

PUBLIC VERSION

Sydney
Melbourne
Brisbane
Perth
Port Moresby

16 November 2017

By email

Special Counsel
Alistair Newton (03) 9672 3483
Email: alistair.newton@corrs.com.au

Mr David Jones
General Manager, Adjudication
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Dear David

BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

As you know, we act for BP Australia Pty Ltd (**BP**) in respect of the above applications for authorisation dated 10 May 2017 (together, the **Application**) made on behalf of BP, resellers of fuel under the BP brand (**BP Resellers**) and Woolworths Limited (**Woolworths**) (together, the **Applicants**).

We refer to the Applicants' previous submissions in this matter, the further interested party submissions received by the ACCC from Endeavour Petroleum Pty Ltd (**Endeavour Petroleum**), 7-Eleven Stores Pty Ltd (**7-Eleven**) and Master Grocers Australia Limited (the **MGA**) on 6, 10 and 14 November 2017 respectively, and recent discussions between the Applicants and the ACCC.

1 Overview

This letter addresses the following issues relevant to the ACCC's assessment of the Application.

- **(Non-contingent, loyalty-based fuel discounts)** First, the extent to which competing fuel retailers have, or could have, access to funding for non-contingent (i.e. not contingent upon a separate purchase from an associated non-fuel business) loyalty-based fuel discounts and, in that context, the extent to which competing fuel retailers would be able to compete with such discounts offered by the Applicants.

As the ACCC is aware, BP and Woolworths have offered section 87B undertakings to cap contingent fuel discounts at 4cpl, including contingent loyalty-based fuel discounts, and not to aggregate such discounts. BP and Woolworths have not offered section 87B undertakings to cap non-contingent loyalty-based fuel discounts because the Applicants do not consider there to be any public

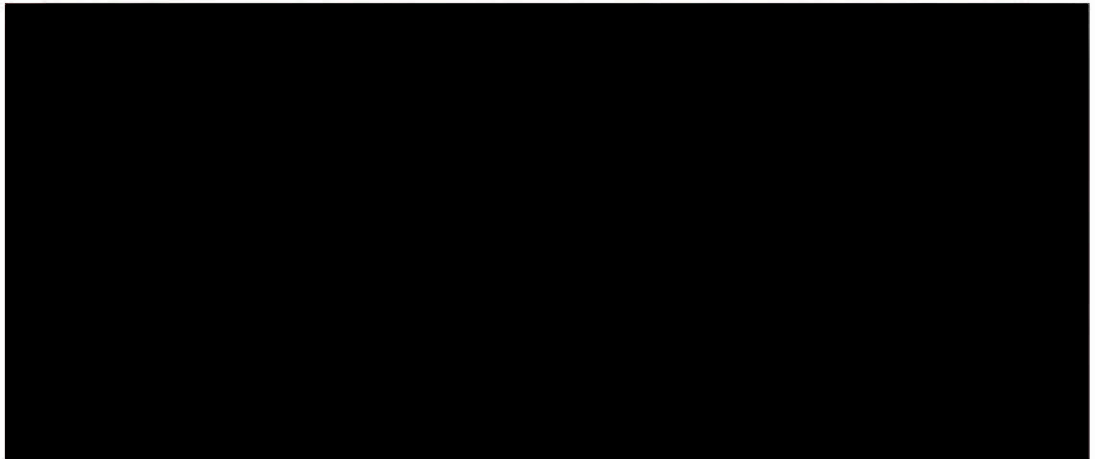
16 November 2017

Australian Competition and Consumer Commission

BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

detriment arising from such offers. Retail fuel competition occurs at a local level and such offers can be made by any fuel retailer who has a loyalty offer and by any loyalty program operator who enters into an arrangement with a fuel retailer.

•



- **(Further Endeavour Submission)** Third, certain issues raised in the further submission received from Endeavour Petroleum (**Further Endeavour Submission**).

The Applicants do not propose to address any aspect of the submissions received from 7-Eleven or the MGA, as the issues raised in those submissions have been addressed at length in the Applicants' previous submissions and/or are irrelevant to the Application. For example:

- 7-Eleven submits that fuel discounts under the Shopper Docket Discount Scheme should be capped at 4cpl and should not be aggregated with any Woolworths Rewards Loyalty Program-based offer. However, this is addressed completely by the Applicants' proposed section 87B undertakings.
- The MGA alleges competitive harms arising merely from the proposed development of *Metro@BP* sites. However, the Applicants are not seeking authorisation for any aspect of the proposed *Metro@BP* offering.

