

PUBLIC REGISTER VERSION

Applications for authorisation
A91580, A91581 & A91582 –
further supplementary submission
after draft determination

BP Australia Pty Ltd on behalf of itself,
BP Resellers,
and Woolworths Limited

30 October 2017

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1 Overview

This is a further supplementary submission by BP Australia Pty Ltd (**BP**) in respect of the applications for authorisation dated 10 May 2017 (together, the **Application**) made on behalf of itself, resellers of fuel under the BP brand (**BP Resellers**) and Woolworths Limited (**Woolworths**) (together, the **Applicants**) regarding a proposed commercial alliance between BP and Woolworths (**Commercial Alliance**).

The purpose of this further supplementary submission is to respond to the draft determination published by the Australian Competition and Consumer Commission (**ACCC**) on 29 August 2017 (**Draft Determination**). This submission does not generally seek to repeat information already provided to the ACCC in the Applicants' initial supporting submission dated 10 May 2017 (**Initial Submission**) or the Applicants' supplementary submission dated 28 July 2017 (**First Supplementary Submission**).

This further supplementary submission addresses only the key issues raised by the Draft Determination. It does not provide the Applicants' views on each and every statement or conclusion set out in the Draft Determination (or, for that matter, interested party submissions received after the Draft Determination, which raise no new issues of substance). For that reason, if an issue is not directly addressed in this further supplementary submission, the ACCC should not take that to mean that the Applicants accept the ACCC's (or interested parties') views on that issue.

This further supplementary submission addresses:

- issues relating to the public benefits and detriments arising from the conduct for which authorisation is sought in relation to fuel discounts under the Shopper Docket Discount Scheme – see section 3;
- issues relating to the public benefits and detriments arising from the conduct for which authorisation is sought in relation to fuel discounts under the Woolworths Rewards Loyalty Program – see section 4;
- public benefits arising from more consistent consumer offerings – see section 5;
- public detriments in relation to an increased risk of co-ordinated behaviour between BP and Woolworths – see section 6; and
- issues arising from the ACCC's proposed condition of authorisation that BP and Woolworths offer and comply with section 87B undertakings limiting per-litre fuel discounts offered through the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program to no more than 4 cents per litre (**cpl**) – see section 7.

2 Confidentiality

Portions of this further supplementary submission 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:

- 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**).

In relation to the confidentiality of interested party submissions, the ACCC appears to have received, but withheld entirely from the public register, one submission that is described as confidential (see paragraph 41 of the Draft Determination). The nature of that submission is unclear, although it appears that it raises at least the co-ordination issues outlined in paragraphs 176 and 207 of the Draft Determination. Without access to other relevant material in that submission, the Applicants are not able fully to assess, or respond properly to, the arguments put to the ACCC against the Application and on which the ACCC may rely. It is also doubtful that the submission is, in its entirety, composed of material that is confidential. The Applicants request that the ACCC confirm its position in relation to this submission. The same concerns are likely to arise from any interested party submissions received *after* the Draft Determination that are also withheld entirely from the public register, and if there are any such interested party submissions then the Applicants request that the ACCC also confirm its position in relation to those submissions.

3 Fuel discounts under the Shopper Docket Discount Scheme

3.1 Public benefits

The Applicants submit that the Draft Determination significantly understates 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 (other than in section 7 below, the term “*aggregate discounts*” in this submission refers to the total value of cpl fuel discounts provided to all consumers under a shopper docket scheme or loyalty program, and does not refer to situations where

multiple cpl fuel discounts (e.g. one under a shopper docket scheme and one in respect of an in-store purchase) may be applied in a single consumer transaction).

(a) *Certainty of increase in aggregate fuel discounts*

The Draft Determination states that it is unclear to what extent the expansion of the Shopper Docket Discount Scheme will result in increased aggregate fuel discounts because a large proportion of the subset of consumers who most value shopper docket discounts are likely already to use them (see paragraphs 69 and 72).

In fact, there is a high degree of certainty that aggregate discounts will substantially increase as a result of the expansion of the Shopper Docket Discount Scheme to BP and BP Reseller sites – for reasons including the following.

