
Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the
Competition and Consumer Act 2010 (Cth)
by Caltex Australia Petroleum Pty Ltd ACN
000 032 128

15 May 2014

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Date:

1 Person giving the Undertaking

This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Caltex Australia Petroleum Pty Limited ACN 000 032 128 on behalf of itself and its subsidiaries (together referred to as **Caltex** in this Undertaking).

2 Background

The parties

- 2.1 Caltex is the main trading entity of the Caltex Australia Group (a directly wholly owned subsidiary of Caltex Australia Limited, the listed entity) which includes a number of other Caltex owned entities. Caltex and its related bodies corporate are one of the four refiner-marketers of petrol, diesel and automotive LPG operating in Australia. Caltex's business operations also include the wholesale distribution and the retail supply of fuel via retail service stations.
- 2.2 The Scotts Group of Companies operates a fuel business in regional areas of Victoria, South Australia, part of southern NSW and the Northern Territory (Alice Springs) (**Scotts**). The Scotts fuel business consists of retail service stations and wholesale depots.

The proposed acquisition

- 2.3 On 21 February 2014, Caltex entered into an agreement to acquire 27 retail service stations, 8 depots with depot fronts/unmanned card facilities, 12 depots, one unmanned card facility and one curb-side pump from Scotts Group of Companies in regional areas of South Australia, Victoria, NSW and Alice Springs in the Northern Territory (**Proposed Acquisition**).

The ACCC's review

- 2.4 The ACCC commenced its public review of the Proposed Acquisition on 27 February 2014.
- 2.5 The ACCC has conducted market inquiries and considered information provided by Caltex, Scotts, industry participants and others. The purpose of the ACCC's inquiries was to assess whether or not the Proposed Acquisition would have the effect, or would be likely to have the effect, of substantially lessening competition in any market in contravention of section 50 of the Act.
- 2.6 On 2 May 2014, Caltex sold the Caltex owned site at 29 Penola road, Mt Gambier to Peregrine Corporation.

The ACCC's competition concerns

- 2.7 The ACCC considered that, in the absence of this Undertaking, the Proposed Acquisition would result in competition concerns in the retail supply of fuel in Mt Gambier (South Australia) and Nhill (Victoria) (each a **Local Market**).
- 2.8 The ACCC considered that Scotts retail sites and Caltex controlled retail sites in both Mt Gambier and Nhill are close competitors to each other.

- 2.9 In Nhill, in the absence of this Undertaking, Caltex would operate two of the three retail sites with both sites located on the Western Highway, the main road for vehicle traffic in Nhill. Likewise, in Mt Gambier, in the absence of the sale of the divestiture sites, Caltex would control and operate retail fuel sites in prime locations for traffic volume in Mt Gambier, particularly on the Princes Highway and Riddoch Highway.
- 2.10 The ACCC considered that, in the absence of the Undertaking, Caltex would be unlikely to face effective competitive constraint in the Mt Gambier and Nhill local markets. As a result, Caltex may have the ability to increase prices or implement an equivalent reduction in the non-price aspect of its retail offer in these local markets. The ACCC also considered that the threat of new entry in both Mt Gambier and Nhill was unlikely to provide a strong competitive constraint on Caltex.

The Undertaking remedy

- 2.11 Caltex has, without admission, offered this Undertaking under section 87B of the Act to divest, or cause the divestiture of the retail fuel sites at:
- (a) 64 Nelson St, Nhill, Victoria
 - (b) 82 Jubilee Highway, Mt Gambier, South Australia
 - (c) 197 Commercial St, Mt Gambier, South Australia
 - (d) 32 Bay Road, Mt Gambier, South Australia
- (together, the **Divestiture Businesses**)
- 2.12 Caltex has entered into a binding agreement to sell the Divestiture Businesses to Agostino.
- 2.13 This Undertaking addresses the ACCC's competition concerns in the Local Markets by:
- (a) in relation to the ACCC's competition concerns regarding Caltex's acquisitions of Scotts owned retail sites in Mt Gambier, requiring Caltex to divest three retail sites to an Approved Purchaser;
 - (b) in relation to the ACCC's competition concerns regarding Caltex's acquisition of a Scotts operated retail site in Nhill, requiring Caltex to divest one retail site to an Approved Purchaser;
 - (c) ensuring the Approved Purchasers have the necessary assets to operate the Divestiture Businesses effectively;
 - (d) ensuring the provision of any Technical Assistance by Caltex required by the Approved Purchasers to operate the Divestiture Businesses effectively;
 - (e) preserving the Divestiture Businesses prior to divestiture; and
 - (f) providing for the effective oversight of Caltex's compliance with this Undertaking.

3 Commencement of this Undertaking

- 3.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Caltex; and

- (b) this Undertaking so executed is accepted by the ACCC
(the **Commencement Date**).

4 Cessation of Ongoing Obligations

Withdrawal

- 4.1 This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

Revocation

- 4.2 The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

Waiver

- 4.3 The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or amend the date by which any such obligation is to be satisfied.

Completion

- 4.4 Clauses 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15 and 16 survive completion of the obligations in clauses 5, 6, 7, 9, 10, 11 and Schedule 4 and Schedule 5.