The submissions in this letter are additional to, and should be read in conjunction with, the Applicants' more detailed October Submission.

Capitalised terms in this letter have the same meanings as in the Applicant's earlier submissions.

2 Confidentiality

Portions of this letter that have been highlighted in red and are preceded by the word "**CONFIDENTIAL:**" contain confidential and commercially sensitive information. Subject to the below, this information must not be disclosed to any third party without the express written consent of BP and Woolworths. BP and Woolworths:

16 November 2017

Australian Competition and Consumer Commission

BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

- acknowledge that there is no restriction on the internal use, including future use, that the ACCC may make of confidential information consistent with the ACCC's statutory functions;
- consent to the disclosure of confidential information to the ACCC's external advisors and consultants on the condition that each such advisor or consultant will be informed of the obligation to treat the information as confidential; and
- acknowledge that the ACCC may disclose confidential information to third parties (in addition to its external advisors and consultants) if compelled by law or in accordance with section 155AAA of the *Competition and Consumer Act 2010* (Cth) (CCA).

3 Non-contingent loyalty-based fuel discounts

The ACCC may have a concern that, as a result of the size of the Woolworths Rewards Loyalty Program membership base, the Woolworths supermarket business and/or the post-acquisition BP-branded site network, independent fuel retailers will be unable to match the Applicants' non-contingent loyalty-based fuel discount offers. The ACCC may also have a concern that the Applicants will have access to funding for non-contingent loyalty-based fuel discounts that independent fuel retailers may not have access to.

For the reasons set out below, these concerns are unfounded. Other loyalty programs have a comparable base and are growing, and loyalty programs are not exclusive – a consumer is likely to be a member of numerous such programs and members of the Woolworths Rewards Loyalty Program are not foreclosed to other fuel retailers (or any other retailers or loyalty programs). Retail fuel competition occurs at a local level and, for this reason, independent fuel retailers are not disadvantaged by, and have competitive responses available to them in respect of, non-contingent fuel discounts offered by the larger loyalty program operators in association with larger retail fuel site networks. Examples of the broad range of competitive offers currently available are set out in the Applicants' more detailed October Submission. Various competing loyalty program operators are able readily to offer and fund discounts, including at relatively high levels, as a short-term benefit of membership to promote their respective programs. Accordingly, these concerns do not form a proper basis for concluding that non-contingent loyalty-based discounts of the kind permitted by the Applicants' proposed section 87B undertaking would result in public detriments.

(a) *Relevance of size of Woolworths Rewards Loyalty Program, Woolworths supermarket business and BP-brand site network*

For the reasons set out below, the Applicants submit that it is not relevant that the Woolworths Rewards Loyalty Program has a large membership base, that Woolworths' supermarket business operates nationally, or that the post-acquisition BP-branded fuel site network will be larger than independent retail fuel networks.

- **(Various competing national loyalty programs are similarly large)** First, the Woolworths Rewards Loyalty Program, which has approximately 9 million

16 November 2017

Australian Competition and Consumer Commission

BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

members, is not unusually large. Various competing loyalty programs have similarly large memberships numbering in the millions of consumers. For example, in addition to the MyIGA loyalty program mentioned above:

- *Flybuys* – the Flybuys loyalty program operated by Wesfarmers has approximately 10 million members and is associated with the Coles Express retail fuel business;
- *Velocity* – the Velocity loyalty program has approximately 6 million members, and is a loyalty program in which numerous retailers participate. BP is an “earn and redemption partner” in the Velocity loyalty program, with both BP and BP Reseller sites participating. In addition, Velocity currently has a relationship with Loyalty Pacific Pty Ltd in respect of the Flybuys loyalty program: points earned in the Flybuys program can be redeemed for points in the Velocity program. BP’s agreement in respect of its participation in the Velocity loyalty program expires in April 2018 (if not terminated earlier). Once BP’s association with the Velocity loyalty program concludes, Velocity will have renewed opportunities to engage with competing fuel retailers; and
- *MYER one* – the Myer one loyalty program has approximately 5 million members and is associated with Caltex-brand retail fuel businesses.