- **(Target)** As set out in the First Supplementary Submission (see page 9), BP and Woolworths will target aggregate 4cpl discounts of approximately [REDACTED] per annum. This represents an increase from approximately [REDACTED] in the financial year ending 30 June 2016 and approximately [REDACTED] in the financial year ending 30 June 2017.
- **(Basis for target)** [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- **(Mechanisms to ensure target is met)** The Applicants are confident that the aggregate 4cpl discount target will be met over time.
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The ACCC also refers to a statement in the Initial Submission that the aggregate discounts delivered to consumers under the expanded Shopper Docket Discount Scheme will ultimately depend on BP's and BP Resellers' success in attracting new consumers and their competitors' responses (see paragraph 67). To be clear, the Applicants' submission was that the precise

amount of discounts would be dependent on those factors. Notwithstanding that aggregate discounts cannot be predicted with precision, there can be no doubt that those aggregate discounts will substantially increase under the proposed expansion of the Shopper Docket Discount Scheme.

(b) Relevance of pre-discount retail fuel price levels

The Draft Determination suggests that pre-discount retail fuel price levels are relevant to the extent of public benefits, because shopper docket discounts obtained at a low-priced fuel retailer provide greater benefits than similar shopper docket discounts at a higher-priced fuel retailer (see paragraph 73).

The Applicants recognise that pre-discount retail fuel price levels are relevant. However, retail fuel purchasing behaviours are influenced by a wide variety of price and non-price factors, and 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, it should not be assumed – as the ACCC appears to do – 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.

(c) Prices paid by supermarket customers and customers without shopper dockets

The Draft Determination states that fuel discounts under the Shopper Docket Discount Scheme are likely to be, at least in part, ultimately funded through higher prices paid by Woolworths' supermarket customers and fuel customers who do not use shopper dockets (see paragraph 74).

These concerns are misconceived.

First, Woolworths has no ability to increase supermarket prices in the way suggested by the Draft Determination, whether or not for the purpose of recouping its funding of fuel discounts under the Shopper Docket Discount Scheme. Woolworths participates in highly competitive grocery markets which, if anything, are likely to become increasingly competitive over time (including as a result of, for example, the successful entry and ongoing expansion of ALDI and Costco, and the forthcoming entries of Kaufland and Amazon). If Woolworths had the ability and incentive to raise supermarket prices in this context, it would have done so already. [REDACTED]

[REDACTED]

Second, 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. [REDACTED]

[REDACTED]

[REDACTED]

In any event, even if it were established that shopper docket discounts were funded in that way to some degree, that would not materially detract from the public benefits arising from an increase in the aggregate fuel discounts provided under the expanded Shopper Docket Discount Scheme. In economic terms, that would simply involve charging price-sensitive customers relatively low prices which are (indirectly) facilitated by charging price-insensitive (and therefore indifferent) customers relatively high prices, better matching retail fuel prices to consumer requirements and expectations.

3.2 Public detriments

The Draft Determination (see paragraph 84) states that:

- 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 reach*” of other fuel retailers, the incentives of those other fuel retailers to discount their fuel prices may be reduced;
- this can cause higher fuel prices across retail fuel markets;
- the effect of shopper dockets on retail fuel prices and competition is therefore uncertain; and
- accordingly, the ACCC does not consider that there is likely to be significant public benefits in the form of enhanced competition between fuel retailers on price.

Expanding upon the above, the Draft Determination also states or suggests that:

- where shopper docket discounts exceed 4cpl, there is a higher risk of foreclosure of price-sensitive (i.e. shopper-docket-holding) consumers to other fuel retailers, a higher risk of a reduction in the intensity of competition for other (i.e. non-shopper-docket-holding) consumers, and increased risks faced by other fuel retailers to invest or remain in retail fuel markets – leading to higher retail fuel prices (see paragraph 119);
- Coles Express is likely to have the ability to match, and compete effectively against, larger discounts (i.e. above 4cpl), but other fuel retailers who are unlikely to be able to do so and in the medium to long term may be forced to exit (see paragraph 120); and
- accordingly, the expansion of the Shopper Docket Discount Scheme as proposed is likely to result in significant public detriments

constituted by a lessening of competition if shopper docket discounts were to exceed 4cpl (see paragraph 122 and paragraphs 132-139).

