agrees to supply BP Resellers with fuels and other goods and services.⁹

Woolworths

18. Woolworths' primary business is in food, liquor and general merchandise retailing. Among its businesses, Woolworths operates Woolworths-branded supermarkets and smaller-format grocery stores branded 'Woolworths Metro'.¹⁰
19. Woolworths' retail fuel business currently operates 531 service station sites throughout Australia in a co-branded alliance with Caltex Australia Petroleum Pty Ltd (**Caltex**). Woolworths' partnership with Caltex is both as a wholesale fuel

⁵ BP & Ors, Submission to the ACCC, 10 May 2017, page 24.

⁶ Information in this section is derived from BP & Ors, Submissions to the ACCC dated 10 May 2017, pages 2-24.

⁷ BP & Ors, Submission to the ACCC, 10 May 2017, page 6.

⁸ BP & Ors, Submission to the ACCC, 10 May 2017, page 7.

⁹ BP & Ors, Submission to the ACCC, 10 May 2017, page 7.

¹⁰ BP & Ors, Submission to the ACCC, 10 May 2017, page 7.

customer and as an alliance partner in the redemption of shopper docket fuel discounts. However, in the event of BP's Proposed Acquisition of Woolworths retail fuel sites, Woolworths will exit fuel retailing in Australia.¹¹

20. Woolworths also operates the Woolworths Rewards Loyalty Program, which allows members to earn points through qualifying purchases at Woolworths supermarkets, BWS stores, Woolworths retail fuel sites and via the Woolworths online shopping platform, and then redeem those points in exchange for various benefits. Woolworths Rewards Loyalty Program does not currently operate in Tasmania.¹²

Background

The fuel industry

21. The fuel industry in Australia comprises three broad functional levels: the refining of crude oil or importation of refined fuel products; the wholesale of refined fuel to retailers; and the retail of fuel to consumers.
22. Retail service stations operate under a variety of competing brands, including those of vertically integrated wholesalers. In addition to the Applicants' service stations, fuel retailers in Australia include:
 - a. *Caltex* – The Caltex-branded network comprises approximately 1 450 sites, which are a mix of sites owned and operated by Caltex Australia, and others which are owned and operated by independent retailers who re-sell fuel under the Caltex brand.
 - b. *Coles Express/Shell* – The Coles Express/Shell network comprises approximately 700 sites supplied exclusively by Viva Energy under the Shell brand. The service station sites are generally leased by Coles Express (a subsidiary of Wesfarmers) from Viva Energy.
 - c. *7-Eleven* – A network of approximately 460 corporate and franchised service stations supplying Mobil fuel.
 - d. *United* – A network of approximately 400 United-branded franchisee or commission agent sites.
 - e. *Puma* – A network of approximately 330 service stations under the Puma, Gull, Neumann, Choice, Matilda, and Peak brands.
 - f. *Metro* – A network of approximately 120 service stations, mainly centred in Sydney and regional NSW.
 - g. *Liberty* – A network of approximately 60 service stations, mainly centred in Victoria and NSW.¹³

¹¹ BP & Ors, Submission to the ACCC, 10 May 2017, page 9.

¹² BP & Ors, Submission to the ACCC, 10 May 2017, page 10.

¹³ Information in this section is derived from BP & Ors, Submissions to the ACCC dated 10 May 2017, pages 14-16.

23. Based on ACCC monitoring, the supermarket operated sites (Coles and Woolworths) comprise around a third of Australian retail petrol sales volumes. Since the early 2000s, supermarket operated sites have gained market share of sales volumes at the expense of refiner-wholesalers. The share of large independent chains has grown marginally, apart from a sharp increase in 2010-11 when 7-Eleven and Peregrine acquired Mobil's company-owned sites.¹⁴
24. In terms of refiner-wholesalers, BP, Caltex, Mobil, and Viva Energy (formerly Shell) dominate the refining and wholesaling functional levels in Australia. These refiner-wholesalers supply fuel that has been refined in domestic refineries, bought from other refiner-wholesalers, or imported.
25. Other wholesalers, which include Puma Energy, United, and Liberty, do not refine their own fuel, but purchase it from the Australian refiner-wholesalers or import it directly from overseas refineries, and then supply it to their own branded retailers or other independent retailers.
26. The general industry trend in the past 10 years has been for a reduction in domestic refining and an associated increase in imported fuel refined in Asia.¹⁵

Other aspects of the transaction

27. Through the Proposed Acquisition, BP would acquire Woolworths' 531 service stations and would become the exclusive wholesale fuel supplier to those service stations and Woolworths' existing fuel supply arrangement with Caltex would cease.
28. The Proposed Acquisition is the subject of separate consideration by the ACCC under section 50 of the CCA, and does not form part of the ACCC's consideration of these applications for authorisation of the Proposed Conduct. The proposed Commercial Alliance, including the Proposed Conduct, is a component of the overall transaction and will not be implemented unless the Proposed Acquisition takes place.
29. Under the Commercial Alliance, in addition to the Proposed Conduct, BP proposes to roll out a co-branded retail convenience store offering known as 'Metro @BP'.¹⁶ Authorisation is not sought for implementation of the Commercial Alliance as a whole, or for any aspect of the *Metro @BP* convenience offering.¹⁷

Shopper docket discount schemes and loyalty programs

30. Shopper docket discount schemes and loyalty programs have been part of the retail fuel sector for over 20 and 10 years respectively. The Proposed Conduct does not introduce a new type of commercial arrangement, but instead would have the effect of including BP and certain BP Resellers as parties to Woolworths' existing Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program.

¹⁴ ACCC *Statement of Issues, BP - Proposed acquisition of Woolworths' network of retail service station sites*, 10 August 2017, pages 7-8.

¹⁵ ACCC *Monitoring of the Australian petroleum industry. Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia*. December 2014, page 17.

¹⁶ BP & Ors, Submission to the ACCC, 10 May 2017, page 12.

¹⁷ BP & Ors, Submission to the ACCC, 10 May 2017, page 4.

Shopper dockets

31. Woolworths first introduced its Shopper Docket Discount Scheme in 1996, when it opened its first service station. In 2004, Woolworths extended the scheme to certain Caltex stores, which became co-branded sites with Woolworths.¹⁸ Currently, Woolworths service stations and participating co-branded Caltex service stations offer a discount of 4 cents per litre upon redemption of a Woolworths supermarket receipt totalling \$30 or more, and an additional 4 cents per litre discount when \$5 or more is spent in-store at the service station. If the Proposed Acquisition proceeds and the Commercial Alliance is implemented, Woolworths' co-branded relationship with Caltex will cease, and Woolworths shopper dockets will not be redeemable at any Caltex service stations under an agreement with Woolworths.
32. Coles (and BI-LO), IGA, and Drakes supermarkets also offer shopper dockets providing customers discounts on fuel purchases at various fuel retailers throughout Australia. These schemes range from:
 - a. structures similar to Woolworths' Shopper Docket Discount Scheme - for example Coles supermarkets' 4 cents per litre shopper docket discount offer redeemable at Coles Express service stations (or United service stations in the Northern Territory) for supermarket purchases of \$30 or more; and
 - b. reverse structures in which shoppers receive a discount on their supermarket purchases at over 500 participating IGA supermarkets in NSW, Queensland, South Australia and Victoria upon presentation of a fuel receipt from any service station, with the discount equivalent to 4 cents per litre.¹⁹
33. There are also shopper docket schemes offered by independent fuel retailers: for example, certain Liberty sites offer a 4 cents per litre discount on fuel purchases to customers producing a Woolworths or Coles receipt showing a supermarket purchase of more than \$30.²⁰

Loyalty programs

34. Loyalty programs have likewise been a longstanding feature of retail markets in Australia, and the Applicants submit that approximately 90% of Australian fuel consumers are members of at least one loyalty program.²¹ Loyalty programs enable members to earn points for shopping at retailers participating in the program, and then redeem those points for in store discounts or other products or benefits (for example conversion to Qantas Frequent Flyer points). The Woolworths Rewards Loyalty Program (which does not operate in Tasmania) awards points to members for purchases made at Woolworths supermarkets, BWS stores, Woolworths fuel sites and via the Woolworths online shopping platform. Woolworths Rewards Loyalty Program currently has over 9 million members.²²

¹⁸ BP & Ors, Submission to the ACCC, 10 May 2017, page 9.

¹⁹ BP & Ors, Submission to the ACCC, 10 May 2017, pages 17-18.

²⁰ BP & Ors, Submission to the ACCC, 10 May 2017, pages 17-18.

²¹ BP & Ors, Submission to the ACCC, 10 May 2017, page 19.

²² BP & Ors, Submission to the ACCC, 10 May 2017, page 10.

35. Other large loyalty programs in Australia include:²³
- a. Flybuys, operated by Wesfarmers, which awards points to members for purchases made at Coles supermarkets, Coles Express fuel sites, Target, K-Mart, Liquorland, AGL, OPSM and Medibank. Flybuys currently has over 10 million members.
 - b. MYER One, operated by Myer, which awards points to members for purchases made at Myer and partner retail outlets including Caltex, Ritchie's IGA, Hertz, Swissotel, Air New Zealand and Wilson Parking. MYER One currently has over 5 million members.
 - c. Altitude Rewards, operated by Westpac, which awards points to members for purchases using Westpac-issued Altitude credit cards, and bonus points for purchases made from program partners. Altitude Rewards points can be converted to frequent flyer points for use on the loyalty programs of Qantas, Virgin Australia, Malaysia Airlines, Air New Zealand, Singapore Airlines, and Cathay Pacific.
36. Smaller loyalty programs include MyIGA, Priceline Sister Club, David Jones American Express Card, ANZ Rewards, Commbank Rewards, and NAB Rewards.²⁴
37. Major fuel retailers have partnerships with loyalty programs, including the following:²⁵
- a. Caltex, which has partnerships with MYER One and Altitude Rewards
 - b. Woolworths fuel sites, which have partnerships with Woolworths Rewards and Qantas Frequent Flyer
 - c. Coles Express / Shell, which have a partnership with Flybuys
 - d. BP, which has a partnership with the Velocity Program
 - e. Puma, which has a partnership with Puma Local Rewards
 - f. United, which has a partnership with United Club Rewards.
38. The ACCC has previously considered loyalty programs and shopper dockets in relation to retail fuel. Most relevantly, on 18 August 2015, the ACCC made a determination granting authorisation to BP and participating BP Resellers to collectively participate in the Velocity Program, and to BP allowing it to require BP Resellers to participate in the Velocity Program as a condition of the reseller agreements (**BP Velocity Authorisation**).²⁶

Woolworths' shopper docket undertaking

39. In 2013, the ACCC accepted a court enforceable undertaking from Woolworths with respect to its shopper docket arrangements (**Woolworths Undertaking**).

²³ BP & Ors, Submission to the ACCC, 10 May 2017, pages 19-20.

²⁴ BP & Ors, Submission to the ACCC, 10 May 2017, page 22.

²⁵ BP & Ors, Submission to the ACCC, 10 May 2017, page 23.

²⁶ Authorisations A91485 – A91487, available on the ACCC's public register: <http://registers.accc.gov.au/content/index.phtml/itemId/6031>

The Woolworths Undertaking was offered voluntarily in order to address the ACCC's concerns about competition effects of shopper docket discounts due to their size and the way in which Woolworths funded the discounts. Under the Woolworths Undertaking:

- a. discounts for fuel purchased at Woolworths service stations are capped at 4 cents per litre when redeeming shopper dockets earned outside Woolworths' fuel division
 - b. the discount provided by the redemption of shopper dockets must be funded wholly from Woolworths' fuel division.
40. The terms of the Woolworths Undertaking allow Woolworths, at any time from December 2018, to give one month's notice of its intention to withdraw the Undertaking.
41. If the Proposed Acquisition occurs, Woolworths will no longer have a fuel division. Therefore any Woolworths contribution to the funding of the proposed Shopper Docket Discount Scheme must necessarily be sourced from outside its fuel division. In light of this, Woolworths has proposed to vary its Undertaking to reflect the changed circumstances that will exist after BP completes its Proposed Acquisition of the Woolworths' sites. Woolworths has proposed that the varied Undertaking will continue to cap discounts contingent upon non-petrol station sales at 4 cents per litre (subject to the same exceptions set out in the existing Woolworths Undertaking).²⁷
42. The Applicants submit that their intention is to have the Shopper Docket Discount Scheme remain at a discount of 4 cents per litre for redemption of a Woolworths supermarket receipt.²⁸ The Shopper Docket Discount Scheme would be jointly funded by Woolworths and BP.²⁹

Consultation

43. The ACCC tests the claims made by applicants in support of applications for authorisation through an open and transparent public consultation process.
44. Upon receiving the application, the ACCC invited submissions from a range of potentially interested parties including major competitors, customers, and relevant industry associations.³⁰
45. Prior to the draft determination, the ACCC received 10 public submissions and one confidential submission from interested parties, and one submission from the Applicants.
46. Following the draft determination, the ACCC received seven public submissions and three confidential submissions from interested parties, and three public submissions and one confidential submission from the Applicants.

²⁷ BP & Ors, Submission to the ACCC, 28 July 2017, page 7.

²⁸ BP & Ors, Submission to the ACCC, 10 May 2017, page 24.

²⁹ BP & Ors, Submission to the ACCC, 10 May 2017, page 24.

