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Dear David

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

We refer to:

- previous submissions to the Australian Competition and Consumer Commission (**ACCC**) in respect of the above applications for authorisation (together, the **Application**) on behalf of BP Australia Pty Ltd (**BP**), resellers of fuel under the BP brand (**BP Resellers**) and Woolworths Limited (**Woolworths**) (together, the **Applicants**);
- the further interested party submissions received by the ACCC from the IGA National Council dated 23 November 2017 (the **IGA NC Submission**) and United Petroleum Pty Ltd dated 27 November 2017 (the **United Submission**); and
- discussions between BP, Woolworths and the ACCC on 5 December 2017.

This letter sets out the Applicants' further submissions in relation to the offer of non-contingent (i.e. not contingent upon a purchase from an associated non-fuel business, such as a Woolworths retail business) fuel discounts, and the funding of both non-contingent and contingent fuel discounts.

### **Non-contingent fuel discount offers**

For the detailed reasons set out in section 3 of the Applicants' submission to the ACCC dated 16 November 2017 (**November Submission**), the Applicants remain of the strong view that non-contingent fuel discounts do not result in public detriments, and accordingly there is no proper basis for the ACCC seeking to place any cap on non-contingent fuel discounts in the context of the Application. Those reasons include, for example, that:

- operators of competing loyalty programs (many of which are of comparable size to the Woolworths Rewards Loyalty Program, and which are not foreclosed to any consumers as a result of the proposed conduct) are able readily to offer such fuel discounts; and

- competing fuel retailers, including independent fuel retailers (which compete against BP and BP Resellers at the local level) are able to competitively respond to non-contingent fuel discounts offered under the Woolworths Rewards Loyalty Program by associating with a competing loyalty program

The Applicants also reiterate that the fundamental concern about fuel discounts associated with supermarket businesses since 2012 has been that efficient, stand-alone fuel retailers would not be able to match fuel discounts of 8cpl or higher, because those offers were only available to customers of the supermarket business which shared common ownership with the fuel business, and the so-called “cross-subsidy” between those two businesses.

Woolworths did not accept there was any cross-subsidy, nor any anti-competitive effects, at that time. In any event, none of those features will be present in respect of the proposed conduct because there will no longer be any common ownership of the Woolworths supermarket business and the fuel business that will be owned by BP – all that will be in place will be commercial agreements between Woolworths, BP and BP Resellers. Any fuel retailer can enter into a commercial agreement with another fuel retailer, loyalty program operator and/or any other business or organisation (for example, RACT in Tasmania) and agree to the commercial terms of a fuel discount or other loyalty offer.

There is therefore no principled basis for capping non-contingent fuel discounts at any level. The submissions by third parties calling for this to occur should be considered in light of the commercial interests of those third parties, which appear to seek regulatory restrictions to ensure that they are not faced with pro-competitive fuel discount offers which would otherwise drive a competitive response and increased benefits to consumers.

### **Funding of fuel discounts**

In relation to the funding of fuel discounts, the Applicants consider that there is no basis for the ACCC to seek to impose any cap on Woolworths’ funding, for the following reasons.

- **(Non-contingent fuel discounts)** In relation to non-contingent fuel discounts, for the same reasons as given in section 3(b) of the November Submission, the Applicants consider that competing loyalty program operators are readily able to fund non-contingent fuel discounts, including at varied levels (such as the recent 10cpl Woolworths Rewards Loyalty Program offer). Those competing loyalty program operators include the operator of the MyIGA loyalty program, 7-Eleven and the operators of various major retailer and bank-based loyalty programs. In that context, it is not correct to suggest (as the IGA NC Submission and United Submission do) that the Applicants have some special or unique access to funding for non-contingent fuel discounts which other loyalty program operators or fuel retailers lack.
- **(Contingent fuel discounts)** In relation to contingent fuel discounts under the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program, the Applicants have already offered to cap contingent fuel discounts at 4cpl, and not to aggregate such discounts. That offer responds directly to the concerns expressed in the Draft Determination in relation to possible distortions to retail fuel markets in the event of greater-than-4cpl contingent fuel discounts. The source of funding for those contingent fuel discounts, capped at 4cpl, is immaterial to

whether or not the public detriments identified by the ACCC in this respect are likely to occur, since they are clearly avoided entirely by the 4cpl cap alone. Further, as mentioned in the Applicants' submission to the ACCC dated 30 October 2017 (**October Submission**), there are various retailers that are in a position to provide funding that is equal to or greater than Woolworths' proposed funding.

- (**Interested party submissions regarding “cross-subsidisation”**) Finally, there is no cross-subsidy. Woolworths is selling its fuel business. All that will be in place is a commercial agreement between Woolworths and BP. Any fuel retailer can enter into a commercial agreement with a retailer under which that retailer agrees to contribute to funding of fuel discounts, if the retailer chooses to do so. With the sale of Woolworths' fuel business, there is no common ownership nor any incentive for Woolworths to drive fuel sales. To the extent that they are relevant to the ACCC's consideration of potential caps on Woolworths' funding of fuel discounts, the Applicants consider that the further interested party submissions significantly overstate the potential for so-called “cross-subsidisation” of such fuel discounts. In particular, the IGA NC Submission states that “Woolworths... has an enormous capacity to underwrite discounts by relying on profits” generated from its other businesses. First, insofar as the submissions imply that Woolworths is able to charge increased grocery prices to fund fuel discounts, they are incorrect – as set out in section 3(c) of the October Submission, Woolworths has no ability to do so in the context of the increasingly competitive grocery markets in which it competes. Second, Woolworths' ability to fund fuel discounts from profits generated from its grocery sales is severely constrained by the need for it to re-invest those profits in its grocery business to remain competitive in grocery markets. In any event, as noted above, Woolworths' ability to fund fuel discounts is matched by a variety of other retailers and loyalty program operators.

Yours sincerely

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Partner