5 Divestiture of the Divestiture Business

Divestiture

- 5.1 Caltex must, in accordance with this Undertaking, divest, or cause the divestiture of, each of the Divestiture Businesses to one or more Approved Purchasers within the Initial Sale Period.
- 5.2 Caltex must divest, or cause the divestiture of, the Divestiture Businesses to the Approved Purchaser on terms which include:
- (a) the sale, assignment, transfer and/or licence of all of the assets in Confidential Schedule 5;
 - (b) the transfer or grant to the Approved Purchaser of all Consents pursuant to clauses 5.5;
 - (c) the transfer of the Transferred Personnel pursuant to clauses 5.8;
 - (d) compliance with any Approved Technical Assistance Agreement pursuant to clause 5.10; and
 - (e) compliance with any Approved Interim Supply Agreement pursuant to clause 5.12;
- 5.3 Caltex must not consent to the variation, or waiver of any of the conditions of, any:
- (a) Approved Sale and Purchase Agreement ;

- (b) Approved Interim Supply Agreement; or
 - (c) Approved Technical Assistance Agreement,
- without the written consent of the ACCC.

5.4 Caltex must do everything in its power or control to enforce the terms of any executed agreement with the Approved Purchaser under which the Approved Purchaser is obliged to acquire the Divestiture Business.

Consents

5.5 Caltex must:

- (a) obtain or assist the Approved Purchaser to obtain as expeditiously as possible all Consents as required by the Approved Purchaser to complete the divestiture in accordance with clause 5.1;
- (b) comply with all requirements necessary to obtain any Consents, including by promptly providing all information necessary for the Consents to be given;
- (c) act in good faith in its negotiations with the Approved Purchaser in relation to obtaining any Consents;
- (d) promptly pay the costs and expenses of any third party reasonably incurred in providing the Consents; and
- (e) enter into an Approved Interim Supply Agreement with the Approved Purchaser in relation to any goods or services that are required for the operation of the Divestiture Businesses which may be affected by any failure to gain any Consent.

5.6 If, seven Business Days before the Completion Date, the Approved Purchaser fails to obtain or is unable to obtain one or more Consents, then:

- (a) Caltex must immediately provide to the ACCC, in writing details of the:
 - (i) Consents that have not been obtained;
 - (ii) reasons why the Consents have not been obtained; and
 - (iii) information or material required to obtain the Consents; and
- (b) Caltex must continue to do everything in its power to obtain the Consents (and until such time as clause 5.5 is satisfied).

5.7 Notwithstanding the fact that Caltex has complied with clauses 5.5 and 5.6, it remains a breach of this Undertaking if Caltex is unable to effect the divestiture of the Divestiture Businesses in accordance with clauses 5.1 by reason of a failure to obtain one or more Consents.

Transferred Personnel

5.8 At the option of the Approved Purchaser, Caltex must transfer to the Approved Purchaser:

- (a) employees of the Divestiture Businesses (if any) who are, in the view of the Approved Purchaser, necessary for the Approved Purchaser to effectively

maintain, operate and conduct the Divestiture Businesses, and who consent to the transfer of their employment to the Approved Purchaser (**Transferred Personnel**); and

- (b) service providers to the Divestiture Businesses under contracts for service, who in the view of the Approved Purchaser are necessary for the Approved Purchaser to effectively maintain, operate and conduct the Divestiture Businesses, provided that such contracts can legally be transferred (**Transferred Services**).

5.9 When fulfilling its obligations under clause 5.8, Caltex must:

- (a) not directly or indirectly discourage any Transferred Personnel, or supplier of Transferred Services, from continuing or seeking employment with, or providing services to, the Approved Purchaser;
- (b) effective on the Completion Date, release the Transferred Personnel from any obligations to provide services to Caltex;
- (c) effective on the Completion Date, release the Transferred Personnel from any non-compete or similar restraint of trade obligation, to the extent that such an obligation would otherwise prevent the person from performing his or her contemplated role in relation to the Divestiture Businesses; and
- (d) not procure, promote or encourage the transfer of any of the Transferred Personnel from the Approved Purchaser to Caltex for a period of six months after the Completion Date.

Approved Technical Assistance Agreement

5.10 At the option of the Approved Purchaser, Caltex must provide Technical Assistance to, or procure Technical Assistance for, the Approved Purchaser in accordance with an Approved Technical Assistance Agreement, subject to the Technical Assistance being:

- (a) required by the Approved Purchaser in order to operate the Divestiture Businesses;
- (b) on a transitional basis for no more than 3 months, which period is to be nominated by the Approved Purchaser, or such other period as agreed in writing with the ACCC; and
- (c) provided at cost price and on such terms other than price which are no less favourable to the Approved Purchaser than arm's length terms.

5.11 If Caltex and the Approved Purchaser agree to an option to renew the Approved Technical Assistance Agreement, that option can only be exercised if the requirements of clause 5.10 are satisfied.

Approved Interim Supply Agreement

5.12 At the option of the Approved Purchaser, Caltex must supply any goods or services to the Approved Purchaser which are necessary to enable the Approved Purchaser to be a viable, effective, stand-alone independent and long-term competitor in the market for the retail supply of fuel, under an Approved Interim Supply Agreement.