³⁰ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

47. Submissions from interested parties generally focussed on concerns:
- a. that the Woolworths Undertaking would not be extended to former Woolworths retail fuel sites following the Proposed Acquisition or that, if the Woolworths Undertaking were extended, it would be on new terms, including because it could no longer quarantine Woolworths' funding of the Shopper Docket Discount Scheme to Woolworths' fuel business. Generally, interested parties have asked the ACCC to require shopper docket discounts to remain capped at 4 cents per litre, due to concerns that any removal of the 4 cents per litre fuel discount cap is likely to distort the fuel retail market
 - b. that, if participation in Woolworths Shopper Docket Discount Scheme is not offered to all BP Resellers, this could substantially impact the ability of excluded BP Resellers to compete with BP COCO sites and BP Resellers who are participants in the Scheme³¹
 - c. that the Metro@BP concept will enhance Woolworths' ability to leverage its power in grocery markets into convenience store offerings
 - d. about the potential for large Woolworths Rewards Loyalty Program offers to distort or lessen the intensity of competition in retail fuel markets
 - e. about the potential for offers by BP of additional fuel discounts based on 'in-store' purchases (**in-store fuel offers**) to be anti-competitive, particularly if such discounts are funded in whole or in part by Woolworths.
48. Submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the applications for authorisation.

ACCC assessment

49. On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to these applications, notwithstanding that they were lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under former subsections 88(1A), 88(1) and 88(8) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.
50. Pursuant to subsections 90(7) and 90(8), the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a benefit to the public and that benefit would outweigh the detriment to the public that would result or be likely to result from the conduct.³²

³¹ Interested parties also raised concerns that the Woolworths Rewards Loyalty Program may not be offered to all BP Resellers; however the Applicants have now confirmed that the Woolworths Rewards Loyalty Program will be offered to all BP Resellers.

³² As a cartel provision applies to the Proposed Conduct, the test under subsection 90(7)(a) does not apply: section 90(8).

Relevant areas of competition

51. BP submits that it is unnecessary for the ACCC to precisely define the relevant markets for the purposes of assessing the applications. However, BP submits that the ACCC should have regard to the impact of the Proposed Conduct on competition for:
- the supply of fuels, convenience store products and ancillary services in retail fuel markets
 - the supply or acquisition of loyalty program services.³³
52. Past notifications made to the ACCC concerning shopper dockets,³⁴ and the ACCC's review of shopper docket notifications in 2004,³⁵ focussed on the markets for the supply of petroleum products and grocery products at wholesale and consumer retail levels.
53. In the BP Velocity Authorisation, the ACCC considered the relevant conduct in relation to loyalty program services and to the retail supply of fuel.³⁶
54. In terms of the product dimension, three types of fuel products are commonly sold at retail service stations in Australia: petrol (including regular unleaded, premium unleaded and ethanol blends), diesel and LPG.
55. The ACCC does not consider it necessary to form a definitive view as to whether there are separate markets for these fuel types, or whether they should be considered a single market. For simplicity, the ACCC is considering the effect of the Proposed Conduct on competition in the retail supply of petrol.
56. In terms of the geographic market, while the ACCC acknowledges that fuel and grocery products are purchased by consumers at a local level, the ACCC does not consider that it is necessary to assess the Proposed Conduct with regard to any particular local or metropolitan market.
57. In this instance, the ACCC considers that the relevant areas of competition for assessing the Proposed Conduct include the:
- retail supply of fuel (petrol, diesel and LPG)
 - supply and/or acquisition of convenience groceries
 - supply and/or acquisition of loyalty program services.
58. The ACCC considers precise identification of the relevant areas of competition is not required for the purpose of assessing the applications for authorisation. The ACCC can consider the areas of competition in a broad sense when assessing the public benefits and detriments that would likely result from the Proposed Conduct.

³³ BP & Ors, Submission to the ACCC, 10 May 2017, page 32.

³⁴ See notifications N90959; N90960; N31734; N97368 available on the ACCC's Authorisations and Notifications Public Register: <http://registers.accc.gov.au/content/index.phtml/itemId/6031>.

³⁵ ACCC, Assessing shopper docket petrol discounts in the petrol and grocery sectors, 4 February 2004.

³⁶ Authorisations A91485 – A91487, available on the ACCC's public register: <http://registers.accc.gov.au/content/index.phtml/itemId/6031>.

Future with and without the Proposed Conduct

59. To assist in its assessment of the benefits and detriments likely to result from the Proposed Conduct, the ACCC compares the benefits and detriments likely to arise in the future *with* the conduct for which authorisation is sought (the Proposed Conduct) against those in the future *without* that conduct.

Applicants' submissions³⁷

60. BP submits that it has not formed a concluded view on the appropriate future without the conduct (i.e. what the Applicants would do if they were unable to engage in the Proposed Conduct). However, BP submits that it is not likely that the parties would simply abandon aspects of the Proposed Acquisition or Commercial Alliance if authorisation is not obtained.
61. The Applicants submit that if authorisation is not granted, they may enter into slightly modified terms so as to allow the parties' commercial objectives to be realised without the need for authorisation (because the modified terms would not breach the CCA). In doing so, BP considers that the Applicants would be likely to seek to implement modified business structures that more clearly rely on exceptions to the relevant prohibitions in the CCA (such as the exemptions which apply to certain forms of joint ventures, exclusive dealing and collective acquisitions) and agency arrangements.
62. The Applicants submit that it is appropriate for the ACCC to assess the applications for authorisation on the basis that both the future with and without the Proposed Conduct involve BP acquiring Woolworths sites and, accordingly, that the benefits and detriments arising from the Proposed Acquisition do not flow from the Proposed Conduct to be authorised.
63. The Applicants submit that, in any event, they consider it is not necessary for the ACCC to reach a conclusion on the appropriate future without the Proposed Conduct. This is because they consider that the Proposed Conduct will not result in any material public detriment that would need to be weighed against the likely future without the Proposed Conduct.

ACCC view

64. The ACCC considers that it is necessary to form a view on the likely future without the Proposed Conduct in order to assess the likely benefits and detriments. Identification of the likely future with and without the Proposed Conduct provides a basis for comparison to enable assessment of relevant benefits and detriments. The ACCC notes that both ACCC merger clearance and authorisation for the Proposed Conduct are conditions precedent to the Proposed Acquisition, which means that, under the Business Sale Agreement, the Proposed Conduct cannot proceed without the Proposed Acquisition, and vice versa.
65. While it is possible for the conditions precedent to be waived or the terms of the Business Sale Agreement to be amended, the ACCC considers that the appropriate future without the Proposed Conduct is one in which the Proposed Acquisition has not been completed.

³⁷ Information in this section is derived from BP & Ors, Submissions to the ACCC dated 10 May 2017 (page 33) and 28 July 2017 (page 6).

66. The ACCC considers that it is likely that Woolworths would continue to offer shopper docket discounts at its retail petrol sites, but that it is not certain that it would offer redemption at Caltex (or any other fuel retailer's) sites.
67. Similarly, the ACCC considers that in the short term it is likely that BP would not offer a loyalty program (including Velocity), other than its own loyalty program, at BP COCO and Commission Agent sites. The ACCC also considers it is likely that BP would not offer shopper docket redemption at its COCO and Commission Agent sites.
68. The ACCC considers that in the likely future without the Proposed Conduct, BP Resellers would preserve their current ability to offer shopper docket redemption and participation in loyalty programs with a range of commercial partners.
69. The ACCC has assessed the likely benefits and detriments of the Proposed Conduct against this likely future without the Proposed Conduct. This does not include any likely benefits or detriments of the Proposed Acquisition.

Public benefits

70. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the approach of the Australian Competition Tribunal, which has stated that the term 'benefit to the public' should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.³⁸

71. Having regard to the information available, including submissions of the Applicants and interested parties, the ACCC has considered whether the Proposed Conduct is likely to result in the following potential public benefits:
 - increased aggregate fuel discounts under the Shopper Docket Discount Scheme
 - increased aggregate fuel discounts, and additional opportunities to earn and redeem points, under the Woolworths Rewards Loyalty Program
 - enhancements to competition in retail fuel markets
 - more consistent consumer offerings
 - transaction cost savings
 - fuel prices being lower due to the Price Competitiveness Arrangements.

³⁸ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

Increased aggregate fuel discounts under the Shopper Docket Discount Scheme

Applicants' submissions

72. Under the Proposed Conduct, the Shopper Docket Discount Scheme will be withdrawn from Caltex branded sites that currently participate, retained at the 531 Woolworths sites to be acquired by BP, and extended to a number of BP and BP Reseller sites. Because more BP and BP Reseller sites will participate than the current number of Caltex sites that participate, the Applicants submit that the Proposed Conduct will result in a net increase of approximately 200 sites participating in the Shopper Docket Discount Scheme.³⁹
73. The Applicants also submit that the net increase in the size and geographic scope of the Shopper Docket Discount Scheme will inevitably result in an increase in the aggregate level of discounts delivered to consumers. However, they note that the total value of the discounts delivered to consumers through the extended Shopper Docket Discount Scheme will ultimately depend on BP's and BP Resellers' success in attracting new consumers to their respective sites, and the competitive responses of their competitors.⁴⁰ As an indication of the expected increase in Shopper Docket availability, the Applicants submit that joint funding of the shopper dockets with the Proposed Conduct will increase from the amount currently funded by Woolworths for the financial year ending 30 June 2016.⁴¹
74. The Applicants submit that the draft determination significantly understated the public benefits that will flow from the proposed expansion of the Shopper Docket Discount Scheme, particularly in relation to the increase in aggregate discounts delivered to consumers under the expanded Scheme. The Applicants submit that there is a high degree of certainty that aggregate discounts will substantially increase under the proposed expansion of the Shopper Docket Discount Scheme.⁴²
75. The Applicants submit that while pre-discount retail fuel price levels are relevant, retail fuel purchasing behaviours are influenced by a wide variety of price and non-price factors: two retail sites with differing retail price levels may not be comparable due to non-price factors that customers value in addition to price, such as location, convenience, and site facilities and amenity. Accordingly, the Applicants submit that it should not be assumed that a consumer obtaining a given level of shopper docket discount from a relatively high-priced fuel retailer does not receive a commensurate benefit to a consumer obtaining the same level of shopper docket discount from a relatively low-priced fuel retailer.⁴³
76. The Applicants also submit that Woolworths has no ability to increase supermarket prices to fund or recoup its funding of fuel discounts. The Applicants submit that there is no evidence that fuel discounts under the Shopper Docket Discount Scheme are funded by higher prices charged to fuel customers who do not use shopper dockets. In any event, if this were established, the Applicants submit that would not materially detract from the public benefits arising from an

³⁹ BP & Ors, Submission to the ACCC, 10 May 2017, page 34.

⁴⁰ BP & Ors, Submission to the ACCC, 10 May 2017, page 35.

⁴¹ BP & Ors, Submission to the ACCC, 28 July 2017, page 9.

⁴² BP & Ors, Submission to the ACCC, 30 October 2017, page 4.

⁴³ BP & Ors, Submission to the ACCC, 30 October 2017, page 6.

increase in aggregate fuel discounts provided under the expanded Shopper Docket Discount Scheme.⁴⁴

ACCC view

77. The ACCC recognises the value that many consumers place on the availability and use of shopper docket discounts to obtain a discount on retail petrol. Woolworths introduced its Shopper Docket Discount Scheme in 1996, and since then Coles and independent supermarkets such as IGA have responded to the consumer demand by offering their own schemes.
78. The ACCC considers that it is unclear to what extent the expansion of the Shopper Docket Discount Scheme will increase the aggregate discounts delivered to consumers. Previous studies by the ACCC in retail fuel markets have shown that particular consumers are more likely than others to use shopper docket discounts. That is to say, the ACCC understands that a particular subset of the market tends to purchase fuel where they can redeem shopper docket discounts, but the remainder tend not to.⁴⁵ Accordingly it is unclear to what extent the expansion of the Shopper Docket Discount Scheme will result in increased aggregate discounts, as a large proportion of the subset of consumers who most value these discounts are likely to already use them.
79. However, the ACCC considers that at least some increase in consumer ability to access discounts under the Proposed Conduct is likely as a result of the expanded network and consequently improved geographic spread of sites offering shopper docket discounts. In particular, it is likely that some consumers who have not previously been regular users of shopper docket discounts may be more inclined to take them up because of the higher profile and wider spread of the expanded network, while consumers who already regularly use the docket discounts will (on average) have reduced search and travel costs to find a participating fuel retailer.
80. The ACCC notes that the Applicants expect there to be greater uptake and this is reflected in provision for increased levels of funding of the Shopper Docket Discount Scheme compared to previous levels.⁴⁶
81. The ACCC considers that this likely greater uptake of discounts and the reduction in search costs for consumers who already redeem shopper docket discounts is a public benefit. However, the extent of this benefit is uncertain as the ACCC considers that those consumers who most value fuel discounts are likely to already use them, although they will have access to these discounts at a broader range of sites.
82. The ACCC recognises the importance of the pre-discount price level, as this will impact the extent of the benefit to consumers, and may influence the level of uptake of the shopper docket discounts. For example, shopper docket discounts at a low priced retailer would result in a lower ultimate price paid, and hence provide greater benefits than similar shopper docket discounts at a higher priced retailer. Therefore an increase in the availability of shopper docket discounts alone may not necessarily lead to large consumer benefits.