Further information concerning these and other competing loyalty programs is set out in section 6.2 of the Applicants’ initial supporting submission dated 10 May 2017.

- **(Loyalty program membership is not exclusive)** Second, loyalty program membership is not exclusive and it is usual for consumers both to be members of multiple loyalty programs and to take advantage of various offers under each of those multiple loyalty programs from time to time. As a result, the size of the Woolworths Rewards Loyalty Program membership base does not act to exclude existing or prospective competing loyalty programs, or foreclose Woolworths Rewards Loyalty Program members to independent fuel retailers who may associate with those competing loyalty programs.
- **(Competition in retail fuel is fundamentally local)** Third, competition in fuel retailing is fundamentally local in that consumers make fuel purchasing decisions based on the options available to them in local areas. To illustrate, it would not be competitively relevant to an independent fuel retailer located in a regional Victorian town that members of the Woolworths Rewards Loyalty Program residing and purchasing fuel in Brisbane are offered non-contingent loyalty-based fuel discounts. For this reason, independent fuel retailers are not disadvantaged by, and have competitive responses available to them in respect of, non-contingent fuel discounts offered by the larger loyalty program operators and supermarkets in association with larger retail fuel site networks. For example, by associating with a loyalty program operated by a local independent supermarket

16 November 2017

Australian Competition and Consumer Commission

BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

operator (such as an IGA-branded supermarket) or other retailer(s), an independent fuel retailer could reproduce the benefits available under the Woolworths Rewards Loyalty Program for its local customer base.

The parties have proposed to extend the undertaking given by Woolworths in December 2013 to fuel discounts offered to Woolworths Rewards Loyalty Program members where a selection criterion is the customer's past shopping at a Woolworths business, in recognition of (but without accepting) the concerns that have been raised about potential anti-competitive detriments arising from such a connection. However, the parties have not proposed any limits on fuel offers to Woolworths Rewards Loyalty Program members where there is no connection between the offer and the customer's purchases at Woolworths, because without such connection the sorts of potential anti-competitive detriments raised by the ACCC do not arise, for the reasons set out above.

(b) *Funding of non-contingent loyalty-based fuel discounts*

In relation to the funding of non-contingent loyalty-based fuel discounts, the Applicants submit that various competing loyalty program operators are able readily to offer and fund such discounts, including at relatively high levels (such as the recent 10cpl Woolworths Rewards Loyalty Program offer), as a short-term benefit of membership to promote their respective programs. In particular:

- **(MyIGA)** The operator of the MyIGA loyalty program – which the Applicants estimate has 1-2 million members¹ – could readily associate with independent fuel retailers (in much the same way as IGA supermarkets already associate with independent fuel retailers in respect of shopper docket fuel discounts) and fund (or pass through funding for) non-contingent fuel discounts to its members.
- **(Other loyalty programs)** Similarly, operators of various major retailer and bank-based loyalty programs – such as Priceline, David Jones, ANZ, Commonwealth Bank and National Australia Bank, Telstra, Optus as well as Velocity (as noted above) – could readily associate with independent fuel retailers and fund non-contingent loyalty-based fuel discounts.

Further, 7-Eleven – which to date has elected not to introduce a comprehensive loyalty program for its fuel and non-fuel customers and which would presumably prefer not to face intensified competition in the form of loyalty-based fuel discounts available at BP-branded fuel sites – could also readily introduce and fund non-contingent fuel discounts, either through a new loyalty program or through its existing 7-Eleven Fuel App (which the Applicants understand has been downloaded by over 700,000 consumers).²

¹ Based on survey results published in 2016 by Roy Morgan Research, which estimated that approximately 7% of Australians are members of My IGA. See <http://www.roymorgan.com/findings/6983-how-popular-are-customer-loyalty-programs-really-201609261433>

² See <https://www.c-store.com.au/2017/10/31/7-eleven-opens-500th-fuel-store-burpengary/>