5.13 Any Approved Interim Supply Agreement must:

- (a) last for a period no longer than 6 months, which period is to be nominated by the Approved Purchaser or such other period as agreed in writing with the ACCC; and

- (b) provide for the supply of the goods and services, including price and other terms, on such terms that are no less favourable to the Approved Purchaser than arm's length terms.
- 5.14 If Caltex and the Approved Purchaser agree to an option to renew the Approved Interim Supply Agreement, that option can only be exercised if the requirements of clause 5.13 are satisfied.

6 Approved Purchaser

Divestiture only to the Approved Purchaser

- 6.1 Caltex must divest the Divestiture Businesses to one or more Approved Purchasers, and must not authorise the Approved Divestiture Agent to sell any of the Divestiture Businesses to a purchaser other than an Approved Purchaser.

Purchasers approved at the time the Undertaking was accepted

- 6.2 At the time this Undertaking was accepted, the ACCC also approved Agostino as the Approved Purchaser of each of the Divestiture Businesses.
- 6.3 ACCC approval of Agostino as the Approved Purchaser of each of the Divestiture Businesses included approval of the Agostino Agreement as an Approved Sale and Purchase Agreement.
- 6.4 In making the decision described in clause 6.2, the factors to which the ACCC had regard included whether the:
- (a) Approved Purchaser will acquire the Divestiture Businesses from Caltex, pursuant to the Agostino Agreement;
 - (b) Approved Purchaser is and will remain independent of and have no direct or indirect interest in Caltex, except for the terms of the Agostino Agreement;
 - (c) Approved Purchaser is of good financial standing and has an intention to maintain and operate each of the Divestiture Businesses as a going concern;
 - (d) Approved Purchaser is able to conduct the Divestiture Businesses effectively; and
 - (e) divestiture of the Divestiture Businesses to the Approved Purchaser will address any concerns in relation to the likely long-term viability and competitiveness of the Divestiture Businesses after divestiture by Caltex.
- 6.5 The ACCC may revoke the Approved Purchaser's status as an Approved Purchaser if the ACCC becomes aware that any material information provided to it by Caltex was incorrect, inaccurate or misleading.

Approval of a Proposed Purchaser if the sale of the Divestiture Businesses is not completed

- 6.6 If at any time it becomes apparent that the sale of any of the Divestiture Businesses to Agostino cannot be completed by the end of the Initial Sale Period, Caltex must seek approval for an alternative Proposed Purchaser by providing the ACCC with a Proposed Purchaser Notice in respect of the acquisition of that Divestiture Business as soon as practicable after it becomes apparent that the sale of that Divestiture Business to Agostino cannot be completed;

- 6.7 For the avoidance of doubt, this clause does not affect the obligation of Caltex under clause 5.1 to divest, or cause the divestiture of, all of the Divestiture Businesses within the Initial Sale Period.

Provision of a notice for a Proposed Purchaser

- 6.8 To seek approval for a Proposed Purchaser of one or more of the Divestiture Businesses in accordance with clause 6.6, Caltex or the Approved Divestiture Agent must provide the ACCC with a Proposed Purchaser Notice in the form prescribed in Schedule 2 to this Undertaking (**Proposed Purchaser Notice**).
- 6.9 After receiving a Proposed Purchaser Notice, the ACCC must decide whether to:
- (a) approve the person named in the Proposed Purchaser Notice as an Approved Purchaser which includes approving:
 - (i) the draft sale and purchase agreement attached to the Proposed Purchaser Notice;
 - (ii) any draft technical assistance agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clause 5.10; and
 - (iii) any interim supply agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clause 5.13; or
 - (b) not approve the person named in the Proposed Purchaser Notice as an Approved Purchaser.
- 6.10 Without limiting the ACCC's discretion, in making the decision described in clause 6.9, the factors to which the ACCC may have regard include whether the:
- (a) draft sale and purchase agreement is consistent with this Undertaking and otherwise acceptable to the ACCC;
 - (b) Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase agreement;
 - (c) Proposed Purchaser is independent of, and has no direct or indirect interest in, Caltex;
 - (d) Proposed Purchaser is of good financial standing;
 - (e) Proposed Purchaser has an intention to maintain and operate the Divestiture Business as a going concern;
 - (f) Proposed Purchaser is able to conduct the Divestiture Business effectively; and
 - (g) divestiture of the Divestiture Business to the Proposed Purchaser will address any competition concerns of the ACCC, including in relation to the likely long-term viability and competitiveness of the Divestiture Business under the ownership of the Proposed Purchaser.
- 6.11 Within 10 Business Days after receiving a Proposed Purchaser Notice, the ACCC must notify Caltex in writing of its decisions made pursuant to clause 6.9.

- 6.12 The ACCC may extend the period within which it will provide the notice described in clause 6.11 by notifying Caltex in writing of the extension within 10 Business Days after receiving the Proposed Purchaser Notice.
- 6.13 Any extension of time by the ACCC pursuant to clause 6.12 extends the Initial Sale Period by the same length of time.
- 6.14 The ACCC may revoke an Approved Purchaser's status as an Approved Purchaser if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

7 Divestiture Businesses Protection

Protection of the assets of the Divestiture Businesses

- 7.1 From the Commencement Date, Caltex must not sell or transfer its interest, or any assets comprising part of, or used in, any of the Divestiture Businesses (other than the sale of goods and services in the ordinary course of business) or make any Material Change (excluding branding or signage changes), except in accordance with this Undertaking.