The Applicants' response to these aspects of the Draft Determination, which the Applicants submit are misconceived and/or overstated, are set out below.

(a) *Factual errors in Draft Determination*

In relation to shopper docket discounts, the Draft Determination incorrectly states (at paragraphs 38, 111 and 120) that the Applicants have already determined or agreed that the discount to be offered under the Shopper Docket Scheme will be capped at 4cpl. As the Initial Submission notes (section 7.1, page 24), the current fuel discount of 4cpl (or 6cpl, in Tasmania) will be maintained however the parties may change the level of discount by mutual agreement (which the ACCC also recognises at paragraph 120 of the Draft Determination). Confidential Annexure G to the Initial Submission also makes clear that, [REDACTED]

[REDACTED] Reflecting those arrangements, the First Supplementary Submission expressly states that fuel discounts of greater than 4cpl are not precluded under the proposed conduct (see section 5, page 7), but also are not currently proposed (see section 11, page 19).

(b) *Likely impacts on competition*

While the Applicants agree with the ACCC that shopper docket fuel discounts are likely to be attractive to price-sensitive consumers (and thus will have the public benefits set out in section 3.1(a) above), the Applicants submit that the ACCC's analysis in relation to the potential detrimental competitive effects of shopper docket discounts rests upon assumptions that are invalid or from which the ACCC's conclusions do not follow.

- **(No “significant proportion” of price-sensitive consumers affected by proposed conduct)** For the reasons set out below, it is wrong to suggest that a “significant proportion” of price-sensitive consumers will be affected by the conduct to be authorised.
 - *Limited expansion of Shopper Docket Discount Scheme* – First, as set out in section 8.4 of the First Supplementary Submission, through the proposed conduct, the Shopper Docket Discount Scheme will be extended to approximately [REDACTED] BP and BP Reseller sites. It is only the incremental impact of shopper docket discounts at these sites that falls to be assessed by the ACCC in relation to the Application. Clearly, given the limited number of BP and BP Reseller sites involved, the vast majority of consumers (price-sensitive or otherwise) will not be affected by the proposed conduct.
 - *Limited proportion of consumers will use shopper dockets* – Second, the proportion of consumers presenting with

shopper dockets at Woolworths sites is generally

[REDACTED]

- **(Consumers not “out of reach” as a result of profitable discount offers)** As set out in section 5.2 of the Initial Submission and section 8.4 of the First Supplementary Submission, other fuel retailers will continue to have a wide variety of competitive responses available to them, including in particular the various forms of competing shopper docket offers referred to in paragraphs 28 and 29 of the Draft Determination. There is no evidence that other fuel retailers cannot compete effectively for price-sensitive consumers in the context of fuel discounts at the 4cpl level currently generally offered by Woolworths. Further, and importantly, price-sensitive consumers should clearly not be considered “out of reach” of other fuel retailers (including BP Resellers not participating in the Shopper Docket Discount Scheme) in the event of greater-than-4cpl shopper docket fuel discounts, if those discounts are profitable for BP. In those circumstances, the inability of another fuel retailer to compete would simply reflect that the other fuel retailer is inefficient relative to BP. As the ACCC is aware, the profitability of a given level of shopper docket discount (for BP or any other fuel retailer) does not depend on whether it is less than prevailing retail fuel margins. Rather, it depends on the efficiency of the retailer’s operations, the level of shopper docket discount, retail fuel margins, the redemption rate (as noted above) and the extent to which consumer demand, and therefore volumes, are increased by the offer of the discount.
- **(Tasmanian market developments are strong evidence that greater-than-4cpl discounts are profitable for other fuel retailers)** In addition to the above, the Applicants note that, through 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 docket discounts in Tasmania. These developments are clearly pro-competitive. 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*” (see page 39).