16 November 2017
Australian Competition and Consumer Commission
BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

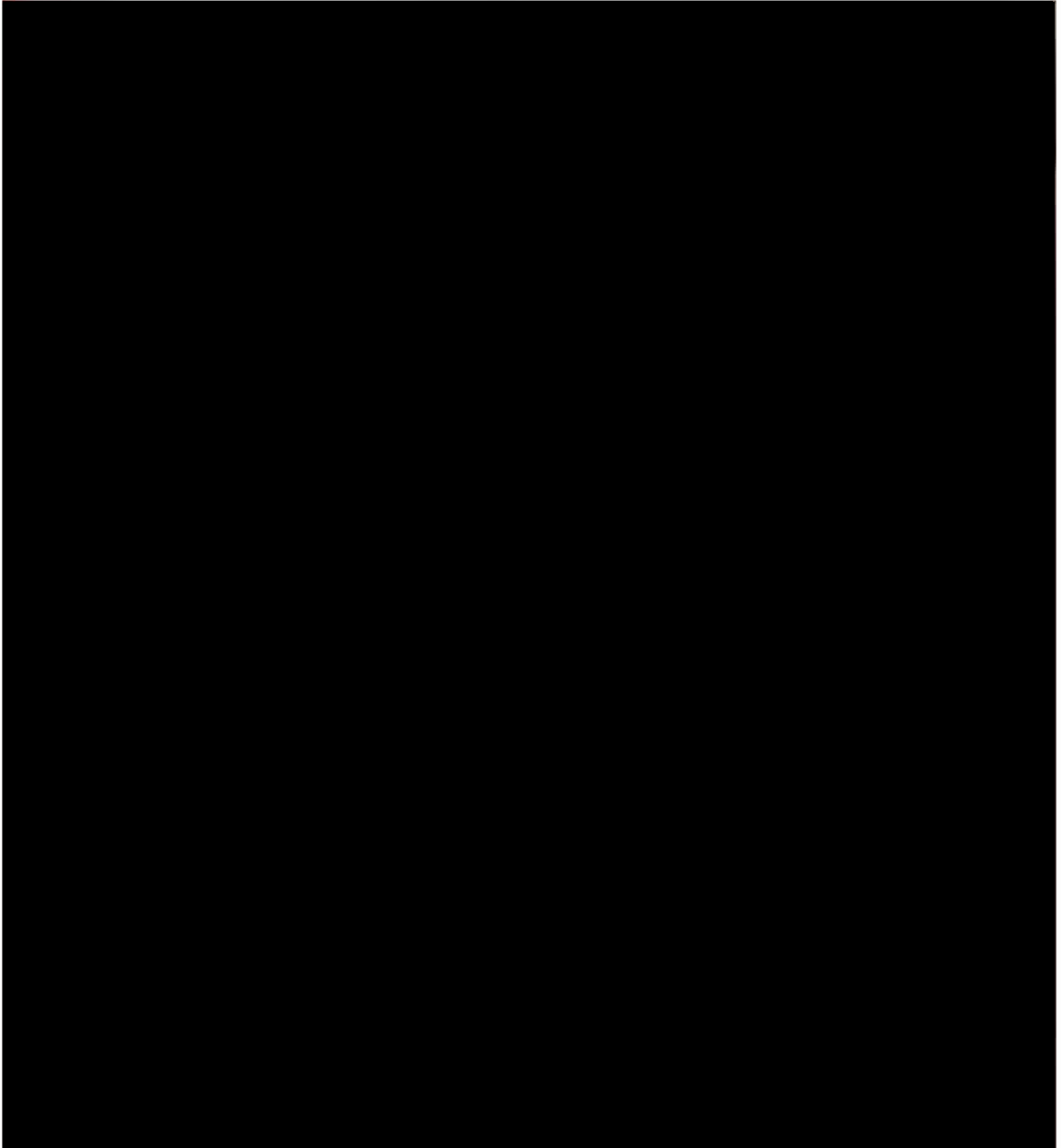
4



16 November 2017

Australian Competition and Consumer Commission

BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions



5 Response to Further Endeavour Submission

The Applicants agree with aspects of the Further Endeavour Submission. In particular, the Applicants agree with Endeavour Petroleum that:

- the expansion of the Shopper Docket Discount Scheme will “*create downward [retail] price pressure*” (see page 1);
- upon completion of the Proposed Acquisition, Caltex will be “*looking to build their [wholesale] volume base after the loss of Woolworths*” and that, as Endeavour