Caltex's obligations in relation to the Divestiture Businesses prior to completion of divestiture

- 7.2 Without limiting this clause 7, for each Divestiture Business, Caltex must, from the Commencement Date until completion of the divestiture of the Divestiture Business, take all steps available to it to:
- (a) ensure that the Divestiture Business is managed and operated in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Divestiture Business at the Commencement Date;
 - (b) minimise any risk of loss of competitive potential for the Divestiture Business;
 - (c) continue to provide access to working capital and sources of credit for the Divestiture Business in a manner which is consistent with the financing of the Divestiture Business before the Commencement Date;
 - (d) continue to provide administrative and technical support for the Divestiture Business in a manner which is consistent with the operation of the Divestiture Business before the Commencement Date and in accordance with any plans established before the Commencement Date;
 - (e) maintain staffing levels consistent with the management of the Divestiture Business as a fully operational, competitive going concern;
 - (f) maintain the supply of those goods and services that are part of the Divestiture Business to existing customers in a manner consistent with the supply of those goods and services as at the Commencement Date;
 - (g) maintain the standard of manufacture, distribution, promotion and sale of those products which form part of the Divestiture Business as at the Commencement Date; and

- (h) carry out promotion and marketing of the products which form part of the Divestiture Business in accordance with any plans established before the Commencement Date.

Company's ongoing obligations in relation to the Divestiture Businesses

7.3 To the extent that Caltex has obligations in relation to:

- (a) the provision of technical assistance pursuant to clauses 5.10 of this Undertaking;
or
- (b) the supply of goods or services pursuant to clauses 5.12 of this Undertaking,

in relation to one or more Divestiture Business, Caltex must not sell, assign, transfer, and/or licence directly or indirectly any of the assets required by Caltex to fulfil such obligations without the prior written consent of the ACCC.

Direction to personnel of Caltex

7.4 As soon as practicable after the Commencement Date, Caltex must direct its personnel, including directors, contractors, managers, officers, employees and agents not to do anything in breach of, or inconsistent with, Caltex's obligations under this Undertaking.

Confidential Information

7.5 Caltex must not, at any time from the Commencement Date, use or disclose any confidential information about the Divestiture Businesses gained through:

- (a) ownership and/or management of the Divestiture Businesses; or
- (b) fulfilling any obligations pursuant to this Undertaking.

7.6 Clause 7.5 does not apply to information that:

- (a) Caltex requires to comply with legal and regulatory obligations including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements; or
- (b) Caltex requires to carry out its obligations pursuant to the Undertaking or to comply with legal or regulatory obligations,

provided such information is only used or disclosed for that purpose and is only disclosed to those officers, employees, contractors and advisers of Caltex who need to know the information to carry out the permitted purposes.

8 Independent Management of Unsold Business

Application of clause

8.1 For each Divestiture Business, in the event that the divestiture of the Divestiture Business to an Approved Purchaser is not completed by the end of the Initial Sale Period, the Divestiture Business becomes an unsold business and the provisions of clause 8 apply (**Unsold Business**).

Obligation to appoint an Approved Independent Manager

- 8.2 Caltex must appoint and maintain an Approved Independent Manager to manage each Unsold Business, from the end of the Initial Sale Period until the completion of the divestiture of the Unsold Business in accordance with this Undertaking.
- 8.3 Without limiting its obligations in this Undertaking, Caltex must:
- (a) comply with and enforce the Approved Terms of Appointment of the Approved Independent Manager;
 - (b) maintain and fund the Approved Independent Manager to carry out his or her functions, including:
 - (i) indemnifying the Approved Independent Manager for any expenses loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Manager of his or her functions as the Approved Independent Manager except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Manager;
 - (ii) ensuring that the Approved Independent Manager is fully able to acquire and pay for sufficient and timely delivery of all goods and services (including from third parties) which the Approved Independent Manager considers are required by the Unsold Business; and
 - (iii) providing and paying for any external expertise, assistance or advice required by the Approved Independent Manager to perform his or her functions as the Approved Independent Manager; and
 - (c) not interfere with the authority of, or otherwise hinder, the Approved Independent Manager's ability to carry out his or her obligations as the Approved Independent Manager, including:
 - (i) accepting (and directing its directors, contractors, managers, officers, employees and agents to accept) direction from the Approved Independent Manager as to the control, management, financing and operations of the Unsold Business, and for the Unsold Business to meet all legal, corporate, financial, accounting, taxation, audit and regulatory obligations;
 - (ii) providing access to the facilities, sites or operations of the Unsold Business required by the Approved Independent Manager;
 - (iii) providing to the Approved Independent Manager any information or documents requested by the Approved Independent Manager that he or she considers necessary for managing and operating the Unsold Business or for reporting to or otherwise advising the ACCC;
 - (iv) not requesting information or reports regarding the Unsold Business or from the personnel of the Unsold Business except through the Approved Independent Manager; and
 - (v) not appoint the Approved Independent Manager, or have any Agreements with the Approved Independent Manager, to utilise the Approved Independent Manager's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent

Manager ceases to act in the role of the Approved Independent Manager without the prior written approval of the ACCC.