⁴⁴ BP & Ors, Submission to the ACCC, 30 October 2017, page 6.

⁴⁵ ACCC, *Petrol prices and Australian consumers: Report of the ACCC inquiry into the price of unleaded petrol* December 2007, at 12.4.1

⁴⁶ BP & Ors, Submission to the ACCC, 28 July 2017, page 9.

Increased aggregate fuel discounts, and opportunities to earn and redeem points under the Woolworths Rewards Loyalty Program

Applicants' submissions

83. As part of the Proposed Conduct, members of the Woolworths Rewards Loyalty Program will be able to earn points through purchases made at participating BP branded petrol stations. These points may be redeemed for discounts and other benefits, including on fuel, at the Applicants' retail sites and from other merchants who participate in the Woolworths Rewards Loyalty Program.
84. In addition, the Woolworths Rewards Loyalty Program will be withdrawn from the Caltex branded sites that currently make the Woolworths Rewards Loyalty Program available, retained at the 531 Woolworths sites to be acquired by BP, extended to all 316 BP owned and operated sites, and extended to as many BP Reseller sites as possible.⁴⁷ All BP Resellers will be offered access to the Woolworths Rewards Loyalty Program; however participation will not be mandatory under current Privately Owned Sites Agreements. BP reserves the right to make participation in the Loyalty Program mandatory when Privately Owned Sites Agreements are renegotiated.⁴⁸ The Applicants submit that the result of the Proposed Conduct will be a substantial expansion in the number of fuel sites participating in the Woolworths Rewards Loyalty Program.
85. BP also intends to allow the redemption of Woolworths Rewards points in return for fuel discounts. Currently, Woolworths Rewards points cannot be redeemed at the point of sale at Woolworths' fuel sites. Under the Proposed Conduct, consumers will benefit from automatic redemptions at a rate of \$10 discount per 2,000 points.⁴⁹
86. The Applicants submit that the expansion of the Woolworths Rewards Loyalty Program will result in public benefit because the expanded Woolworths Rewards Loyalty Program network will provide consumers with significantly increased opportunities to earn and redeem Program points, including under various promotional offers to be developed and implemented on an ad hoc basis.⁵⁰

ACCC view

87. The ACCC considers that the expanded Woolworths Rewards Loyalty network will provide consumers with increased opportunities to earn and redeem points, and will provide consumers with access to various promotional offers to be developed and implemented on an ad hoc basis by participating sites.
88. The ACCC considers that, to the extent consumers value the ability to earn and redeem Woolworths Rewards points and access various promotional offers, the expansion of the Woolworths Rewards Loyalty Program is likely to result in public benefit.

⁴⁷ BP & Ors, Submission to the ACCC, 10 May 2017, page 35.

⁴⁸ BP & Ors, Submission to the ACCC, 10 May 2017, page 26.

⁴⁹ BP & Ors, Submission to the ACCC, 10 May 2017, page 36.

⁵⁰ BP & Ors, Submission to the ACCC, 10 May 2017, page 36.

Enhanced competition between fuel retailers

Applicants' submissions

89. The Applicants submit that the Proposed Conduct will enhance competition in retail fuel markets by improving the competitiveness of participating BP branded sites.⁵¹ In particular, the Applicants submit that the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program are highly valued by consumers.⁵²
90. The Applicants also submit that through the participation of some BP Resellers in the Shopper Docket Discount Scheme and the Woolworths Rewards Loyalty Program, the Proposed Conduct will enhance the competitiveness of independently-operated BP sites.⁵³

ACCC view

91. To the extent the ability to redeem shopper docket discounts and to earn and redeem Woolworths Rewards Loyalty points on BP fuel purchases would elicit competitive responses from other fuel retailers, the ACCC considers this to be a public benefit. The ACCC considers that the Proposed Conduct is more likely to result in competitive responses from other fuel retailers if those fuel retailers are able to find commercial partners that enable them to match all or a significant part of the discount offers to be made under the Proposed Conduct.
92. The ACCC notes a number of fuel retailers have already introduced discount schemes in response to shopper dockets offered by Woolworths and Coles, such as arrangements with smaller or independent supermarkets. While the ACCC considers it is possible that there would be some additional offers made by competing fuel retailers in response to the expansion of the Woolworths Shopper Docket Discount Scheme, the additional benefit is not likely to be significant.
93. Further, as the ACCC has found in previous investigations, there is scope for shopper docket fuel discounts to have the effect of increasing pre-discount pump prices. Shopper docket fuel discounts are likely to be attractive to 'price-sensitive' consumers. If shopper dockets result in a significant proportion of these consumers being 'out of the reach' of other fuel retailers, the incentives of these fuel retailers to discount their pump prices may be reduced. This can cause higher pre-discount pump prices across retail fuel markets. As a result, the effect of shopper dockets on retail fuel competition and pre-discount pump prices is uncertain.
94. As a result, the ACCC does not consider that there is likely to be a significant benefit arising from the Proposed Conduct in the form of improved price competition in fuel retailing.

⁵¹ BP & Ors, Submission to the ACCC, 10 May 2017, page 36.

⁵² BP & Ors, Submission to the ACCC, 10 May 2017, page 36.

⁵³ BP & Ors, Submission to the ACCC, 10 May 2017, page 36.

More consistent consumer offerings

Applicants' submissions

95. The Applicants submit that BP is committed to extending the Woolworths Rewards Loyalty Program to as many BP Reseller sites as possible, and that it will be open to all BP Resellers to opt-in to the Loyalty Program. BP is optimistic that most will choose to do so.⁵⁴
96. On the other hand, the Shopper Docket Discount Scheme will only be extended to certain BP Resellers, as selected by BP. In making that determination, the Applicants submit that BP's intention is to ensure that BP receives the benefit of the substantial funding it has contributed, whilst also ameliorating BP Reseller concerns by adopting a fair and transparent approach that avoids preferring BP sites over BP Reseller sites where possible.⁵⁵ The Applicants submit that BP will generally offer a BP Reseller participation in the Shopper Docket Discount Scheme where the BP Reseller operates a site in proximity to a Woolworths supermarket and there is not also an existing BP site or Woolworths site in proximity.⁵⁶
97. The Applicants submit that the Proposed Conduct will allow the benefits of the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program to be offered more consistently across the BP-branded network post-transaction.
98. The Applicants submit that this benefits consumers in a number of ways, including by:
- a. improving the clarity with which the benefits of BP and BP Resellers' participation in the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program are communicated to consumers
 - b. according with consumer expectations that BP-branded sites will generally (but not necessarily always) participate in promotions that are advertised in relation to the BP brand
 - c. reducing the extent to which consumers need to seek out BP-branded sites at which benefits under the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program can be obtained.⁵⁷
99. In addition, the Applicants submit that to the extent that the Proposed Conduct will technically involve exclusive dealing conduct (as a result of limiting the Applicants' participation in other shopper docket discount schemes and/or loyalty programs), it will assist to:
- a. ensure that the parties, particularly BP and BP Resellers, are consistently committed to the promotion of the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program

⁵⁴ BP & Ors, Submission to the ACCC, 28 July 2017, page 12.

⁵⁵ BP & Ors, Submission to the ACCC, 28 July 2017, page 11.

⁵⁶ BP & Ors, Submission to the ACCC, 28 July 2017, page 11.

⁵⁷ BP & Ors, Submission to the ACCC, 10 May 2017, page 37.

- b. avoid consumer confusion that may arise from BP-branded sites offering benefits in relation to various competing shopper docket discount schemes and/or loyalty programs
- c. allow the efficient development, undertaking and implementation of marketing initiatives and promotions with respect to the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program.⁵⁸

Interested party submissions

100. The Australian Small Business and Family Enterprise Ombudsman submits that in a local area consumers may be presented with a choice between two BP branded sites – one offering a fuel discount and the other not. The Ombudsman raises concerns that consumers would have no way to tell if the site is a company owned site, a commission agent site or a dealer-owner, dealer operated site.⁵⁹

ACCC view

101. The ACCC considers that the expansion of the Woolworths Rewards Loyalty Program is likely to result in a more consistent offering to consumers, which may be more easily marketed, accords better with consumer expectations, and will reduce consumer search costs. This is likely to constitute a public benefit because it will be expanded to the majority of BP branded sites in Australia.
102. However, in respect of the expansion of the Shopper Docket Discount Scheme, there will be a significant proportion of BP branded sites that the Applicants do not intend to be Shopper Docket Redemption sites. Even with signage, the ACCC expects there to be some consumer confusion about which BP branded sites are in the Shopper Docket Discount Scheme and which are not.
103. The ACCC does not consider that, overall, the Proposed Conduct is likely to result in a public benefit from more consistent consumer offerings.

Transaction and other cost savings

Applicants' submissions

104. The Applicants submit that negotiation of access to a loyalty program and a shopper docket discount scheme imposes a number of transaction costs on business participants, noting that the exploration and negotiation of commercial arrangements between BP, BP Resellers and Woolworths in relation to the Proposed Conduct have been lengthy and costly.⁶⁰
105. BP submits that the collective participation of BP Resellers with BP in negotiating access to these schemes lowers the transaction costs that each individual participant would otherwise need to bear. BP further submits that if BP Resellers were required to negotiate individually, some would find the cost to participate prohibitive.

⁵⁸ BP & Ors, Submission to the ACCC, 10 May 2017, page 37.

⁵⁹ Australian Small Business and Family Enterprise Ombudsman, Submission to the ACCC, 1 June 2017, pages 1-2.

⁶⁰ BP & Ors, Submission to the ACCC, 10 May 2017, page 37.

ACCC view

106. The ACCC accepts that negotiations regarding participation in the Proposed Conduct have involved substantial transaction costs for Woolworths, BP and BP Resellers. In the absence of the Proposed Conduct, negotiations would be unlikely to occur with individual Resellers if the expected cost of negotiation outweighs the expected benefits for either party.
107. The ACCC considers that, absent the Proposed Conduct, the transaction costs associated with independently negotiating access to similar loyalty schemes and shopper docket discount schemes would be likely to be prohibitive, and many BP Resellers would not participate in any such schemes.
108. Collective negotiations about the terms of participation in the Woolworths Rewards Loyalty Program and Shopper Docket Discount Scheme are accordingly likely to result in public benefits from a sharing of the costs of negotiation. These cost savings may also lead to more widespread participation in loyalty schemes and shopper docket discount schemes, than would occur absent the Proposed Conduct.
109. The ACCC also considers that the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program are likely to be implemented more effectively and efficiently with the Proposed Conduct in place than if BP and each BP Reseller separately negotiated the terms of their participation in the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program with Woolworths. This will improve efficiency, and reduce the overall transaction costs associated with implementing and offering such schemes.
110. The ACCC therefore considers that the Proposed Conduct is likely to result in public benefit in the form of transaction costs savings. The ACCC considers that this benefit will be greater to the extent there is sufficient retail fuel competition so that BP and BP Resellers participating in the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program pass some of those cost savings to consumers.

Impact of Price Competitiveness Arrangements

ACCC view

111. The Proposed Conduct includes Price Competitive Arrangements (PCAs), which mean that, for a period of time after commencement of the Commercial Alliance, former Woolworths sites and participating BP sites must meet certain fuel price competitiveness requirements. In effect, they seek to constrain the potential upper limits of BP's fuel prices in certain circumstances, but do not limit BP's ability to discount fuel prices.
112. In assessing the likely benefits from the PCAs, as noted at paragraph 65, the ACCC considers that the appropriate point of comparison (the future without the Proposed Conduct) is one in which the Proposed Acquisition has not been completed. In effect, we are comparing a world in which Woolworths continues to have a fuel retail business (and set its own retail fuel prices) with a world in which BP has acquired former Woolworths sites, and sets fuel prices subject to the terms of the PCAs.

113. The ACCC does not consider it necessary to determine the extent to which the PCAs would constrain BP's prices at relevant sites. However, to the extent that the PCAs would provide any such constraint, they would only constrain BP's prices to levels that are generally still above the likely prices Woolworths would set at those sites in the future without the conduct.
114. As a result, the ACCC considers that the Price Competitiveness Arrangements are likely to result in only marginal, if any, public benefit.

Conclusion on public benefits

115. Having regard to the submissions of the Applicants and interested parties, the ACCC considers that the Proposed Conduct is likely to result in some public benefits from:
- increased aggregate fuel discounts for consumers under the Shopper Docket Discount Scheme and increased availability of these discounts
 - increased aggregate fuel discounts, and additional opportunities to earn and redeem points for consumers, under the Woolworths Rewards Loyalty Program
 - transaction cost savings.

Public detriments

116. The CCA does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the approach of the Australian Competition Tribunal, which has defined 'public detriment' as:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principle elements the achievement of the goal of economic efficiency.⁶¹
117. Having regard to the information available including submissions of the Applicants and interested parties, the ACCC has considered the following potential public detriments from the Proposed Conduct:
- lessening of competition in fuel retailing because other retailers are unable to compete due to the:
 - potential for escalating shopper docket discounts
 - expanded coverage of the Woolworths Shopper Docket Discount Scheme
 - expanded coverage of the Woolworths Rewards Loyalty Program, and/or
 - funding of fuel discounts and rewards from non-fuel operations
 - lessening of competition in grocery retailing

⁶¹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- increased risk of coordinated behaviour beyond the Proposed Conduct
- reduced competition between loyalty programs
- reduced competition between shopper docket discount schemes
- mandatory participation in the Woolworths Shopper Docket Discount Scheme and/or Woolworths Rewards Loyalty Program
- enhanced ability for Woolworths to leverage its power in grocery markets into convenience store offerings
- reduced competition resulting from the Price Competitiveness Arrangements.