There is no reasonable basis for the ACCC to distinguish between a greater-than-4cpl discount initiated by a fuel retailer such as United and a greater-than-4cpl discount (of at least 6cpl, but possibly greater) initiated by the Applicants, which can be expected to have the same pro-competitive effects. [REDACTED]

[REDACTED]

For these reasons, the Applicants are of the strong view that a 4cpl cap on fuel discounts in respect of the Shopper Docket Discount Scheme is no longer justified by the available evidence.

- **(Uncertainty does not establish that public benefits are unlikely to be realised)** Any uncertainty in relation to the effect on competition that would arise in the circumstances that the ACCC describes should not be resolved in the Draft Determination simply by concluding that enhanced competition is unlikely, particularly when that uncertainty rests upon three separate, and equally uncertain, conditions (“if” price-sensitive consumers are “out of reach”, incentives to discount “may” be reduced, and higher prices “can” result). There is no evidence for this conclusion and it does not form a proper basis for the imposition of any condition upon authorisation as the ACCC proposes.

Finally, in forming the views set out in the Draft Determination about the detriments likely to arise from greater-than-4cpl shopper docket fuel discounts, the ACCC relies on evidence obtained and analysed in its 2013 investigation of those discounts (see paragraphs 119 and 120). However, none of that evidence, nor any detail of the ACCC’s reasoning from it, is reflected in the Draft Determination. The ACCC also offers no reason to think that its conclusions from its 2013 investigation remain valid in the context of current retail fuel markets, which have experienced significant changes since 2013. As a result of those changes, independent fuel retailers enjoy greater-than-ever opportunities improve the competitiveness of their operations. In particular, the changes since 2013 include the following.

- **(Independent import terminal investments)** 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.
- **(Entry and expansion of independent retail networks)** 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 4cpl 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)** 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).
- **(New entries in fuel discount offers)** 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.

Since the Applicants cannot determine the extent to which these important developments have impacted on the ACCC's previously-formed views, the Applicants are not able fully to assess, or respond to, critical aspects of the Draft Determination.

4 Fuel discounts under the Woolworths Rewards Loyalty Program

4.1 Public benefits

The Draft Determination suggests that the ability to earn and redeem points and access various promotional offers under the Woolworths Rewards Loyalty Program may ultimately be funded through higher prices paid by fuel customers of BP and BP Resellers (and other customers of Woolworths) and, if so, the actual public benefits from fuel discounts under the Program are likely to be low (see paragraph 80).

At the outset, the Applicants note that it is not aware of the ACCC making this or any similar suggestion in the context of any previous authorisation application or exclusive dealing notification relating to loyalty-based discounts. In any event, the Applicants submit that, for the reasons set out below, there is no basis for this suggestion and it cannot be safely relied upon to limit the extent of public benefits arising under the Woolworths Rewards Loyalty Program.

In relation to fuel customers of BP and BP Resellers, there is no “cross-subsidy” upon the redemption of Woolworths Rewards points. This is for the

simple reason that the ability to use points as payment for fuel and other purchases at a BP or BP Reseller site will be granted to a particular customer upon the redemption of Woolworths Rewards points by that particular customer.

In relation to Woolworths' other businesses (or their customers) and the ability to earn and redeem points under the Woolworths Rewards Loyalty Program, that also involves no "cross-subsidy". This is because, as set out in section 10 of the First Supplementary Submission, [REDACTED]

[REDACTED]

[REDACTED] As a result, Woolworths will not bear the costs of the redemption of Woolworths Rewards points at BP and BP Resellers under the Woolworths Rewards Loyalty Program and has no need to recoup those costs from its other businesses (or their customers). Accordingly, there is no related impact on the public benefits available to consumers from the redemption of Woolworths Rewards points at BP or BP Resellers under the Program. Even if there were such a "cross-subsidy", for the same reasons as set out in section 3.1(c) above, Woolworths has no ability to increase prices in the way suggested by the Draft Determination and the "cross-subsidy" would simply involve the relevant costs being absorbed by Woolworths.