Approval of the Approved Independent Manager

- 8.4 At least 15 Business Days prior to the end of the Initial Sale Period, if the divestiture of a Divestiture Business has not been completed, Caltex must provide the ACCC with a notice for a Proposed Independent Manager in the form prescribed in Schedule 3 to this Undertaking (**Proposed Independent Manager Notice**).
- 8.5 After receiving the Proposed Independent Manager Notice, the ACCC must decide whether to:
- (a) approve the appointment of the person named in the Proposed Independent Manager Notice as the Approved Independent Manager which includes approving the:
 - (i) terms of appointment attached to the Proposed Independent Manager Notice; and
 - (ii) draft separation and management plan attached to the Proposed Independent Manager Notice; or
 - (b) not approve the person named in the notice as the Approved Independent Manager.
- 8.6 If clause 8.5(b) applies, the ACCC may, at its absolute discretion:
- (a) direct Caltex to submit a Proposed Independent Manager Notice that:
 - (i) names a person identified by the ACCC as the proposed Independent Manager; and/or
 - (ii) includes attachments that:
 - (A) relate to the person identified by the ACCC under clause 8.6(a)(i) (if applicable); and/or
 - (B) address any issues identified by the ACCC in relation to the terms of appointment and/or draft separation and management plan; or
 - (b) identify and approve a person as the Approved Independent Manager together with the:
 - (i) terms of appointment; and/or
 - (ii) draft separation and management plan.
- 8.7 As soon as practicable, and within two Business Days after any direction by the ACCC under clause 8.6(a), Caltex must submit a Proposed Independent Manager Notice in accordance with the direction.
- 8.8 Without limiting the ACCC's discretion, in making the decisions described in clause 8.5 or 8.6, the factors to which the ACCC may have regard include whether the:

- (a) person named in the Proposed Independent Manager Notice or identified to the ACCC has the qualifications and experience necessary to manage the Divestiture Business;
 - (b) person named in the Proposed Independent Manager Notice or identified by the ACCC is sufficiently independent of Caltex;
 - (c) terms of appointment and the draft separation and management plan are consistent with this Undertaking; and
 - (d) terms of appointment and the draft separation and management plan are otherwise acceptable to the ACCC.
- 8.9 Within 10 Business Days after receiving a Proposed Independent Manager Notice, the ACCC must notify Caltex in writing of its decisions and any direction made pursuant to clause 8.5 and/or 8.6.
- 8.10 The ACCC may extend the period within which it will provide notice of the decision or direction (if applicable) described in clause 8.9 by notifying Caltex in writing of the extension within 10 Business Days after receiving the Proposed Independent Manager Notice.
- 8.11 If the Approved Independent Manager has not been appointed:
- (a) by the end of the Initial Sale Period;
 - (b) within 17 Business Days after the Approved Independent Manager resigns or otherwise ceases to act as the Approved Independent Manager pursuant to clause 8.16, 8.17 or 8.18; or
 - (c) if the ACCC has not received a Proposed Independent Manager Notice pursuant to clause 8.19;

then the provisions of clause 8.12 apply.

8.12 If clause 8.11 applies, the ACCC at its absolute discretion may:

- (a) identify and approve a person as the Approved Independent Manager;
- (b) approve the terms of appointment of the Approved Independent Manager; and
- (c) approve the draft separation and management plan.

Appointment of the Approved Independent Manager

8.13 After receiving a notice from the ACCC of its decisions pursuant to clause 8.5, 8.6(b) or 8.12, Caltex must, within two Business Days:

- (a) appoint the person approved by the ACCC as the Approved Independent Manager on the Approved Terms of Appointment; and
- (b) forward to the ACCC a copy of the executed Approved Terms of Appointment within one Business Day of execution.

Obligations and powers of the Approved Independent Manager

- 8.14 Caltex must procure that any proposed terms of appointment for the Approved Independent Manager include obligations on the Approved Independent Manager to:
- (a) maintain his or her independence from Caltex, apart from appointment to the role of an Undertaking Appointment, including not form any relationship of the types described in paragraph 2(c) of Schedule 3 to this Undertaking with Caltex for the period of his or her appointment;
 - (b) act in the best interests of the Unsold Business at all times;
 - (c) not use any confidential information gained through the management of the Unsold Business other than for performing his or her functions as Approved Independent Manager;
 - (d) manage the Unsold Business lawfully in the ordinary course of business, having regard to the nature of the Unsold Business;
 - (e) make only those Material Changes to the Unsold Business which have been approved by the ACCC;
 - (f) operate and manage the Unsold Business to the maximum extent practicable, in a manner which is financially and operationally separate from Caltex;
 - (g) co-operate with the requests of any Approved Divestiture Agent appointed pursuant to this Undertaking;
 - (h) provide the following reports directly to the ACCC:
 - (i) a monthly written report regarding the implementation of and any suggested changes to the Approved Separation and Management Plan; and
 - (ii) an immediate report of any issues that arise in relation to the implementation of the Approved Separation and Management Plan or compliance with this Undertaking by any person named in this Undertaking; and
 - (i) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Manager pursuant to this Undertaking.
- 8.15 Caltex must procure that any proposed terms of appointment for the Approved Independent Manager provide the Approved Independent Manager with the sole authority to:
- (a) manage and operate the Unsold Business according to the Approved Separation and Management Plan until the completion of the divestiture of the Unsold Business;
 - (b) provide any information requested by Caltex pursuant to the protocol in the Approved Separation and Management Plan;
 - (c) decide whether or not to provide access and the manner of such access to competitively sensitive information relating to the Unsold Business requested by Caltex which is not covered by the protocol in the Approved Separation and Management Plan;

- (d) renew or replace upon expiry Material Contracts for the provision of goods or services to the Divestiture Business on commercial terms favourable to the Divestiture Business;
- (e) engage, redeploy or make redundant personnel employed in the Unsold Business as the Approved Independent Manager determines necessary; and
- (f) engage any external expertise, assistance or advice required by the Approved Independent Manager to perform his or her functions as the Approved Independent Manager.