Impact on competition in fuel retailing

Potential for escalating shopper docket discounts making it harder for other fuel retailers to compete

Interested party submissions

118. A number of interested parties have expressed concerns that the Proposed Conduct creates the potential for the level of shopper docket discounts to escalate above 4 cents per litre (and, in particular, escalating discounts to levels of up to 20 or even 40 cents per litre), which would make it difficult for other fuel retailers (including independents) to compete because fuel margins are small.

119. 7-Eleven submits that the 'current supermarket undertakings are due to expire at the end of 2018, leaving the door open for the previously experienced abuse of market power by the supermarkets to resume'.⁶² In particular:

In past years, shopper docket programs left unchecked in Australia saw a significant misuse of market power by Australia's largest supermarket chains. This occurred through cross-subsidising fuel discounts to levels up to 40 cents per litre from their larger grocery business to the detriment generally of the retail fuel industry. In particular this led to a rationalisation of the standalone sector, resulting in a lessening of competition and ultimately an increase in retail fuel prices.⁶³

120. 7-Eleven also refers to the ACCC's 2014 Annual Report which highlights that retail unit net profits for petrol have been no greater than 2.42 cents per litre over the preceding 9 year period, which suggests that 4 cents per litre discounts are unsustainable for stand-alone fuel retailers. 7-Eleven submits that the same report also observes that market shares of BP and Mobil (prior to its exit from the market) have been significantly impacted since the introduction of shopper dockets.⁶⁴

Applicants' submissions

121. The Applicants state in their submission that the shopper docket discount will be maintained at 4 cents per litre (or 6 cents per litre, in Tasmania), however the

⁶² 7-Eleven, Submission to the ACCC, 31 May 2017, page 3.

⁶³ 7-Eleven, Submission to the ACCC, 31 May 2017, page 1.

⁶⁴ 7-Eleven, Submission to the ACCC, 10 November 2017, page 2.

parties may change the level of discount by mutual agreement.⁶⁵ The Applicants submit that fuel discounts of greater than 4 cents per litre are not precluded under the Proposed Conduct, but also are not currently proposed.

122. The Applicants further submit that BP's ability to initiate the discount in the way foreshadowed by interested parties will be limited by the terms of the Woolworths section 87B undertaking.⁶⁶
123. The Applicants consider that 4 cents per litre is no longer an appropriate cap for shopper docket discounts (although they are prepared to comply with such a cap if it is imposed). The Applicants submit that since the 2013 s87B undertaking, there have been considerable changes in the market, including the following:
- Significant independent investment in import terminal infrastructure including: new Puma facilities at Mackay, Townsville, Brisbane and Perth; United's current expansion at Hastings; Park Petroleum's opening of a diesel fuel importation and distribution terminal at Newcastle; and Vopak's terminals at Sydney and Darwin.
 - The entry of new participants such as Trafigura (Puma), (which in addition to its acquisition of retail networks of Central Combined Group, Ausfuel and Neumann Petroleum, has added 34 new sites to its network), Costco (5 sites in operation, with a reputation for aggressive discounting) and Vibe Petroleum (19 sites in operation in Western Australia, with an alliance with IGA offering 4 cents per litre shopper docket discounts). There has also been significant organic growth amongst other independent retailers – for instance, Metro Petroleum has now grown to 149 sites in NSW and is expanding into Victoria and Queensland.
 - Increased retail price transparency for consumers, including as a result of the settlement of the Informed Sources proceedings in December 2015, the availability of current petrol data to consumers through various retail petrol price apps including Motor Mouth, Fuel Map, Gas Buddy and 7 Eleven, and new regulatory arrangements in NSW (Fuel Check, since November 2016) and NSW, SA and Victorian (board prices, since November 2016). The availability of new fuel discount schemes that offer discounts for non-fuel retail purchases, such as the Easyfuel program which allows consumers to shop at participating supermarkets, hardware and other retailers and receive fuel discounts at participating Puma, Budget Petrol, BP and Caltex sites across Australia.⁶⁷
124. The Applicants further submit that fuel discounts in excess of 4 cents per litre are profitable for other retailers and cite the 6 cents per litre discount offers offered in Tasmania as an example:

[T]hrough an arrangement with the Royal Automobile Club of Tasmania (RACT), certain independently-operated United sites in Tasmania offer RACT members 6cpl fuel discounts. This is strong evidence that greater-than-4cpl discounts are profitable for other fuel retailers. In response to the greater-than-4cpl discounts initiated by United sites, both Coles and Woolworths have increased their respective shopper

⁶⁵ BP & Ors, Submission to the ACCC, 10 May 2017, page 24.

⁶⁶ BP & Ors, Submission to the ACCC, 28 July 2017, page 18.

⁶⁷ BP & Ors, Submission to the ACCC, 30 October 2017, pages 11-12.

docket discounts in Tasmania. These developments are clearly procompetitive. Indeed, in its recent 'Report on the Launceston Petrol Market', the ACCC concludes that "the United/RACT offer...has brought about a response from other fuel retailers, resulting in increased competition and lower prices for consumers."⁶⁸

125. In response, a number of interested parties submitted that the Tasmanian market is not representative of the Australian market as a whole and that retail margins are typically higher in that state, for reasons including differences in supply arrangements and local market competitive dynamics.
126. As a result, they caution against extrapolating from fuel discount offers in Tasmania to mainland Australia.

ACCC view

127. As a general proposition, the ACCC welcomes discounts offered to consumers. Further, the CCA does not seek to protect individual businesses from the rigours of competition.
128. However, the ACCC considers that shopper docket discounts beyond a certain level can potentially reduce competition over the longer term in fuel markets by placing a significant proportion of sales beyond the competitive 'reach' of otherwise efficient fuel retailers.
129. Beyond a certain level of discount, shopper docket discount schemes may discourage rival fuel retailers from competing as aggressively as they otherwise would or cause them to exit fuel retailing altogether. This is because it is likely that customers who tend to redeem shopper dockets are amongst the most price sensitive of fuel customers. Above a certain level of discount, there is likely to be foreclosure of a greater number of such customers from competition by other fuel retailers that are unable to match those discounts without incurring losses, which may cause those other retailers not to compete as effectively and consequently is likely to reduce the intensity of price competition in respect of retail fuel prices.
130. Since the commencement of supermarket shopper docket fuel discount promotions, the standard fuel discount offered to consumers who purchase a minimum of \$30 worth of groceries from a Coles or Woolworths supermarket has been a fuel discount of 4 cents per litre.
131. Between approximately 2009 and 2013, both Coles and Woolworths offered an increasing variety of offers greater than 4 cents per litre (including escalating fuel discounts in around 2012/13 to levels up to 40 cents per litre). The ACCC had, around that time, investigated whether the fuel discount offers issued by Coles and Woolworths were causing a substantial lessening of competition in markets for the retail sale of fuel. In its investigation, the ACCC focussed on the offers by the major supermarket chains of fuel discounts of 8 cents per litre, which were made for sustained periods during 2012 and 2013. The ACCC was concerned that those offers could have longer term effects on the structure of retail fuel markets, and also shorter term effects of increasing general pump prices in those markets.⁶⁹

⁶⁸ BP & Ors, Submission to the ACCC, 30 October 2017, page 18.

⁶⁹ ACCC Media release 'Coles and Woolworths undertake to cease supermarket subsidised fuel discounts' <http://www.accc.gov.au/media-release/coles-and-woolworths-undertake-to-cessupermarket-subsidised-fuel-discounts>, 6 December 2013.

132. In December 2013 (when the ACCC's investigation was nearing completion), the ACCC accepted court enforceable undertakings from both Coles and Woolworths that sought to address the ACCC's concerns. Relevantly, under the undertakings:
- a. Coles and Woolworths may continue to offer fuel saving offers to their supermarket customers, but any discounts on fuel offered to supermarket customers from 1 January 2014 are not to exceed 4 cents per litre; and
 - b. all fuel discounts (including those offered to supermarket customers) must be funded from within their fuel retailing operations (including associated convenience stores and other activities at their service stations).
133. The ACCC considers that given typical fuel retail margins, other fuel retailers with no affiliation to a supermarket chain or similar large retail business are generally able to still compete against discount offers up to 4 cents per litre, but will struggle beyond that level. This is supported by information available to the ACCC.
134. Based on information available, the ACCC considers that where shopper docket discounts exceed 4 cents per litre, this is likely to result in:
- a. a higher risk of foreclosure of a significant proportion of customers and fuel volumes to rival fuel retailers by placing an important segment of the fuel market (customers *with* discount fuel offers of more than 4 cents per litre) out of the competitive reach of other fuel retailers for a significant period of time;
 - b. a higher risk of a substantial reduction in the intensity of competition for customers *without* a discount fuel offer, who account for a substantial proportion of customers in relevant retail fuel markets. This is likely to result in higher prices paid for fuel by such customers;
 - c. increased risks faced by other fuel retailers of any decision by them to invest or remain in the market, discouraging investment by other fuel retailers over the medium to long term. This is likely to soften competition in fuel retailing leading to higher retail fuel prices for customers in the medium to long term.
135. As noted at paragraph 42, the Applicants have agreed to maintain the discount to be offered under the Shopper Docket Discount Scheme at 4 cents per litre.⁷⁰ However, the ACCC is concerned that the Applicants are able to change that level (and potentially increase the discount) by agreement between them. This would be open to the parties during the 10 year term of the Commercial Alliance, since the terms of the current Woolworths Undertaking (which is intended to cap shopper docket discounts at 4 cents per litre) allow Woolworths, at any time from December 2018, to give one month's notice of its intention to withdraw the Undertaking.
136. The ACCC considers that while Coles is likely to have the ability to match discounts in excess of 4 cents per litre offered under the Proposed Conduct, other

⁷⁰ BP & Ors, Submission to the ACCC, 28 July 2017, page 7; BP & Ors, Submission to the ACCC, 10 May 2017, page 24.

fuel retailers are unlikely to be able to compete effectively, and in the medium to long term may ultimately be forced to exit the industry.

137. The ACCC considers that the expansion of the Shopper Docket Discount Scheme is likely to result in significant public detriments constituted by a lessening of competition if the shopper docket discounts exceed 4 cents per litre.

Expanded coverage of the Woolworths Shopper Docket Discount Scheme making it harder for other fuel retailers to compete

Interested party submissions

138. 7-Eleven submits that the expansion of the shopper docket redemption footprint will impact adversely on independent retailers in the affected markets as they have no means to compete.⁷¹
139. A number of BP Resellers raised concerns that the expansion of the Shopper Docket Redemption Scheme does not go far enough. That is, if the scheme is not extended to all BP Resellers, those sites which do not participate in the scheme will be at a competitive disadvantage to sites that offer shopper docket redemption.
140. Endeavour Petroleum has expressed concerns that BP Fuel Card customers could be offered better deals at service stations that also offer shopper docket, which Endeavour sees as raising predatory pricing concerns.⁷²
141. In essence, interested parties raised concerns that the proposed expanded geographic coverage of the shopper docket redemption scheme has the potential to damage other fuel retailers (including non-BP brand fuel retailers and BP Resellers that do not participate in the shopper docket discount scheme). This may lead to a reduction in the rival fuel retailers' capacity to act as a competitive constraint on fuel retailers that participate in Woolworths' Shopper Docket Discount Scheme.

Applicants' submissions

142. The Applicants submit that a low proportion of the overall number of retail fuel sites in Australia will be involved in the Proposed Conduct and that there will only be limited and pro-competitive coordination of the level of retail fuel discounts.
143. In particular, the Applicants submit that BP and BP Reseller sites will account for approximately 21% of retail fuel sites, and some of those sites will not participate in the Shopper Docket Discount Scheme.⁷³
144. The Applicants submit that the overall increase in the proportion of sites offering fuel discounts under the Shopper Docket Discount Scheme will be "relatively modest"⁷⁴, and estimate that the number of sites participating in the Shopper Docket Discount Scheme will increase by approximately 200 sites.⁷⁵

⁷¹ 7-Eleven, Submission to the ACCC, 31 May 2017, page 2.

⁷² Endeavour Petroleum, Submission to the ACCC, 16 May 2017, page 10.

⁷³ BP & Ors, Submission to the ACCC, 10 May 2017, pages 4-5 and 38-39.

⁷⁴ BP & Ors, Submission to the ACCC, 28 July 2017, page 9.

⁷⁵ BP & Ors, Submission to the ACCC, 28 July 2017, page 9.