16 November 2017

Australian Competition and Consumer Commission

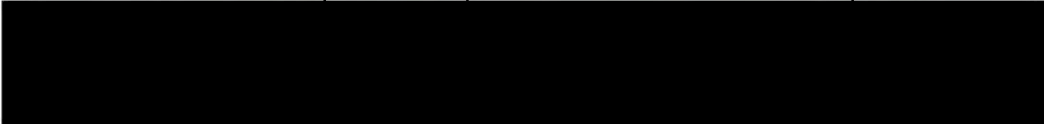
BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

Petroleum implies, the threat of BP Resellers “[moving] away from their supply agreements [with BP]” imposes “greater [wholesale] price pressure [on BP] to hold supply” (see page 2); and

- sites like the Endeavour-branded sites operated by Endeavour Petroleum will “allow other oil companies to continue to invest in terminals...” (see page 2).

However, the Further Endeavour Submission also contains various allegations that are either irrelevant and/or unsupported by the facts. While the Applicants do not propose to respond to all of those allegations, many of which have already been addressed by the Applicants’ earlier submissions, there are particular aspects of the Further Endeavour Submission with which the Applicants (in particular, BP) strongly disagree and which warrant a public response, as set out below.

- **(Funding of fuel discounts under the Shopper Docket Discount Scheme)** The allegation that BP intends to fund fuel discounts under the Shopper Docket Discount Scheme by increasing wholesale fuel prices (“TGP”) is simply wrong. Wholesale fuel markets are, and will continue to be, highly competitive and BP does not have the ability unilaterally to increase its wholesale fuel prices.

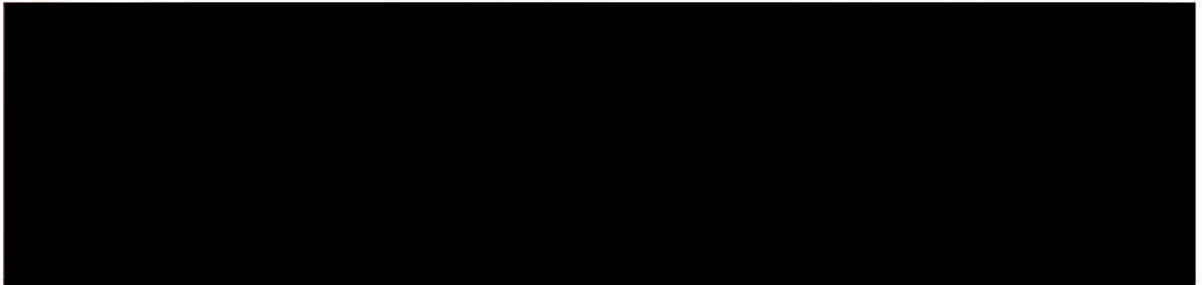
- 
- **(Wholesale supply and retail fuel margins in Tasmania)** BP has not sought to limit supply to BP dealers from its terminals in Tasmania, as it has no commercial incentives to do so. Further, BP has not conducted its wholesale or retail businesses with the aim of “driving” retail margins across Tasmania to higher levels.
 - **(Third-party terminal investments)** Endeavour complains that, in describing various changes to fuel markets since 2013, the October Submission used examples of independent import terminal investments that were diesel-only and mining-related, and which therefore have had no impact on the supply of motor spirit. This is incorrect. The October Submission noted investments in: Puma facilities at Mackay, Townsville, Brisbane and Perth; United’s expanded facility at Hastings; Park Petroleum’s diesel-focused facility at Newcastle; and Vopak’s facilities at Sydney and Darwin. While it is true that some of these are diesel-focused and mining-related, many – including for example Puma’s Mackay facility – have also involved increases in capacity for the importation of motor spirit.
 - **(BP terminal infrastructure in Melbourne and Sydney)** BP rejects the allegation that it uses “poor infrastructure and limit[s] supply using the condition of [its] facilities as the excuse” (see page 2), in Melbourne, Sydney or elsewhere. In Melbourne, BP has a terminal licence agreement at the ExxonMobil Yarraville terminal and uses Viva’s Newport and Geelong terminals. In Sydney, BP uses the relatively new Vopak industry terminal in Sydney. BP has not sought to limit

16 November 2017

Australian Competition and Consumer Commission

BP Australia & Ors – applications for authorisation A91580-82 – further Applicant submissions

supply from these third-party terminals, as it has no commercial incentives to do so.



Yours sincerely

Alistair Newton
Special Counsel

Mark McCowan
Partner