4.2 Public detriments

The Draft Determination refers to a 10cpl fuel discount recently offered by Woolworths under the Woolworths Rewards Loyalty Program and in conjunction with its long-standing shopper docket and in-store purchase fuel discounts of 4cpl respectively (see paragraph 155). The Draft Determination then states that the ACCC considers that offers such as these have the potential to damage, or foreclose, otherwise efficient competitors because other retailers will not be permitted to participate in the Woolworths Rewards Loyalty Program and most of them could not profitably offer similar discounts (see paragraphs 156 to 163).

For the following reasons, the Applicants consider that the ACCC's analysis in this respect is incomplete and does not properly account for situations in which relatively high discounts offered in connection with the Woolworths Rewards Loyalty Program would not be harmful to competition.

- **(Competing loyalty programs can also offer non-contingent fuel discounts)** Woolworths' recent 10cpl fuel discount was not conditional upon a purchase from any of Woolworths' non-fuel businesses. Operators of competing loyalty programs – such as Wesfarmers' FlyBuys (aligned with Coles Express) and MYER one and Altitude Rewards (aligned with Caltex) and Puma Local Rewards – can make similar offers to promote their respective programs. In

doing so, those operators can and do allow the offers to be taken up at the same time as any relevant shopper docket discounts. For instance, FlyBuys recently promoted an offer under which consumers were able to receive a non-contingent 10cpl fuel discount in addition to other shopper docket and in-store purchase discounts available at Coles Express sites.

- **(Competing fuel retailers can also offer non-contingent fuel discounts)** In addition to not being conditional upon a purchase from a Woolworths non-fuel business, Woolworths' recent 10cpl offer was a targeted offer depending on factors such as demographics. Just as an operator of a competing loyalty program could make such an offer to promote their program, a competing fuel retailer could offer a similar fuel discount to a targeted set of customers (and if they do not have access to a database, they could do so by many other means, for example by offering a discount to: customers who hold a Woolworths or Coles shopper docket; customers who can show they live in a particular area; or customers who are members of Woolworths Rewards or any other loyalty scheme). An example of a competing, non-contingent fuel discount is 7-Eleven's current offer, which enables users of the 7-Eleven mobile app to "lock in" a price at a particular point in time and purchase fuel from 7-Eleven at that price at a later time (i.e. at a price which is less than the pump price at that later time).
- **(Profitable discount offers are unproblematic)** In addition to fuel discounts that are not contingent upon non-fuel purchases (which are unproblematic for the reasons stated above), fuel discounts under the Woolworths Rewards Loyalty Program that are profitable for BP (even if linked to purchases from Woolworths' non-fuel businesses) should not raise concerns – for the same reasons as given in section 3.2(b) above in relation to fuel discounts under the Shopper Docket Discount Scheme.
- **(Loyalty-based fuel discounts are targeted)** In contrast to shopper docket discount offers (which are made to consumers at large), loyalty-based fuel discounts are more targeted. For instance, a typical loyalty-based fuel discount offer would be made by email only to particular loyalty-program members who meet certain demographic criteria. [REDACTED]
- **(Exclusivity of Woolworths Rewards is not material)** While it is true that only BP-branded fuel retailers will participate in the Woolworths Rewards Loyalty Program, other fuel retailers will continue to have a variety of loyalty program options available to them. For instance, as outlined in the Initial Submission (section 13,

page 40), once BP's participation in the Velocity Program ceases, Velocity will have new opportunities to engage with other fuel retailers.

5 Public benefits arising from more consistent consumer offerings

The Draft Determination recognises that public benefits in the form of more consistent consumer offerings will result from the expansion of the Woolworths Rewards Loyalty Program (see paragraph 91).

However, the Draft Determination also states that, in respect of the Shopper Docket Discount Scheme, a significant proportion of BP-branded sites will not be shopper docket redemption sites. For that reason, the ACCC expects that there will still be some consumer confusion about which BP-branded sites are participating in the Shopper Docket Discount Scheme. In light of that expectation, the Draft Determination concludes that, overall, public benefits from more consistent consumer offerings are unlikely to result from the proposed conduct (see paragraphs 92 and 93). The Applicants' response is as follows.

First, to the extent that the Shopper Docket Discount Scheme is expanded to BP-branded sites, that will necessarily reduce the scope for consumer confusion. Contrary to the suggestion in the Draft Determination, that will be true even if consumer confusion is not eliminated entirely.