ACCC view

145. Under the Proposed Conduct, there is likely to be a greater number of sites participating in the Shopper Docket Discount Scheme. To the extent that the Proposed Conduct is likely to result in otherwise efficient fuel retailers being damaged, eliminated or prevented from competing effectively in the market, the ACCC would consider this to be a public detriment.
146. The likelihood and extent of any anti-competitive detriment arising from the expanded coverage of the redemption scheme will vary depending on the number and type of rival retail fuel sites in close proximity to the sites that offer Woolworths Shopper Docket redemption, and also on the level of contribution to the discount from Woolworths' non-fuel operations.
147. The ACCC considers that it is likely that BP Reseller sites that do not participate in the Woolworths Shopper Docket Scheme will find it harder to compete with sites in close proximity that do offer Shopper Docket redemption, given that these sites can be considered to be close competitors in terms of price, fuel offerings and service.
148. The ACCC considers that the net increase in the number of participating sites has the potential to damage other fuel retailers, impacting on their capacity to act as a competitive constraint. If other fuel retailers are not able to match the offer, the ACCC considers that barriers to entry in retail fuel will further heighten, resulting in a deterioration of competition in the medium term, which could potentially lead to higher prices. In the long term, this may lead to the exit of fuel retailers if they are no longer able to compete.
149. Given the expansion of the Shopper Docket Discount Scheme, other fuel retailers are likely to face a smaller pool of customers they can potentially win through discounting. It is likely that customers who value and tend to redeem shopper dockets are amongst the most price sensitive of fuel customers. As a result of the expanded Shopper Docket Discount Scheme, there is likely to be foreclosure of a greater number of such customers from competition by other fuel retailers, which is likely to reduce the intensity of price competition in respect of retail fuel prices.
150. A reduction in other fuel retailers' capacity to act as a competitive constraint may in turn lead to consumers paying higher prices for fuel. To the extent that other fuel retailers are likely to face reduced incentives to discount their fuel prices due to the smaller pool of customers they can potentially win through discounting, the ACCC would consider this to be a public detriment.
151. The ACCC considers that the net increase in the number of sites participating in the Shopper Docket Discount Scheme is likely to result in some degree of lost sales by other fuel retail sites as consumers shift to sites which participate in the Shopper Docket Discount Scheme. However, as noted at paragraphs 78, many of the subset of consumers most likely to use shopper docket discounts already utilise them. Further, the ACCC notes the Applicants' submission that the increase in the total number of sites offering fuel discounts under the Shopper Docket Discount Scheme will be "relatively modest".⁷⁶
152. Importantly, the likelihood and extent of any anti-competitive detriment arising from the expanded coverage of the Shopper Docket Discount Scheme will vary

⁷⁶ BP &Ors, Submission to the ACCC, 28 July 2017, page 9.

depending on the number and type of rival retail fuel sites in close proximity to the sites that offer Woolworths Shopper Docket redemption, and also on the level of contribution to the discount from Woolworths' non-fuel operations.

153. The ACCC notes the focus of many interested parties has been on limiting shopper docket discounts to 4 cents per litre, rather than opposing them outright. This suggests that other fuel retailers are generally able to compete if shopper docket discounts are capped at 4 cents per litre.
154. The ACCC considers that the expanded coverage of the Shopper Docket Discount Scheme is likely to result in significant public detriments constituted by a lessening of competition if the shopper docket discounts offered were to exceed 4 cents per litre.

Expanded coverage of the Woolworths Rewards Loyalty Program making it harder for other fuel retailers to compete

Interested party submissions

155. Some interested parties raised concerns that the Proposed Conduct will result in a substantial increase in coverage of the Woolworths Rewards Loyalty Program, which will be detrimental to competition.
156. 7-Eleven is opposed to BP's participation in the Woolworths Rewards Loyalty Program given the potential for such programs to lead to a rationalisation of the standalone independent sector, resulting in a lessening of competition and ultimately an increase in retail fuel prices. 7-Eleven submits:

The rollout of Woolworths loyalty program across BP branded fuel outlets in partnership with what will be Australia's largest fuel retailer post acquisition (with close to a third of the nation's fuel outlets) would deliver an exceptional level of consumer reach to one of Australia's largest and most formidable retailers.⁷⁷

157. 7-Eleven has also submitted that, through the Woolworths Rewards Loyalty Program, BP could offer shopper docket-like fuel discounts in excess of 4 cents per litre.⁷⁸

Applicants' submissions

158. The Applicants submit that in contrast to the Shopper Docket Discount Scheme, BP intends that the Woolworths Rewards Loyalty Program will be extended to as many BP branded sites as possible (including BP Resellers).⁷⁹
159. The Applicants submit that the loyalty program (and redemption of loyalty points for use as a fuel discount) has a limited competitive impact because:

Under the Woolworths Rewards Program, the default option is that once a Woolworths Rewards member has accumulated 2000 points, those points will be automatically redeemed and a discount applied to the member's next transaction at a participating retail outlet (whether or not that is a participating BP-branded site). ... as a result, a Woolworths Rewards member will not be in a position to specifically

⁷⁷ 7-Eleven, Submission to the ACCC, 31 May 2017, page 2.

⁷⁸ 7-Eleven, Submission to the ACCC, 31 May 2017, page 2.

⁷⁹ BP & Ors, Submission to the ACCC, 28 July 2017, page 12.

choose to obtain a discount at a participating BP-branded site (as opposed to another participating retail outlet, such as a Woolworths supermarket.)⁸⁰

160. The Applicants submit that they do not expect that the redemption of Woolworths Rewards points at participating BP-branded sites will be a particularly strong driver of fuel purchasing behaviours.⁸¹ They further submit that the Woolworths Rewards Loyalty Program will not act to exclude other fuel retailers.
161. The Applicants disagree with 7-Eleven's submission that, through the Proposed Conduct, BP and Woolworths would be able to offer discounts under the Woolworths Rewards Loyalty Program that are similar in effect to the fuel discounts currently precluded by the Woolworths Undertaking in respect of the Shopper Docket Discount Scheme. The Applicants submit that the terms of Woolworths' 2013 undertaking precludes any fuel discount of greater than 4 cents per litre that is contingent upon a purchase other than from a petrol station, including where the discount is obtained through the redemption of Woolworths Rewards points.⁸²

ACCC view

162. The ACCC considers that the expansion of the Woolworths Rewards Loyalty Program has the potential to impact competition in the retail fuel sector.
163. To the extent that the Proposed Conduct results in the damage or foreclosure of otherwise efficient fuel retailers, or otherwise reduces their capacity to act as a competitive constraint, the ACCC would consider this to be a public detriment.
164. The ACCC considers that the likelihood and degree of anti-competitive effects arising from an expansion to the loyalty program is likely to be heightened where the accrual of and/or redemption of rewards at BP fuel sites is significant (and particularly absent a cap on the value of the accrual and/or redemption of rewards which may be offered at BP fuel sites).
165. The ACCC notes the Applicants' submission that Woolworths Rewards members will be unable to elect to have their points redeemed at BP sites (other than by using the card at BP sites when 2000 points are accrued); redemption (in the form of a \$10 discount) is automatically applied to the next transaction at any participating retailers once a consumer accrues 2000 points.⁸³
166. The ACCC notes that the Applicants' intention is to expand the Woolworths Rewards Loyalty Program to as many BP branded sites as possible, including its large network of BP Reseller sites.⁸⁴ The ACCC also notes 7-Eleven's submission that Woolworths Rewards Loyalty Program has approximately 9 million members.
167. The ACCC considers that a subset of Woolworths Rewards Loyalty Program members will choose to purchase fuel at BP sites due to their membership in the Woolworths Rewards Loyalty Program, in order to accrue and/or redeem points at BP sites participating in the program.

⁸⁰ BP & Ors, Submission to the ACCC, 28 July 2017, page 17.

⁸¹ BP & Ors, Submission to the ACCC, 28 July 2017, page 17.

⁸² BP & Ors, Submission to the ACCC, 28 July 2017, pages 17-18.

⁸³ BP & Ors, Submission to the ACCC, 28 July 2017, page 17.

⁸⁴ BP & Ors, Submission to the ACCC, 28 July 2017, page 12.

168. As with the offering of shopper docket discounts, the ACCC considers that there is a point where fuel discount offers at BP sites made through the Woolworths Rewards Loyalty Program would be likely to attract consumers away from other fuel retailers to BP sites by offering such large discounts that otherwise efficient fuel retailers would be unable to match.
169. The ACCC also notes a Woolworths Rewards promotion, advertised to certain Woolworths Rewards members via email on or about 28 July 2017⁸⁵ which states the following:

MAKE AN INSTANT SAVING NOW
 Get 10c off per litre!

 Just fill up at Caltex Woolworths and scan your Rewards card in store for an instant 10c saving. Hurry – offer ends Thursday, 3rd August.
 PLUS ANOTHER 8C OFF PER LITRE!
 When you add these fuel vouchers
 Docket 4c off per litre
 When you shop in a Caltex Woolworths convenience store**
 Fuel 4c off per litre
 With a Woolworths supermarket fuel discount receipt**⁸⁶

170. The ACCC considers that there is potential for damage to or foreclosure of efficient competitors arising from substantial rewards offers like the offer set out above, since competing fuel retailers will be excluded from participating in the Woolworths Rewards Loyalty Program due to the exclusive nature of the Proposed Conduct. As noted above, the Woolworths Rewards Loyalty Program has a substantial membership base, with approximately 9 million members.
171. The ACCC further considers that, through the Woolworths Rewards Loyalty Program, fuel discounts are likely to be offered in excess of 4 cents per litre. The above example provides for a Woolworths Rewards fuel discount of 10 cents per litre, and allows for combination with a shopper docket and in-store discount to a total of 18 cents per litre. The ACCC considers that it is unlikely that most other fuel retailers could profitably offer similar discounts.
172. The ACCC notes that, after the Proposed Acquisition, Woolworths will no longer operate a fuel business and its motivation to direct consumers to fuel sites through promotional discounts such as at paragraph 169 will be lower. However, the ACCC considers that through the Metro@BP partnership, Woolworths will have an indirect incentive to encourage consumers to go to certain BP sites (being Metro@BP sites), as this will increase Woolworths' profits through its convenience supply arrangement with BP.
173. The ACCC also considers that Woolworths has a direct incentive to drive consumers to BP sites via attractive rewards offerings (such as that at paragraph 1699), as by doing so it is likely to both increase Rewards membership numbers and drive existing and new members to make purchases at Woolworths supermarkets.
174. The ACCC considers that it is likely that a 'cents per litre' discount of the type described at paragraph 169 will have a greater impact on consumer choices than rebates (such as \$10 for every \$2000 spent). Similarly, offers such as significantly

⁸⁵ The ACCC notes that it is also aware of similar fuel discount offers being made by Coles.

⁸⁶ Email from contacts@email.woolworthsrewards.com.au, 28 July 2017.

higher points earned per dollar spent at a BP fuel site would be likely to result in detriments where such offers could not be matched by otherwise efficient fuel retailers.

175. If, under the Proposed Conduct, consumers are allowed to redeem Woolworths Rewards Loyalty Program discounts at BP fuel sites in addition to redeeming shopper docket discounts at these sites, the size of the aggregate discount available to consumers may be sufficiently large that most other fuel retailers (with the exception of Coles) would be unable to competitively match it.
176. As with the assessment of the Shopper Docket Discount Scheme above, the ACCC considers that loyalty rewards offered to consumers at a fuel site can potentially reduce competition over the longer term in fuel retailing by placing a significant proportion of sales beyond the competitive 'reach' of otherwise efficient fuel retailers.
177. The ACCC considers that the potential anti-competitive impact of redemption of loyalty rewards will be higher where the Woolworths Rewards Loyalty Program's points redemption rate is significant or 'uncapped' and/or where the program makes cents per litre offers of the kind described in paragraph 1699. In the ACCC's view, both scenarios may place fuel retailers who are not partnered with a supermarket loyalty program at a competitive disadvantage.
178. The ACCC therefore considers that the expanded coverage of the Woolworths Rewards Loyalty Program is likely to result in significant public detriments if the parties were to offer large fuel or combined discounts that otherwise efficient fuel retailers were unable to compete with.

Funding of fuel discounts and rewards from non-fuel operations making it harder for other fuel retailers to compete

Interested party submissions

179. A number of interested parties raised concerns that any 'cross-subsidisation' of fuel discounts from supermarket operations under the Proposed Conduct may distort competition in the retailing of fuel.
180. Interested parties are concerned that Woolworths has a greater capacity to fund shopper docket discounts than independent fuel retailers. Superior discounts offered by Woolworths may result in the foreclosure of independent fuel retailers who would be unable to compete on price.
181. In terms of the funding of rewards from non-fuel operations, 7-Eleven submits:

The Woolworths loyalty program will effectively facilitate cross-subsidised fuel discounts with discount rewards proposed to be redeemed at the fuel point of purchase, something that is new to the Woolworths program... There is currently no undertaking limiting the loyalty points on fuel purchases leaving open the opportunity for implementation of a strategy of high cross subsidised discounts conducive to a misuse of market power.⁸⁷

⁸⁷ 7-Eleven submission to the ACCC, 31 May 2017, page 2.

182. An interested party submits that:

“[t]he ACCC should not let BP offer extra discounts on top of the 4 cpl if customers buy certain products in store. The Woolworths Rewards Loyalty Program has 9 million members so the ability to distort competition by offering extra discounts is high”.⁸⁸

Applicants’ submissions

183. The Applicants submit that the Shopper Docket Discount Scheme would be jointly funded by Woolworths and BP.⁸⁹

184. The Applicants also submit that their intention is to have the Shopper Docket Discount Scheme remain at a discount of 4 cents per litre for redemption of a Woolworths supermarket receipt.⁹⁰

185. The Applicants further submit that discounts upon the redemption of Woolworths Rewards Loyalty Program points do not involve a ‘cross-subsidy’.⁹¹

ACCC view

186. The ACCC considers that, if fuel discounts and rewards are funded from other than fuel retailing operations, fuel retailers not affiliated with a supermarket business may not be able to compete and large discounts (in excess of 4 cents per litre) could result in a lessening of competition in fuel retailing.