Resignation, revocation or termination of the Approved Independent Manager

- 8.16 Caltex must immediately notify the ACCC in the event that the Approved Independent Manager resigns or otherwise stops acting as the Approved Independent Manager before the completion of the divestiture of the Unsold Business.
- 8.17 The ACCC may revoke an Approved Independent Manager's status as the Approved Independent Manager if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 8.18 The ACCC may approve any proposal by, or alternatively may direct, Caltex to terminate the appointment of the Approved Independent Manager if in the ACCC's view the Approved Independent Manager acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.
- 8.19 If clause 8.16, 8.17 or 8.18 applies, Caltex must provide the ACCC with a Proposed Independent Manager Notice within five Business Days after the relevant event occurs, otherwise clause 8.12 applies.

9 Reporting on compliance with this Undertaking

- 9.1 Caltex must prepare a detailed report that includes:
 - (a) a statement of Caltex's compliance with this Undertaking;
 - (b) a detailed description of the steps Caltex has taken to comply with this Undertaking; and
 - (c) if Caltex is aware of any non-compliance by it with this Undertaking during the period addressed by the notice, identify and describe all known instances of Caltex's non-compliance with this Undertaking during that period and the steps taken by Caltex to address those issues of non-compliance,

(**Compliance Report**).
- 9.2 Caltex must provide a Compliance Report to the ACCC:
 - (a) within 10 Business Days after the Control Date;
 - (b) every month thereafter until the first month after the date on which the divestiture of the Divestiture Business is completed;
 - (c) every three months after the date of provision of the last Compliance Report pursuant to clause 9.2(b), until the ACCC confirms in writing to Caltex that it is

satisfied that the divestiture of the Divestiture Business pursuant to clause 5 of this Undertaking has been completed; and

- (d) a final report due three months after the last report provided pursuant to clause 9.2(c).
- 9.3 Caltex must comply with any direction of the ACCC in relation to matters arising from a Compliance Report within 10 Business Days of being so directed (or such longer period as agreed with the ACCC).

10 Divestiture of Unsold Business

Application of clause

- 10.1 For each Divestiture Business, in the event that the Divestiture Business becomes an Unsold Business, the provisions of clause 10 apply.

Obligation to appoint an Approved Divestiture Agent

- 10.2 From the end of the Initial Sale Period, Caltex must appoint and maintain an Approved Divestiture Agent to effect the divestiture of the Unsold Business.
- 10.3 Without limiting its obligations in this Undertaking, Caltex must from the end of the Initial Sale Period:
- (a) comply with and enforce the Approved Terms of Appointment for the Approved Divestiture Agent;
 - (b) maintain and fund the Approved Divestiture Agent to carry out his or her functions, including:
 - (i) indemnifying the Approved Divestiture Agent for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Divestiture Agent of his or her functions as the Approved Divestiture Agent except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Divestiture Agent;
 - (ii) providing and paying for any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent;
 - (iii) paying such fees as are agreed between the Approved Divestiture Agent and Caltex (but not fees contingent on the price to be obtained for the Unsold Business); and
 - (iv) if an agreement as to fees cannot be reached between the Approved Divestiture Agent and Caltex within 15 Business Days after the end of the Initial Sale Period, Caltex agrees to pay such fees as are directed by the ACCC;
 - (c) not interfere with, or otherwise hinder, the Approved Divestiture Agent's ability to carry out his or her functions as the Approved Divestiture Agent, including:
 - (i) directing its personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 10;

- (ii) providing access to the facilities, sites or operations of the Unsold Business as required by the Approved Divestiture Agent; and
 - (iii) providing to the Approved Divestiture Agent any information, documents or other assistance requested by the Approved Divestiture Agent that he or she considers necessary for carrying out his or her functions as the Approved Divestiture Agent or for reporting to or otherwise advising the ACCC;
- (d) within three Business Days after receiving notice from the ACCC pursuant to clause 6.9, Caltex must instruct the Approved Divestiture Agent to complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the documents approved by the ACCC pursuant to clause 6.9; and
- (e) other than in accordance with clause 10.3(d) of this Undertaking, not instruct the Approved Divestiture Agent to divest the Unsold Business.