Second, even if some limited consumer confusion persists in relation to the Shopper Docket Discount Scheme, that does not detract from the public benefits available to consumers as a result of the more consistent roll-out of the Woolworths Rewards Loyalty Program (which benefits the ACCC clearly recognises).

In these circumstances, the Applicants submit that it is not open for the ACCC to conclude that, overall, the proposed conduct is unlikely to result in public benefits from more consistent consumer offerings.

6 Public detriments in relation to co-ordinated behaviour

The Draft Determination states that, because the proposed conduct involves exclusivity arrangements, price competitiveness arrangements and potential cartel conduct between BP and Woolworths in the event that BP is unable immediately to take possession of former Woolworths sites upon completion of the Proposed Acquisition, there is the prospect of collusion between BP and Woolworths on retail fuel prices for a protracted period (see paragraphs 189 and 190). As a result, the ACCC proposes to grant authorisation for conduct between BP and Woolworths (as opposed to conduct between BP and BP Resellers) for a period of 12 months only (see paragraph 191).

The ACCC's concerns in this respect are misconceived, and there is no need to limit this aspect of the authorisation to 12 months.

Under the Proposed Acquisition, petrol stations that are not immediately transferred to BP will [REDACTED]

As noted in the Initial Submission, the Applicants do not consider that these arrangements involve cartel conduct or are likely to have any anti-competitive effect, but rather included them in the conduct for which authorisation is sought out of an abundance of caution only. If the authorisation is relevantly limited to 12 months, BP and Woolworths will, at the expiry of the 12-month period, assess whether the continuation of the transitional arrangements is required and, if so, BP and Woolworths may decide to continue to implement those arrangements without authorisation.

Finally, although not directly relevant to the question of whether the proposed conduct involves an increased risk of co-ordination between BP and Woolworths, the Applicants note that the Draft Determination states that the proposed price competitiveness arrangements will apply *"to any site (including BP Resellers) that participates in the Woolworths Shopper Docket Discount Scheme"* (see paragraph 179). This is not correct. The price competitiveness arrangements negotiated between BP and Woolworths have no application to BP Reseller sites, and BP Resellers will continue to have freedom to set retail fuel prices at their sites in their absolute discretion.

7 Issues arising from proposed section 87B undertakings

7.1 ACCC's proposed undertakings

The draft determination (see paragraphs 228, 229 and 240) proposes a condition that BP and Woolworths offer and comply with section 87B undertakings on terms acceptable to the ACCC that:

- limit per-litre fuel discounts offered through the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program to no more than 4cpl on any single fuel purchase;
- incorporate protections against BP and Woolworths making alternative offers that are similar in effect to fuel discount offers in excess of 4cpl; and
- do not limit the ability of BP or any BP Reseller to offer reasonable unilateral discounts unconnected with the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program, and, more specifically:

- do not limit “BP’s discretion to independently offer [fuel] discounts...”, by which the Applicants take the ACCC to mean fuel discounts that are not offered under the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program;
- do not limit “typical loyalty program rebates for points accumulation”, by which the Applicants take the ACCC to mean the redemption of Woolworths Rewards points, either automatically (as already proposed – see section 12.4 of the Initial Submission) or at the initiative of a Woolworths Rewards member (for example, under an ad hoc or standing offer – noting that, as described in section 10, page 16 of the First Supplementary Submission, such offers do not involve any “cross-subsidy” of BP by Woolworths because
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]); and
- do not limit BP, BP Resellers or Woolworths from offering discounts to “meet the competition” that are “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...offered.”

7.2 Applicants’ proposed undertakings

The Applicants’ response to the ACCC’s proposal is set out below.

In broad terms, the Applicants submit that the condition proposed by the ACCC goes significantly further than is required to address any public detriments that could reasonably be said to flow from the conduct that is proposed to be authorised or ensure that the proposed conduct meets the net public benefit test.