187. There is some scope for other fuel retailers to enter into similar arrangements with other supermarket retailers (or other businesses) to partly fund shopper docket discounts and/or loyalty programs to compete with BP.

188. However, the ACCC considers that other fuel retailers (other than Coles) are likely to find it difficult to compete with BP where sizable discounts (such as discounts in excess of 2 cents per litre) are funded by Woolworths.

189. Similarly, the ACCC also recognises the potential for fuel discount offers tied to purchases at a convenience store (in-store fuel offers) to impact competition in fuel retailing, particularly where such offers are funded from other than fuel retailing operations. Such conduct falls outside the scope of conduct sought to be authorised. This means that if at any time in the future the ACCC was concerned that any offers by BP of in-store fuel discounts, or Woolworths funding of those offers, raised competition concerns, such conduct would be exposed to the operation of the CCA and the ACCC may take action.

190. Woolworths has a commercial incentive to fund shopper docket discounts from its supermarket business where it also owns a retail fuel business. That is, by increasing shopper docket discounts, it would both attract customers to its fuel business and its supermarket business.

191. As Woolworths will no longer own a retail fuel business following the Proposed Acquisition, the ACCC considers that Woolworths’ direct incentive to subsidise offers of significant rewards points redemption at retail fuel sites – which, on its

⁸⁸ An interested party, Submission to the ACCC, 14 November 2017, page 1.

⁸⁹ BP & Ors, Submission to the ACCC, 10 May 2017, page 24.

⁹⁰ BP & Ors, Submission to the ACCC, 10 May 2017, page 24.

⁹¹ BP & Ors, Submission to the ACCC, 28 July 2017, page 16.

face would primarily benefit BP – would be reduced. Upon completion of a pilot of the Metro@BP format, Woolworths intends to supply a range of grocery, fresh food and ready-to-eat meals to support non-fuel offerings at more than 200 Metro@BP sites.⁹² As a result, Woolworths would benefit indirectly from increased consumer numbers at BP fuel sites. The ACCC also considers that the shopper docket and loyalty rewards programs under the Proposed Conduct are likely to result in increased purchases at Woolworths supermarkets, as noted at paragraph 173.

192. Through its current undertaking, Woolworths is restricted from funding shopper docket discounts from its non-fuel business (including its supermarket business). Shopper docket discounts can only be funded from its fuel business. This restriction arose to address concerns that Woolworths, as an owner of both supermarkets and petrol stations, had commercial incentive to subsidise shopper docket discount offers from its supermarket business that may distort competition in retail fuel to the advantage of its retail fuel business. In the future with the Proposed Conduct, Woolworths would no longer own any petrol stations, so the concern about revenue flowing from its supermarket business to fund shopper dockets is substantially reduced. In this context, the ACCC considers that Woolworths' ability to provide some funding for shopper docket discounts to be redeemed at BP petrol stations is unlikely to result in significant detriments, but substantial levels of funding would be likely to result in significant detriment by distorting competition in fuel retailing. The ACCC considers that funding above 2 cents per litre in any single transaction would be likely to result in significant detriments.
193. The ACCC considers that the agreements between BP and Woolworths to jointly fund shopper docket and loyalty program discounts as part of the Proposed Conduct are likely to result in significant public detriments where discounts exceed 4 cents per litre in aggregate in a single transaction, or are funded by Woolworths in excess of 2 cents per litre in a single transaction.

Impact on competition in grocery retailing

Interested party submissions

194. Master Grocers Australia (**MGA**) has raised concerns that the shopper docket discount system has in the past been regarded as anti-competitive, particularly when the discounts reached excessively high levels. MGA submits:

It is inevitable that small retailers will be the losers when big businesses are able to exert their corporate strength as was evidenced in the “shopper docket wars” in 2013... What might have seemed in some cases to be beneficial to consumers was in fact destructive to many small retailers in Australia... This type of bundling was undoubtedly anti-competitive, it was dividing the petrol industry, seriously affecting the sales of goods in independent supermarkets and had the potential to lessen competition...

There is no doubt that any resurgence of the shopper docket system to the levels that existed in 2013 would once again result in serious damage to the independent supermarket sector.⁹³

⁹² BP & Ors, Submission to the ACCC, 10 May 2017, pages 12-13.

⁹³ MGA, Submission to the ACCC, 29 May 2017, pages 2-3.

195. MGA submits that there is a risk to the competitive process if the 4 cents limit is left uncapped and strongly supports the retention of the cap at the current level.⁹⁴

ACCC view

196. While the primary focus of this assessment has been the potential for escalating shopper docket discounts to lessen competition in fuel retailing, the ACCC recognises the potential for impact on supermarket competition.
197. The ACCC notes that a number of smaller and independent supermarkets have entered into arrangements with service stations to jointly provide shopper docket discounts of 4 cents per litre. The ACCC accepts that if BP and Woolworths offer shopper docket discounts well in excess of 4 cents per litre, it is likely that smaller and independent supermarkets would struggle to be able to offer competitive discounts and that this has the potential to result in detriments by lessening competition between supermarkets.
198. The ACCC considers that the potential impact on competition in the supermarket sector will be limited where discounts are limited to 4 cents per litre in aggregate in a single transaction.

Increased risk of coordinated behaviour between BP and BP Resellers

Interested party submissions

199. A number of interested parties raised concerns about a greater risk of coordinated behaviour by BP and BP Resellers, and in particular, that the Proposed Conduct has the potential to reduce the extent to which BP controlled sites and BP Reseller sites compete on pump prices.
200. One interested party confidentially submits that in contrast to the BP Velocity authorisation⁹⁵, BP will have contractual covenants with Woolworths around pricing, such that BP must meet certain fuel 'PCA' requirements. These requirements for consistent discount offers, mutual agreement and pricing covenants may create an environment conducive to coordinated behaviour between BP controlled sites and BP Reseller sites, which would otherwise be operating in competition with each other for retail customers.

Applicants' submissions

201. The Applicants submit that there will only be limited and pro-competitive coordination of the level of retail fuel discounts (and not pre-discount prices). The Applicants submit that BP and BP Resellers will only agree the level of benefits to be delivered to consumers under the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program (including applicable fuel discounts).⁹⁶
202. The Applicants further submit that the Proposed Conduct will not involve any coordination between BP and BP Resellers in respect of pre-discount retail fuel prices, convenience store offerings, investments in service levels or site facilities

⁹⁴ MGA, Submission to the ACCC, 14 November 2017, page 3.

⁹⁵ ACCC Determination A91485-A91487, Application for authorisation lodged by BP Australia Pty Ltd & Ors in respect of collective participation in the Velocity Program.

⁹⁶ BP & Ors, Submission to the ACCC, May 10 2017, page 38.

and amenities, and that they will continue to vigorously compete in relation to these aspects of their competitive offers.⁹⁷

ACCC view

203. The Proposed Conduct does not explicitly provide for BP and BP Resellers to agree on pricing beyond the level of shopper docket and loyalty program discounts.
204. However, as with any application for coordinated conduct, authorisation raises the risk that the parties will engage in anti-competitive coordination beyond the scope of the conduct for which authorisation is sought. This includes the potential for the parties to (either expressly or tacitly) collude on pre-discount fuel prices offered to consumers.
205. The ACCC notes that BP and BP Resellers already interact with each other regularly regarding the wholesale supply of fuel and the provision of other services by BP, and that the parties have limited their agreements on prices to setting the level of retail fuel discounts.
206. However, the Proposed Conduct will provide BP with some discretion over which BP Reseller sites are able to participate in the Shopper Docket Discount Scheme, which is likely to be seen as valuable to many BP Resellers. This may provide BP with greater ability to influence or control behaviour by BP Resellers, such as fuel pricing decisions.
207. As a result, the ACCC considers that there is likely to be an increased risk of coordinated behaviour between BP and BP Resellers, and consequently some potential public detriment.
208. The ACCC notes that any such conduct would not be protected under the authorisation (if granted), and may breach the CCA.

Increased risk of coordinated behaviour between BP and Woolworths

Interested party submissions

209. Interested parties did not provide submissions on the likelihood of coordinated conduct between BP and Woolworths. The ACCC considers that this may be due to the fact that post acquisition, BP and Woolworths will not directly compete in the retail fuel market, and that such conduct may be prohibited by the CCA. However, for the acquisition and/or supply of convenience groceries, BP and Woolworths may be seen to compete, and to the extent that BP does not immediately take possession of all Woolworths petrol sites, BP and Woolworths will compete for the acquisition or supply of retail fuel for a transitional period.

Applicants' submissions

210. The Applicants submit that to the extent that authorisation is sought for coordination between BP and Woolworths, potential contraventions only arise

⁹⁷ BP & Ors, Submission to the ACCC, July 28 2017, page 20.

because Woolworths may retain possession of a small number of sites for a transitional period following completion of the Business Sale Agreement.

211. The Applicants further submit that in so far as authorisation is sought for coordination in relation to pre-discount retail fuel prices, this is sought only to allow implementation of 'PCA' arrangements under the Redemption Agreement (which does not place any upward pressure on retail fuel prices).⁹⁸

ACCC view

212. As noted above, coordinated conduct raises the potential for coordination beyond the scope of the applications for authorisation. The Proposed Conduct is broadly defined to include exclusivity arrangements, 'PCA' agreements for a limited period of time, and potential cartel conduct in the event that BP is not able to immediately take possession of former Woolworths sites upon completion of the Proposed Acquisition.
213. Given the length of authorisation applied for is broadly expressed to be for 10 years, this could lead to collusion on prices, either expressly or tacitly, for a protracted period.
214. The ACCC considers that an appropriate time limit on transitional conduct between BP and Woolworths would mitigate the potential harm likely to result from protracted coordinated conduct. The ACCC considers that 12 months is an appropriate length of authorisation in respect of the transitional period which may result in potential cartel conduct if BP is not able to immediately take possession of former Woolworths sites upon completion of the Proposed Acquisition.

Reduced competition between loyalty programs

215. BP intends to extend the Woolworths Rewards Loyalty Program redemption scheme to current BP COCO sites in addition to current Woolworths sites. Further, it will be open to all BP Resellers to opt-in to the program. BP submits that it is committed to extending the program to as many BP Reseller sites as possible.⁹⁹
216. Under the Proposed Conduct, the Woolworths Rewards Loyalty Program will be the exclusive loyalty program for BP sites and a significant number of (and potentially all) BP Resellers. This will have the effect of limiting the pool of merchants which other loyalty programs can access as potential partners.
217. To the extent that the Proposed Conduct results in an otherwise efficient loyalty program being damaged, eliminated or prevented from competing effectively in the market, the ACCC would consider this to be a public detriment.
218. However, there are a number of loyalty programs operating in competition with Woolworths Rewards Loyalty Program. Of these, some programs allow the earning and redemption of points through purchases made through fuel retailers. Although fuel retailers are attractive partners for loyalty programs, BP is only one of a number of fuel retailers, and a wide variety of other attractive classes of merchants remain available to partner with either existing loyalty programs or new ones.

⁹⁸ BP & Ors, Submission to the ACCC, May 10 2017, page 38.

⁹⁹ BP & Ors, Submission to the ACCC, July 28 2017, page 12.

219. Accordingly, the ACCC does not consider that the Proposed Conduct is likely to lead to any or any significant public detriment in the form of reduced competition between loyalty programs.

Reduced competition between shopper docket discount schemes

220. Under the Proposed Conduct, a subset of BP and BP Reseller sites will be offered the opportunity to participate in the Woolworths Shopper Docket Discount Scheme, which will have the effect of limiting the pool of fuel retailers which can be accessed by competing shopper docket discount schemes as potential partners.

221. The ACCC notes there are a range of competing offers to the Woolworths Shopper Docket Discount Scheme. For example, even with the Proposed Conduct, it remains open to:

- a. merchants which offer competing shopper docket programs to partner with non-participating fuel retailers (including the subset of BP Resellers which are not included in the Woolworths Shopper Docket Discount Scheme);
- b. non-participating fuel retailers to offer 'unendorsed' shopper docket discount schemes. For example, Liberty offers a 4 cents per litre discount on fuel purchases to customers producing a Woolworths or Coles receipt showing a supermarket purchase of more than \$30; and
- c. independent grocers or other merchants to offer a 'reverse' discount offer, where shoppers may receive a discount on their purchases upon presentation of a fuel receipt from a nominated service station. For example, IGA supermarkets in NSW, Queensland, South Australia and Victoria, offer a discount on supermarket purchases upon presentation of a fuel receipt from any service station, with the discount equivalent to 4 cents per litre.

222. Accordingly, the ACCC does not consider that the Proposed Conduct is likely to lead to any or any significant public detriment in the form of reduced competition between shopper docket discount schemes.