Approval of the Approved Divestiture Agent

- 10.4 At least 15 Business Days prior to the end of the Initial Sale Period, if the divestiture of the Divestiture Business has not been completed, Caltex must provide the ACCC with a notice for a Proposed Divestiture Agent in the form of Schedule 3 to this Undertaking (**Proposed Divestiture Agent Notice**).
- 10.5 After receiving a Proposed Divestiture Agent Notice, the ACCC must decide whether to:
- (a) approve the appointment of the person named in the Proposed Divestiture Agent Notice as the Approved Divestiture Agent which includes approving the:
 - (i) terms of appointment attached to the Proposed Divestiture Agent Notice;
 - (ii) draft business sale agreement attached to the Proposed Divestiture Agent Notice; and
 - (iii) draft marketing and sale plan attached to the Proposed Divestiture Agent Notice; or
 - (b) not approve the person named in the Proposed Divestiture Agent Notice as the Approved Divestiture Agent.
- 10.6 If clause 10.5(b) applies, the ACCC may, at its absolute discretion:
- (a) direct Caltex to submit a Proposed Divestiture Agent Notice that:
 - (i) names a person identified by the ACCC as the Proposed Divestiture Agent; and/or
 - (ii) includes attachments that:
 - (A) relate to the person identified by the ACCC under clause 10.6(a)(i)10.6(a) (if applicable); and/or
 - (B) address any issues identified by the ACCC in relation to the terms of appointment, draft business sale agreement, and/or draft marketing and sale plan; or
 - (b) identify and approve a person as the Approved Divestiture Agent together with the:

- (i) terms of appointment
 - (ii) draft business sale agreement and/or
 - (iii) draft marketing and sale plan.
- 10.7 As soon as practicable, and within two Business Days after any direction by the ACCC under clause 10.6(a), Caltex must submit a Proposed Divestiture Agent Notice in accordance with the direction.
- 10.8 Without limiting the ACCC's discretion, in making the decisions described in clause 10.5 or 10.6, the factors to which the ACCC may have regard include whether the:
- (a) person named in the Proposed Divestiture Agent Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Divestiture Agent;
 - (b) person named in the Proposed Divestiture Agent Notice or identified by the ACCC is sufficiently independent of Caltex;
 - (c) terms of appointment, draft business sale agreement and draft marketing and sale plan are consistent with this Undertaking; and
 - (d) terms of appointment, draft business sale agreement and draft marketing and sale plan are otherwise acceptable to the ACCC.
- 10.9 Within 10 Business Days after receiving a Proposed Divestiture Agent Notice, the ACCC must notify Caltex in writing of its decisions and any direction made pursuant to clause 10.5 and/or 10.6.
- 10.10 The ACCC may extend the period within which it will provide notice of the decision or direction (if applicable) described in clause 10.9 by notifying Caltex in writing of the extension within 10 Business Days after receiving the Proposed Divestiture Agent Notice.
- 10.11 Any extension of time by the ACCC under clause 10.10 extends the Initial Sale Period by the same length of time.
- 10.12 If the Approved Divestiture Agent has not been appointed:
- (a) within 10 Business Days after the Divestiture Business becomes an Unsold Business;
 - (b) within 17 Business Days after the Approved Divestiture Agent resigns or otherwise ceases to act pursuant to clause 10.18, 10.19 or 10.20; or
 - (c) if the ACCC has not received a Proposed Divestiture Agent Notice pursuant to clause 10.21;
- then the provisions of clause 10.13 apply.
- 10.13 If clause 10.12 applies, the ACCC may, at its absolute discretion:
- (a) identify and approve a person as the Approved Divestiture Agent;
 - (b) approve the terms of appointment of the Approved Divestiture Agent;
 - (c) approve the draft business sale agreement; and

- (d) approve the draft marketing and sale plan.

Appointment of the Approved Divestiture Agent

10.14 After receiving notice from the ACCC of its decisions pursuant to clause 10.5, 10.6(b) or 10.13, Caltex must within two Business Days:

- (a) appoint the person approved by the ACCC as the Approved Divestiture Agent on the Approved Terms of Appointment; and
- (b) forward to the ACCC a copy of the executed Approved Terms of Appointment within one Business Day of execution.

Obligations and powers of the Approved Divestiture Agent

10.15 Caltex must procure that any proposed terms of appointment for the Approved Divestiture Agent include obligations on the Approved Divestiture Agent to:

- (a) maintain his or her independence from Caltex, apart from appointment to the role of an Undertaking Appointment, including not form any relationship of the types described in paragraph 2(c) of Schedule 3 to this Undertaking with Caltex for the period of his or her appointment;
- (b) not use any confidential information gained through the divestiture of the Unsold Business other than for performing his or her functions as Approved Divestiture Agent;
- (c) follow the Approved Marketing and Sale Plan;
- (d) divest the Unsold Business only to an Approved Purchaser, with no obligation imposed by Caltex to achieve a divestiture at a minimum price;
- (e) use his or her best endeavours to enter into a binding agreement for the divestiture of the Unsold Business as quickly as possible using the Approved Business Sale Agreement;
- (f) co-operate with the requests of any Approved Independent Manager appointed pursuant to this Undertaking;
- (g) every 30 Business Days following appointment of the Approved Divestiture Agent, provide written reports directly to the ACCC which include:
 - (i) information regarding the implementation of the Approved Business Sale Agreement and the Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
 - (ii) information regarding any suggested changes to any Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
 - (iii) an account and explanation of all disbursements, fees and charges incurred by the Approved Divestiture Agent in undertaking his or her duties by month and to the date of the report;
 - (iv) a schedule of agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 10.16(d));
 - (v) the efforts made to sell the Unsold Business;