The conduct for which authorisation is sought falls into two key categories relevant for the purposes of considering the ACCC’s proposed undertaking:

- arrangements between BP and BP Resellers concerning BP Resellers’ participation in the Shopper Docket Discount Scheme and Woolworths Rewards Loyalty Program; and
- third line forcing by BP and BP Resellers, by allowing fuel discounts on condition that customers purchase goods or services from Woolworths.

The Applicants have not sought authorisation for the operation of the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program at large and, in that context, the Applicants do not consider it appropriate for the ACCC

to seek to impose broad conditions that restrict or limit the ability of the Applicants to compete with other loyalty program operators or other fuel and non-fuel retailers, such as supermarkets, that may also offer fuel discounts.

Indeed, if the condition were to be imposed in its currently proposed form, it would be likely to result in significant public detriments that would not otherwise occur.

Woolworths and BP would be constrained in their ability to compete with retail, fuel and loyalty competitors, who would be permitted to offer fuel discounts without being subject to any such restrictions or limitations. Those competitors would also be aware of the restrictions and limitations imposed on Woolworths and BP, and be in a position to take advantage of this knowledge and structure and promote offers that they know Woolworths and BP will not be able to match. Importantly, consumers would also have a significantly reduced opportunity to benefit from fuel discounts otherwise driven by competitive market forces.

[REDACTED]

[REDACTED]

[REDACTED]

There are, however, aspects of the ACCC's proposed condition that are acceptable to BP and Woolworths.

(a) *Limitations on fuel discounts under Shopper Docket Discount Scheme*

The Applicants do not object to a limit on fuel discounts offered under the Shopper Docket Discount Scheme.

However, on the basis of the submissions and evidence set out in section 3.2(b) above, the Applicants do not consider that 4cpl is the appropriate limit. In particular, evidence in relation to the Tasmanian market shows that discounts of at least 6cpl are able to be offered by other fuel retailers and accordingly should not, in principle, be precluded by any undertaking.

Nevertheless, BP and Woolworths are willing to offer and comply with undertakings that maintain the *status quo* in relation to the Shopper Docket Discount Scheme, including the current 4cpl cap.

(b) *Limitations on fuel discounts under Woolworths Rewards Loyalty Program where contingent on purchases from Woolworths' non-fuel businesses*

The Applicants would also be prepared to offer and comply with undertakings limiting fuel discounts offered under the Woolworths Rewards Loyalty Program where they are contingent upon purchases from Woolworths' non-fuel businesses.

[REDACTED]

This proposal reflects the position under the Shopper Docket Discount Scheme and gives the ACCC comfort that limitations imposed in respect of the Shopper Docket Discount Scheme could not be circumvented through loyalty-based fuel discount offers.

However, given that loyalty-based fuel discount offers are more targeted, a 4cpl cap is clearly significantly lower than necessary to address the concerns identified by the ACCC in the Draft Determination.

Again, however, BP and Woolworths are willing to offer and comply with undertakings that effectively extend the existing 4cpl cap in relation to the Shopper Docket Discount Scheme to fuel discounts under the Woolworths Rewards Loyalty Program that are contingent upon purchases from Woolworths' non-fuel businesses.

(c) *"Aggregation" of fuel discounts*

BP and Woolworths are willing to offer and comply with undertakings that preclude any "aggregation" of fuel discounts under the Shopper Docket Discount Scheme with contingent fuel discounts under the Woolworths Rewards Loyalty Program. For example, it would not be possible under BP's and Woolworths' proposal for BP to apply, in respect of a single fuel purchase, both a 4cpl shopper docket fuel discount and a 4cpl Woolworths Rewards-based fuel discount contingent upon a purchase from any of Woolworths' non-fuel businesses for a total fuel discount of 8cpl. In other words, under BP's and

Woolworths' proposal, the cap on discounts contingent upon any purchase from Woolworths' non-fuel businesses, whether under the Shopper Docket Discount Scheme, the Woolworths Rewards Loyalty Program or both, would always be 4cpl on any single fuel purchase.