Mandatory participation in the Woolworths Shopper Docket Discount Scheme and/or Woolworths Rewards Loyalty Program

Interested party submissions

223. 7-Eleven has raised concerns that BP Resellers may be placed in a situation where they are left with no choice but to participate in the Woolworths Shopper Docket Discount Scheme, and will be subject to the costs associated with such a scheme.

Applicants' submissions

224. The Applicants have submitted that the Shopper Docket Discount Scheme and Loyalty Program will be either voluntary or effectively voluntary for BP Resellers, given the intense competition for wholesale supply to independently operated retail fuel sites. The Applicants state:

- BP Resellers are able to choose or switch brands in response to the offers of competing wholesale suppliers and competitors offering reseller arrangements - such as Caltex, Viva, 7-Eleven and Puma - BP faces this risk of bypass when it engages in any contract renegotiations.
- These alternative wholesale suppliers, as well as Mobil (which BP understands is currently developing an improved dealer offer), are very active in seeking new arrangements to grow their brand representation and underwrite their respective investments in production and importing infrastructure. BP has also observed an intensification of wholesale competitor activity over the past 12-24 months.
- A decision of a BP Reseller to agree to participate in either the Shopper Docket Discount Scheme and/or Woolworths Rewards Loyalty Scheme, under a new or re-negotiated Privately Owned Sites Agreement, is effectively voluntary, notwithstanding that it may be a condition of supply by BP.¹⁰⁰

ACCC view

225. Based on the information the ACCC has gathered from BP Resellers, the primary concern regarding the Shopper Docket Discount Scheme is that they will not be able to participate in the scheme rather than that they will be forced to participate. However, there have been some concerns raised by others about Resellers being forced to participate in the Woolworths Rewards Loyalty Program.
226. The ACCC notes the Applicants' contention that competition in the wholesale fuel market is strong, and that BP Resellers can enter into a different Privately Owned Sites Agreement with other fuel retailers at the expiry of their current contract.
227. Importantly, BP will not require participation in the loyalty or shopper docket redemption scheme until the expiry of the relevant current Privately Owned Sites Agreements. As such, the ACCC does not consider that there is likely to be any, or any significant, public detriment arising from the potential mandatory participation.

Enhanced ability for Woolworths to leverage its power in grocery markets into convenience store offerings

Interested party submissions

228. A number of interested parties have expressed concerns that the Commercial Alliance, in particular the Metro@BP concept, will enhance Woolworths' ability to leverage its power in grocery markets into convenience store offerings. Interested parties note that while Woolworths currently operates convenience stores through the Woolworths Metro concept, the Proposed Conduct will give Woolworths a significant opportunity in convenience by giving it access to a larger number of sites through the BP network.
229. Further, interested parties raised concerns with the possibility of coordination between BP and Woolworths in the operation of convenience stores, in the context of BP's submission that:

¹⁰⁰ BP & Ors, Submission to the ACCC, 10 May 2017, page 39.

- Woolworths will provide expertise in supply chain management to improve efficiencies and reduce costs across the Metro@BP network
- Woolworths will supply a range of grocery, fresh food and ready-to-eat meals to support expanded non-fuel offerings at Metro@BP sites, and
- BP will retain operational control, including discretion over convenience pricing at Metro@BP sites.¹⁰¹

230. An interested party has submitted on a confidential basis that the BP submission is silent on the extent of influence or control that Woolworths will have over the pricing of BP's products, and that this lack of independence may result in a risk of coordination between BP and Woolworths.

231. Further, some interested parties raised concerns in regards to the supply arrangements for the BP convenience offering, arguing that because of Woolworths' sizeable nation-wide logistics infrastructure, Woolworths can supply BP cheaper than other suppliers including independents and that this may displace smaller suppliers who currently supply BP's convenience offering.

Applicants' submissions

232. BP does not concede that Woolworths possesses market power in grocery markets, but does not consider it necessary for the ACCC to reach any view on that issue.¹⁰²

233. The Applicants submit that after the Proposed Acquisition, which will see the divestiture of 531 Woolworths retail petrol sites, Woolworths will have a significantly reduced participation in the supply of convenience store offerings.¹⁰³

234. The Applicants further submit that under the proposed Metro@BP convenience partnership, Woolworths' participation will largely be limited to working with BP regarding the Metro@BP store format and branding, developing the Metro brand and certain categories of products, acting as wholesale supplier of certain product categories and providing supply-chain expertise. The Applicants submit that Woolworths has no meaningful ability or incentive to implement a foreclosure strategy.¹⁰⁴

ACCC view

235. The ACCC considers that these concerns relate primarily to the Metro@BP aspects of the proposed Commercial Alliance, which is not within the scope of the Proposed Conduct for which authorisation is sought.

236. However, the ACCC notes that Coles similarly has a convenience grocery offering at its fuel stations, branded as Coles Express. The ACCC considers that it is open to other fuel retailers such as Caltex and independent chains to also offer convenience groceries at their fuel stations, and that it would be open to independent grocery suppliers to partner with these entities to supply their convenience grocery offerings.

¹⁰¹ BP & Ors, Submission to the ACCC, 10 May 2017, page 13.

¹⁰² BP & Ors, Submission to the ACCC, 28 July 2017, page 15.

¹⁰³ BP & Ors, Submission to the ACCC, 28 July 2017, page 15.

¹⁰⁴ BP & Ors, Submission to the ACCC, 28 July 2017, page 15.

237. Further, the ACCC considers that it is also open to the wholesale suppliers to supply standalone convenience grocery stores, particularly in metropolitan areas.
238. With the exception of sites that participate in the Metro@BP concept, it is understood that BP Resellers will retain their ability to independently contract with wholesale suppliers for the supply of their convenience grocery offerings (to the extent that any particular BP Reseller site offers a convenience grocery offering).
239. The ACCC considers that shopper dockets are less likely to have adverse effects on competition in grocery retailing than in retail fuel, as there is scope for other grocery retailers (such as ALDI or IGA operators) to enter into similar arrangements with other fuel retailers (such as Caltex).
240. The ACCC considers that these factors mitigate any likely detriment, but in any event the potential detriments raised under this heading are concerned with the supply of the Metro@BP concept which is not the subject of the applications for authorisation.

Impact of Price Competitiveness Arrangements

ACCC view

241. The Proposed Conduct includes Price Competitive Arrangements (PCAs), which mean that, for a period of time after commencement of the Commercial Alliance, former Woolworths sites and participating BP sites must meet certain fuel price competitiveness requirements.
242. As noted at paragraph 113, the ACCC does not consider it necessary to determine the extent to which the PCAs would constrain BP's prices at relevant sites. However, to the extent that the PCAs would provide any such constraint, they would only constrain BP's prices to levels that are generally still above the likely prices Woolworths would set at those sites in the future without the conduct.
243. In general, where a company signals an intention to price in a certain way, there is potential for this to facilitate prices above competitive levels and can result in detriments from inefficient outcomes. For example, if a company signals its intention to price above the market, this lessens the incentive for other market participants to discount. Similarly, if a company signals its intention to always price below its competitors, that will reduce the incentive for competitors to discount.
244. As other fuel retailers become aware that relevant BP sites are constrained in the way they price fuel (by the PCA), it is likely to impact the nature of competition and result in public detriment.
245. However, on the basis of the information available, the extent of this potential detriment is uncertain. The ACCC considers that any potential detriment would be reduced to the extent that the PCA did not apply to all relevant BP sites or was of limited duration.

Conclusion on public detriments

246. The ACCC considers that the Proposed Conduct is likely to result in some public detriments constituted by a lessening of competition, and that the likely detriments will be significant if discounts offered to consumers through the Shopper Docket

Discount Scheme or the Woolworths Reward Loyalty Program exceed 4 cents per litre in aggregate in a single transaction or are funded by Woolworths in excess of 2 cents per litre.

Balance of public benefit and detriment

247. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
248. The ACCC considers that the Proposed Conduct is likely to result in some public benefits from:
- increased aggregate fuel discounts to consumers under the Shopper Docket Discount Scheme
 - increased aggregate fuel discounts, and additional opportunities to earn and redeem points, to consumers under the Woolworths Rewards Loyalty Program, and
 - transaction cost savings to fuel retailers.
249. The ACCC considers that the Proposed Conduct is likely to result in significant public detriments through reducing competition between fuel retailers, and potentially foreclosing independent fuel retailers, if fuel discounts offered through either the Shopper Docket Discount Scheme or the Woolworths Rewards Loyalty Program exceed 4 cents per litre in aggregate in a single fuel transaction.
250. The ACCC considers that Woolworths and BP appear to have a commercial interest in offering discounts which exceed 4 cents per litre, at least from time to time or in aggregate across shopper dockets and loyalty rewards program offers. The ACCC considers it is likely Woolworths and BP would retain this commercial interest in the future.
251. The ACCC considers that if discounts under the arrangements were limited to 4 cents per litre in aggregate in a single transaction, and the funding of fuel discounts by Woolworths under the arrangements were limited to 2 cents per litre, the detriments of the Proposed Conduct would be limited such that the benefits would outweigh the detriments.
252. As a result, the ACCC has imposed a condition that:
- a. BP and Woolworths limit aggregate per-litre fuel discounts offered through the Shopper Docket Discount Scheme and the Woolworths Rewards Loyalty Program to no more than 4 cents per litre on any single fuel purchase
 - b. Woolworths limits its funding of the fuel discounts to no more than 2 cents per litre on any single fuel purchase
 - c. BP and Woolworths not make alternative offers that are similar in effect to fuel discount offers in excess of 4 cents per litre.

The condition is set out at [Attachment A](#).

Length of authorisation

253. The CCA allows the ACCC to grant authorisation for a limited period of time.¹⁰⁵ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
254. In this instance, the Applicants seek authorisation for 10 years on the grounds that:¹⁰⁶
- the relevant Commercial Alliance agreements are for minimum terms of 10 years and authorisation is sought for 10 years to reflect the commercial arrangements agreed between the parties
 - the Proposed Conduct is not new or unique – Woolworths Shopper Docket Discount Scheme has been in existence for 21 years and the Woolworths Rewards Loyalty Program has been in place for 9 years
 - retail fuel markets are likely to remain highly competitive over the longer term.
255. As set out in its draft determination, the ACCC considered that:
- 10 years is an appropriate period of authorisation in respect of the conduct relating to the Woolworths Shopper Docket Discount Scheme and the Woolworths Rewards Loyalty Program
 - twelve months is an appropriate period of authorisation in respect of the ‘Transitional Dealings’ (including the Price Competitiveness Arrangements) in the event that BP cannot take possession of any of Woolworths site(s) immediately upon completion, due to concerns that the ‘Transitional Dealings’ conduct (described in paragraph 261.c) may result in collusion between competitors for an extended period if BP does not promptly take possession of any Woolworths sites.¹⁰⁷
256. The Applicants submit that the ACCC’s concerns that there is the prospect of collusion between BP and Woolworths on retail fuel prices for a protracted period are misconceived, and that there is no need to limit this aspect of the authorisation to 12 months.¹⁰⁸
257. The ACCC maintains its view that an appropriate time limit on transitional conduct between BP and Woolworths would mitigate the potential harm likely to result from protracted coordinated conduct. The ACCC considers that 12 months is an appropriate length of authorisation in respect of the transitional period during which the Applicants may be engaged in potential cartel conduct if BP is not able to immediately take possession of former Woolworths sites upon completion of the Proposed Acquisition.

¹⁰⁵ Subsection 91(1).

¹⁰⁶ BP & Ors, Submission to the ACCC, 10 May 2017, pages 31-32.

¹⁰⁷ BP & Ors, Submission to the ACCC, 10 May 2017, page 31.

¹⁰⁸ BP & Ors, Submission to the ACCC, 30 October 2017, pages 14-15.

258. Further, the ACCC considers that the transitional arrangements should be very short term by their nature: the transitional arrangements contemplated by the Applicants are to allow for circumstances where Woolworths may retain possession of a small number of sites for a transitory period following completion of the Business Sale Agreement.¹⁰⁹

Determination

The applications

259. On 28 April 2017, the Applicants lodged applications for authorisation A91580, A91581 and A91582. Application A91580 was made using Form A under subsections 88(1 and 1A) of the CCA. Application A91581 was made using Form B under subsections 88(1 and 1A) of the CCA. Application A91582 was made using Form E under subsection 88(8) of the CCA.¹¹⁰

260. Authorisation is sought as the Proposed Conduct may contain cartel provisions within the meaning of Division 1 of Part IV or may have the purpose or effect of substantially lessening competition within the meaning of section 45¹¹¹ of the CCA. The Proposed Conduct may also constitute exclusive dealing.

261. Authorisation is sought as the Proposed Conduct involves:

- a. In respect of the participation of BP and BP Resellers in the Shopper Docket Discount Scheme:
 - i. Potential contraventions of the cartel provisions¹¹² or section 45 of the CCA arising from any contract, arrangement or understanding between BP and BP Resellers as to the discount, allowance, rebate or credit to be given or allowed in relation to fuel purchases at BP Reseller sites under the Shopper Docket Discount Scheme.
 - ii. Potential contraventions of sections 45 or 47 (by virtue of sub-sections 47(6) or (7)¹¹³) of the CCA arising from third-line forcing conduct by BP or BP Resellers in relation to consumers under the Shopper Docket Discount Scheme, including BP or

¹⁰⁹ See BP & Ors, Submission to the ACCC, 10 May 2017, pages 11, 31, 38.

