Alexandra MERRETT
Competition Lawyer

23 November 2017

Mr David Hatfield

Director - Adjudication

Australian Competition and Consumer Commission

By email: adjudications@accc.gov.au

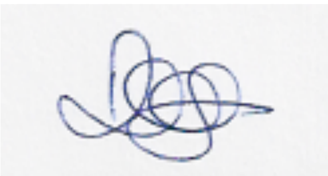
Dear Mr Hatfield

Re: A91580, A91581 & A91582 – BP Australia Pty Ltd & Ors - submission

Please find attached a submission prepared on behalf of the IGA National Council in relation to the above matter.

Thank you in advance for your consideration.

Kind regards,



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This submission is made on behalf of the IGA National Council (the **IGA NC**), the peak body for IGA retailers. It is made without prejudice to any views expressed by the IGA NC, or its members, in respect of the informal merger clearance process involving BP and Woolworths which is currently underway.

The IGA NC thanks the ACCC for the opportunity to comment upon its Draft Determination of 29 August 2017, in particular the proposed condition to the effect that:

> *Per-litre fuel discounts, offered via the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program, be limited to no more than 4 cents per litre on any single fuel purchase (the **Proposed Condition**).*

The IGA NC supports the ACCC's view that the Proposed Condition is necessary and appropriate. In particular, it agrees with the ACCC's assessment that, without such a condition, the conduct the subject of BP and Woolworths' authorisation application (the **Proposed Conduct**) may well lessen competition between fuel retailers, and within the convenience sector. This is due to a range of factors, including:

- Customers regarded as 'price sensitive' will become increasingly 'out of reach' for retailers (whether fuel or convenience) which are unable to offer fuel discounts and/or extensive loyalty programmes;
- Likewise, there is likely to be a parallel reduction in the intensity of competition for less price-sensitive consumers;
- Cross-subsidisation between fuel and grocery sectors may give rise to discounts at levels which otherwise efficient operators are unable to compete with; and
- Similarly, cross-subsidisation can occur within the fuel sector alone, as between different local markets.

The IGA NC generally endorses the ACCC's assessment of the above issues as set out in the Draft Determination. Nonetheless, it would like to expand upon the ACCC's analysis in relation to the following matters:

- The parties' ability and incentive to discount beyond 4c/L;
- The ongoing risk of cross-subsidisation, undermining effective and efficient competitors in local markets; and

- Whether a limit of 4c/L is the appropriate amount.

These issues are discussed in more detail below.

The parties' ability and incentive to discount beyond 4c/L

In response to certain claimed detriments, the Applicants have submitted that the shopper docket discount will be capped at 4c/L and, further, that BP's ability to initiate the discount will be limited by the terms of the Woolworths undertaking given in 2013 (see at [111]ff). As the ACCC notes, the parties can change their mind about the level of the discount at any time; further, the Woolworths undertaking expires at the end of next year (which would be only a year or so into any ten-year authorisation term).

As the ACCC is well aware, both Woolworths and Coles have sought to discount well beyond 4c/L, notwithstanding the 2013 undertakings. Indeed, the ACCC successfully demonstrated before the Court that Woolworths' conduct was in breach of its undertakings. Nonetheless, Coles' conduct – which also effectively gave rise to discounts well in excess of 4c/L – was upheld. This outcome only served to highlight the loopholes available under the current undertakings, which loopholes have been regularly exploited by Woolworths (and Coles) ever since.

This point is reflected in submissions made to the ACCC by Interested Parties, as well as in the ACCC's Draft Determination itself (see e.g. at [155]). The IGA NC wishes to emphasise that such examples are not isolated and, absent the Proposed Condition, would almost certainly continue and even increase if the Proposed Conduct were to be authorised. The IGA NC agrees with the ACCC's assessment that, if the Proposed Conduct is authorised unconditionally, "fuel discounts are likely to be offered in excess of 4c/L… [I]t is unlikely that most other fuel retailers could profitably offer similar discounts" ([157]). Such an outcome would clearly be harmful to competition and ultimately to consumer welfare.

The ongoing risk of cross-subsidisation

The initial undertakings put forward by Woolworths and Coles were prompted by ACCC investigations which revealed that fuel discounts may (at least in part) ultimately be funded through higher prices paid by supermarket customers and fuel customers who do not use shopper dockets to purchase fuel. This is a concern reiterated by the ACCC in its Draft Determination (see at [74]).

This, in short, is an argument of cross-subsidisation. Much of this concern relates to the opportunity for cross-subsidisation as between the fuel and grocery sectors, a concern shared by the IGA NC. Indeed, the anticompetitive effects of cross-subsidisation across sectors must be emphasised. Woolworths, as a vertically integrated operator with an extremely broad national network, has an enormous capacity to underwrite discounts by relying on profits generated in less competitive markets. Independent retailers (whether fuel or convenience) have no such opportunity and must compete entirely on their merits, specifically the revenue generated within their local market. Accordingly, even the most efficient operators are vulnerable to excessive discounting when it is cross-subsidised by profits generated outside the market in question.

To this end, the IGA NC strongly endorses the ACCC's concerns about such cross-subsidisation. It also wishes to highlight the opportunity for cross-subsidisation within the fuel sector itself, an opportunity that would only be enhanced by the Proposed Conduct. In particular, there is a concern that cross-subsidisation will be possible as between local fuel markets.

Absent a condition such as that proposed, BP would have both the ability and a clear incentive to target competitive local fuel markets with heavy discounting. This discounting (assuming that there is indeed no cross-subsidisation as between fuel and groceries) would be ultimately funded by the profits generated in less competitive local markets. In a competitive market, an efficient and effective competitor would not be in a position to match deep discounting without themselves having recourse to such a broad national network.

If the Proposed Conduct were to proceed, the expanded network would in fact give rise to greater prospects of cross-subsidisation as between local fuel markets. This would be due to the estimated 200 additional redemption sites likely to participate in the scheme.

As the ACCC observes, independent fuel retailers – i.e. those without the support of a broad national network – "can be important in providing ongoing competition and keeping fuel prices at more efficient levels". It would be exactly these sorts of retailers that would be most at risk if BP and Woolworths were to have an unfettered ability to offer fuel discounts.

Should any limit on fuel discounting be set at 4c/L or is a higher limit appropriate?

The IGA NC endorses the following conclusions by the ACCC:

- BP and Woolworths have and will continue to have a commercial interest in offering discounts which exceed 4c/L (at least at certain times and in certain places) (see at [227]); and
- Other fuel retailers are generally able to compete if shopper docket discounts are capped at 4c/L (see at [138]).

Once a discount exceeds 4c/L, however, it starts to directly eat into the already slim margins available to retailers (fuel or convenience, depending on who ultimately funds the discount). As already noted, this effect is exacerbated for the independent sector, which is generally unable to defray the discount across a broad network and/or across functional levels. Such conduct therefore puts independents at significant risk, which has obvious implications for consumer choice. As the ACCC has continually observed, however, any detrimental effect on the independent sector is even more important given the role of independents in asserting downward price pressures on the majors (whether fuel or convenience). Consequently, any diminution of the independent sector will affect its capacity to exert competitive pressure on the majors, with a direct and adverse impact on consumer welfare.