(d) Other limitations are not required

The Applicants consider that the submissions in sections 3 to 6 above establish that the public benefits of the proposed conduct are greater than acknowledged in the Draft Determination, and that the ACCC's analysis in relation to the detriments arising from the proposed conduct is incomplete or misconceived. In that context, the Applicants submit that the proposed conduct would clearly have net public benefits if the undertakings in paragraphs (a) to (c) above were offered and complied with. Accordingly, the other limitations proposed by the ACCC are not required to secure a net public benefit. The Applicants submit that they would, in fact, involve significant public detriments, as set out below.

- **(Non-contingent loyalty-based fuel discounts)** The ACCC proposes a 4cpl cap on fuel discounts offers under the Woolworths Rewards Loyalty Scheme, whether or not they are contingent upon purchases from Woolworths' non-fuel businesses. Such a cap would put the Applicants at a significant competitive disadvantage to other retailers (fuel and non-fuel, including supermarkets) and loyalty program operators – including most obviously Wesfarmers (FlyBuys and Coles Express), Velocity and any fuel retailer with which Velocity concludes a competing arrangement – who will not be restrained from making such offers.

Even with a comprehensive “meet the competition” exception, the Applicants would be required to be entirely reactive to offers made by other competitors, and would be precluded from developing and launching proactive offers. The Applicants submit that this is likely to significantly reduce the intensity of competition in, and distort, retail markets including markets relating to supermarkets, loyalty program services and retail fuel. The Applicants also submit that while the ACCC's current formulation of a “meet the competition” exception may be appropriate for shopper docket discounts, it is inappropriate for highly-targeted, ad hoc and geographically dispersed loyalty-based offers.

- **(“Reasonableness” of unilateral discount offers)** The ACCC proposes (in paragraph 240 but not paragraphs 228 and 229) not to limit “reasonable” discounts unilaterally offered by BP or BP Resellers that are unconnected with the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program. However, authorisation is not sought for unilateral fuel discount offers outside the Shopper Docket Discount Scheme or Woolworths Rewards Loyalty Program. Accordingly, there is no basis for the ACCC to seek to apply a test of “reasonableness” in respect of such offers.

(e) *Other matters*

Retail markets are more dynamic and innovative now than they have ever been and the Applicants expect this rapid change to accelerate. For example:

- service station numbers are growing as there are more cars on Australian roads and immigration levels are up, shopper docket redemptions are in decline and service stations are increasingly being used for convenience and other offers – for example Caltex has entered into partnerships with food companies such as Sumo Salad, Guzman & Gomez and Boost Juice and is offering services such as laundry, parcel collection and meal kit deliveries¹. It is also trialling a new convenience format called The Foodary. Apco Group has opened 24-hour-a-day cafes and drive-through outlets in several locations in Victoria, enabling motorists to buy coffee and takeaway meals on the go²;
- retailers with different business models such as Costco, Kaufland and Amazon are entering and/or expanding;
- the strategy of entrants such as Amazon or Alibaba may include an alliance with a fuel retailer and there is potential for alliances between retailers such as Aldi and Kaufland with fuel retailers such as 7-Eleven, Caltex and Puma; and
- there is also potential for other loyalty schemes such as Velocity to form alliances with such fuel retailers and for changes to the Coles Flybys scheme.

A "meet the competition" clause of the kind included in Woolworths' existing undertaking, which seeks to specify the specific types of offers that Woolworths may react to, is not sufficient to enable BP and Woolworths to adapt and respond to such competition, and it is very difficult to forecast today the sorts of offers that might be made and to which the parties may need to react during the ACCC's proposed 10-year life of the undertaking.

However, BP and Woolworths are prepared to give an undertaking for the lesser of the term of the authorisation of the relevant conduct or the life of the relevant commercial agreements, subject to mechanisms that are effective to ensure that the parties are not competitively disadvantaged as changes in the competitive landscape occur during the undertaking's term (to be clear, those mechanisms would be in addition to a "meet the competition" provision).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ <http://www.afr.com/business/retail/caltex-puts-pedal-to-metal-on-food-convenience-strategy-20170529-gwfn7b>

² <http://www.afr.com/business/retail/destination-not-desperation-is-future-of-convenience-retail-20170918-gyjimgn>

[REDACTED]

[REDACTED]