¹¹⁰ As noted in paragraph 49, changes to the authorisation provisions in Division 1 of Part VII of the CCA came into effect on 6 November 2017. These changes apply to applications for authorisation under consideration at or after that date pursuant to section 183(2). Accordingly, the CCA as amended will apply to these applications, notwithstanding that they were lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A), (1) and (8) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

¹¹¹ As s4D has been repealed pursuant to the amendments referenced above it has been excluded from the description of the Proposed Conduct. The reference to "within the meaning of section 45 of the CCA" includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect or likely effect or likely effect of substantially lessening competition.

¹¹² Pursuant to the recent amendments to the CCA, the cartel provisions in Division 1 of Part IV referenced in the application for authorisation (ss44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK) have been renumbered to ss45AF, 45AG, 45AJ, and 45AK, respectively. These provisions are referred collectively to the 'cartel provisions' in this Determination.

¹¹³ Pursuant to the recent amendments to the CCA, ss47(6) and (7) are no longer *per se* provisions. This conduct is subject to s47(10), that is the conduct may have the purpose or effect or likely effect of substantially lessening competition.

BP Resellers giving or allowing, or offering to give or allow, a discount, allowance, rebate or credit in relation to fuel purchases under the Shopper Docket Discount Scheme on condition that a person has acquired goods or services from Woolworths.

- iii. Potential contraventions of sections 45 or 47 (by virtue of sub-sections 47(6) or (7)) of the CCA arising from third-line forcing conduct by BP in relation to BP Resellers, including BP supplying, or offering to supply, goods or services to BP Resellers conditional upon their participation in the Shopper Docket Discount Scheme.
 - iv. Potential contraventions of the cartel provisions within the meaning of Division 1 of Part IV, or sections 45 or 47 of the CCA arising from any contract, arrangement or understanding between BP and BP Resellers that BP Resellers will not, or will not except to a limited extent, supply or acquire to or from a third party services of a kind similar to those supplied or acquired by BP Resellers to or from BP under the Shopper Docket Discount Scheme.
- b. In respect of the participation of BP and BP Resellers in the Woolworths Rewards Loyalty Program:
- i. Potential contraventions of the cartel provisions or section 45 of the CCA arising from any contract, arrangement or understanding between BP and BP Resellers as to the terms on which they directly or indirectly supply or acquire services to or from Woolworths under their participation in the Woolworths Rewards Loyalty Program, including but not limited to:
 1. program funding in terms of any earn rate or redeem rate under the Woolworths Rewards Loyalty Scheme; and
 2. charges, fees or expenses that may be paid by Woolworths (either directly to BP or indirectly to participating BP Resellers via BP).
 - ii. Potential contraventions of the cartel provisions or section 45 of the CCA arising from any contract, arrangement or understanding between BP and BP Resellers as to any discount, allowance, rebate or credit (or other benefit) to be given or allowed in relation to fuel purchases at BP Reseller sites under the Woolworths Rewards Loyalty Program.
 - iii. Potential contraventions of sections 45 or 47 (by virtue of sub-sections 47(6) or (7)) of the CCA arising from third-line forcing conduct by BP or BP Resellers in relation to consumers under the Woolworths Rewards Loyalty Program, including BP or BP Resellers supplying, or offering to supply, benefits to consumers on condition that they acquire or have acquired:
 1. loyalty program services from Woolworths;
 2. goods or services from Woolworths group retail outlets; and/or

3. goods or services from a third party.
- iv. Potential contraventions of sections 45 or 47 (by virtue of sub-sections 47(6) or (7)) of the CCA arising from third-line forcing conduct by BP in relation to BP Resellers, including BP supplying, or offering to supply, goods or services to BP Resellers conditional upon their participation in the Woolworths Rewards Loyalty Program or the acquisition of goods or services from third parties in connection with facilities required to process Woolworths Rewards card transactions.
- v. Potential contraventions of the cartel provisions, sections 45 or 47 of the CCA arising from any contract, arrangement or understanding between BP and BP Resellers that BP Resellers will not, or will not except to a limited extent, supply or acquire to or from a third party services of a kind similar to those supplied or acquired by them to or from BP or Woolworths under the Woolworths Rewards Loyalty Program.
- c. In respect of conduct involving BP and Woolworths in circumstances where BP cannot take possession of any Woolworths sites immediately on completion of the Proposed Acquisition:
 - i. Potential contraventions of the cartel provisions or section 45 of the CCA arising from any contract, arrangement or understanding between BP and Woolworths as to any discount, allowance, rebate or credit (or other benefit) to be given or allowed in relation to fuel purchases at BP and former Woolworths sites under the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program.
 - ii. Potential contraventions of the cartel provisions or section 45 of the CCA arising from any contract, arrangement or understanding between BP and Woolworths in relation to the 'PCA' requirements relating to BP and former Woolworths sites.
 - iii. Potential contraventions of the cartel provisions, sections 45 or 47 of the CCA arising from any contract, arrangement or understanding between BP and Woolworths that they will not, or will not except to a limited extent, supply or acquire services of a kind similar to those supplied or acquired by them to or from each other under the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program, to or from a third party.

The net public benefit test

262. For the reasons set out in this determination, and subject to the condition set out at [Attachment A](#), the ACCC is satisfied pursuant to subsections 90(7) and 90(8) of the CCA, that in all the circumstances the conduct for which authorisation is sought would result or be likely to result in a public benefit that would outweigh

any detriment to the public that would result or be likely to result from the conduct.¹¹⁴

Conduct authorised by the ACCC

263. The ACCC grants authorisations A91580-A91582 to the Applicants to engage in the conduct described in paragraph 261 (with the exception of 261.c), for a period of 10 years, subject to the condition set out at Attachment A.
264. However, the ACCC is concerned that the conduct described in paragraph 261.c may result in collusion between competitors for an extended period if BP does not promptly take possession of any Woolworths sites and that authorisation for 10 years is not appropriate. The ACCC grants authorisation for the Applicants to engage in the Transitional Dealings being dealings between BP and Woolworths in the period following completion of the proposed acquisition during which some Woolworths sites may not have transferred to BP and in which Woolworths and BP may be considered competitors), for a period of 12 months, subject to the condition set out at Attachment A.
265. The Proposed Conduct may contain a cartel provision within the meaning of Division 1 of Part IV, may have the purpose or effect or likely effect of substantially lessening competition within the meaning of section 45, or may constitute exclusive dealing under section 47 of the CCA.
266. Under section 88(3), the legal protection afforded by the authorisations does not apply if any of the conditions are not complied with.
267. Under section 88(2) of the CCA, the ACCC extends the authorisation to future BP Resellers.

Conduct not authorised

268. The Applicants did not seek authorisation, and authorisation is not granted, for implementation of the Commercial Alliance as a whole, or for any aspect of the Metro@BP convenience partnership.
269. The Applicants did not seek authorisation, and authorisation is not granted, for any agreements between BP and Woolworths for the making of fuel discount offers tied to purchases at a BP retail convenience store (in-store fuel offers) or any funding of such discounts by Woolworths.

Date authorisation comes into effect

270. This determination is made on 14 December 2017. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 5 January 2018.

¹¹⁴ As a cartel provision applies to the Proposed Conduct, subsection 90(7)(a) does not apply: section 90(8).

Attachment A - Condition

1. Objectives

- 1.1 The following sets out the objectives of imposing a condition to address the ACCC's competition concerns set out in this Determination (A91580-A91582).
- 1.2 The ACCC considers that if discounts under the arrangements were limited to 4 cents per litre in aggregate in a single transaction, and that if funding by Woolworths were limited to 2 cents per litre, the detriments of the Proposed Conduct would be limited such that the benefits would marginally outweigh the detriments.
- 1.3 As a result, the ACCC has imposed a condition of authorisation on Woolworths and BP which is set out in sections 2-5 below and which limits:
- (a) aggregate per-litre fuel discounts offered through shopper dockets or rewards or benefits schemes to no more than 4 cents per litre on any single fuel purchase; and
 - (b) funding of the fuel discounts by Woolworths to no more than 2 cents per litre.

2. Fuel discounts offered through shopper dockets or rewards or benefits schemes

- 2.1 BP and Woolworths (either singly or in combination) must not:
- (a) make any offer pursuant to which a person may obtain a discount or rebate on their acquisition of petrol, diesel or LPG, or
 - (b) allow any discount or rebate to a customer on their acquisition of petrol, diesel or LPG,

at any BP COCO or BP Commission Agent site, where the discount or rebate, in aggregate on a single acquisition of petrol, diesel or LPG, is:
 - (c) funded by Woolworths in an amount greater than 2 cents per litre (or the equivalent of 2 cents per litre); or
 - (d) greater than 4 cents per litre (or the equivalent of greater than 4 cents per litre) and contingent on:
 - (i) the past or future acquisition of other goods or services (except goods or services acquired from the petrol station or a business physically located and operated in conjunction with the petrol station (such as a convenience store, car wash, or fast food outlet)), or
 - (ii) membership of any rewards or benefit scheme associated with Woolworths (including but not limited to the Woolworths Rewards Loyalty Program).

Meeting competition exception

- 2.2 BP or Woolworths can offer a discount to meet competition, being a discount up to and not exceeding the amount of, and only for the duration of, and only in

the geographic areas in which, the rival discount is being respectively offered and allowed. The exception only applies where the competitor is a fuel retailer or grocery supplier which operates or has arrangements with more than 25 petrol stations in a State or Territory or more than 75 petrol stations nationally or has annual Australian revenue of greater than \$500m.

Other discounting restricted

- 2.3 BP or Woolworths must not make alternative fuel discount offers which are equivalent in effect to shopper docket and loyalty program offers greater than 4 cents per litre.

Other discounting not restricted

- 2.4 This condition does not seek to limit:
- (a) BP offering fuel discounts which are not related to a purchase from, or a reward or benefit scheme associated with, Woolworths, or
 - (b) BP or Woolworths offering general Woolworths Rewards Loyalty Program rebates for points accumulation (such as those in the form of \$10 for every \$2000 spent) where such rebates are triggered by any purchase from any participating retailer in the program and are not confined to purchases from BP.

3. Independent audit of compliance

Obligation to appoint an independent auditor

- 3.1 By completion of the Business Sale Agreement, BP and Woolworths must appoint an independent Auditor approved by the ACCC. BP and Woolworths must continue to engage and fund the Auditor to report to the ACCC with respect to the compliance by BP and Woolworths with this condition.
- 3.2 BP and Woolworths must:
- (c) direct their personnel, including directors, managers, officers, employees and agents to act in accordance with the obligations set out in the condition and ensure that such personnel are aware of the Auditor and his or her role; and
 - (d) provide to the Auditor any information or documents he or she considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC.
 - (e) ensure that the Auditor will provide information and documents requested by the ACCC directly to the ACCC.
- 3.3 BP and Woolworths must procure that the terms of appointment of the Auditor include obligations on the Auditor to:
- (a) directly report to or otherwise inform the ACCC of any issues that arise in the performance of his or her functions as auditor or in relation to any matter that arises in connection with this condition

- (b) advise the ACCC of any breach or likely breach of this condition within 7 days of becoming aware of it, and
- (c) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Auditor under this condition.

Compliance audit

- 3.4 BP and Woolworths must within twelve months of completion of the Business Sale Agreement, and subsequently on an annual basis for the term of authorisation, provide to the ACCC a written audit report from the Auditor in relation to BP's and Woolworths' compliance with their obligations under this condition.
- 3.5 The Auditor is to prepare a detailed report (Auditor's Report) on:
 - (a) BP's and Woolworths' compliance with this condition
 - (b) the reasons for the conclusions reached in the Auditor's Report
 - (c) any qualifications made by the Auditor in forming his or her views; and
 - (d) any recommendations by the Auditor to improve the integrity of the auditing process and any reasonable recommendations to improve BP's and Woolworths' processes or reporting systems in relation to compliance with this condition
 - (e) the implementation and outcome of any prior recommendations by the Auditor.

4. Variation of condition

- 4.1 BP or Woolworths may request in writing that the ACCC vary this condition.
- 4.2 Any request by BP or Woolworths to the ACCC for a variation to this condition must state the nature of the variation sought and the circumstances claimed by BP or Woolworths and must be accompanied by evidence supporting the request.
- 4.3 The ACCC may request from BP or Woolworths any additional information required by the ACCC to assess the request for a variation of this condition.
- 4.4 The ACCC may undertake any further consultation as it considers necessary to consider any such request for a variation to this condition, including inviting submissions from interested parties.
- 4.5 In undertaking an assessment of a request to vary this condition, the ACCC may publish or otherwise make publicly available BP or Woolworths' submissions in support of their request for variation and to any submissions made by the interested parties.
- 4.6 After considering a request to vary this condition, the ACCC may, in its absolute discretion, decide to vary this condition or dismiss the request for variation.
- 4.7 If the ACCC decides to vary this condition, the variation will be effective from the date determined by the ACCC.

5. Information

- 5.1 BP and Woolworths must respond as soon as practicable to any queries or requests for information or documents made by the ACCC pursuant to or in relation to this condition.
- 5.2 Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this condition may be used by the ACCC for any purpose consistent with the exercise of its statutory duties and functions.
- 5.3 Nothing in this condition will require the provision of information or documents in respect of which either of BP or Woolworths claim legal professional or other privilege.