- (vi) the identity of any advisers engaged;
 - (vii) the identity of any persons expressing interest in the Unsold Business; and
 - (viii) any other information required by the ACCC.
- (h) within 30 Business Days after the completion of the divestiture of the Unsold Business, provide a written report directly to the ACCC which includes a final accounting of:
- (i) any moneys derived from the divestiture of the Unsold Business;
 - (ii) all disbursements, fees and charges incurred by the Approved Divestiture Agent in fulfilling his or her duties; and
 - (iii) all agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 10.16(d);
- (i) immediately inform the ACCC of:
- (i) any issues that arise in relation to the implementation of the Approved Sale and Purchase Agreement and any Approved Marketing and Sale Plan;
 - (ii) non-compliance with this Undertaking by any person named in this Undertaking; and
 - (iii) any offers for the Unsold Business;
- (j) accept any offer for the Unsold Business upon instruction from Caltex given in accordance with clause 10.3(d); and
- (k) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Divestiture Agent pursuant to this Undertaking.

10.16 Caltex must procure that any proposed terms of appointment for the Approved Divestiture Agent contain an irrevocable grant of power of attorney conferring all necessary power and authority on the Approved Divestiture Agent to:

- (a) negotiate with purchasers to divest the Unsold Business on terms considered by the Approved Divestiture Agent in his or her sole discretion to be consistent with this Undertaking and the Approved Marketing and Sale Plan;
- (b) execute any agreements with the Approved Purchaser required pursuant to clause 6.9;
- (c) upon instruction pursuant to clause 10.3(d), complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the Approved Business Sale Agreement; and
- (d) engage any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent.

10.17 Any irrevocable power of attorney granted pursuant to clause 10.16 will end upon resignation or termination of the Approved Divestiture Agent in accordance with clauses 10.18, 10.19 and 10.20, or in the event that the Unsold Business is divested in accordance with this Undertaking.

Resignation, revocation or termination of the Approved Divestiture Agent

- 10.18 Caltex must immediately notify the ACCC in the event that an Approved Divestiture Agent resigns or otherwise stops acting as an Approved Divestiture Agent before the completion of the divestiture of the Unsold Business.
- 10.19 The ACCC may revoke an Approved Divestiture Agent's status as the Approved Divestiture Agent if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 10.20 The ACCC may approve any proposal by, or alternatively may direct, Caltex to terminate an Approved Divestiture Agent if in the ACCC's view the Approved Divestiture Agent acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.
- 10.21 If clause 10.18, 10.19 or 10.20 applies then Caltex must provide the ACCC with a Proposed Divestiture Agent Notice within five Business Days, otherwise clause 10.13 applies.

11 Information

- 11.1 Caltex must notify the ACCC and each Undertaking Appointment in writing of the proposed date of each of the following events at least five Business Days before each is proposed to occur:
- (a) the Control Date; and
 - (b) the completion of the divestiture of each Divestiture Business.
- 11.2 Caltex must notify the ACCC and each Undertaking Appointment in writing of the occurrence of each of the following events within one Business Day after the date the event occurs:
- (a) the Control Date; and
 - (b) the completion of the divestiture of each Divestiture Business.
- 11.3 The ACCC may direct Caltex in respect of its compliance with this Undertaking to, and Caltex must:
- (a) furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce information, documents and materials to the ACCC within Caltex's custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) direct its personnel, including its directors, contractors, managers, officers, employees and agents to attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 11.4 Any direction made by the ACCC under clause 11.1 will be notified to Caltex, in accordance with clause 16.

- 11.5 In respect of Caltex's compliance with this Undertaking or an Undertaking Appointment's compliance with its Approved Terms of Appointment, the ACCC may request an Undertaking Appointment to:
- (a) furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce information, documents and materials to the ACCC within Caltex's or the Undertaking Appointment's custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 11.6 Caltex will use its best endeavours to ensure that an Undertaking Appointments comply with any request from the ACCC in accordance with clause 11.5.
- 11.7 Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 11 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 11.8 The ACCC may, in its discretion to be exercised in good faith:
- (a) advise any Undertaking Appointment of any request made by it under this clause 11; and/or
 - (b) provide copies to any Undertaking Appointment of any information furnished, documents and material produced or information given to it under this clause 11.
- 11.9 Nothing in this clause 11 requires the provision of information or documents in respect of which Caltex has a claim of legal professional or other privilege.
-

12 Disclosure of the Undertaking

- 12.1 Caltex and the ACCC agree that:
- (a) Schedule 4 and clause 1 of Schedule 5 will remain confidential until after completion of the divestiture of all of the Divestiture Businesses; and
 - (b) Clause 2 of Schedule 5 will remain confidential at all times.
- 12.2 Caltex acknowledges that the ACCC may provide Undertaking Appointments with a copy of this Undertaking which includes versions of Schedule 4 and Schedule 5.
- 12.3 Caltex acknowledges that the ACCC may, subject to clause 12.1:
- (a) make this Undertaking publicly available; and
 - (b) publish this Undertaking on its Public Section 87B Undertakings Register; and
 - (c) from time to time publicly refer to this Undertaking.
- 12.4 Nothing in this clause 12 or the confidential parts of this Undertaking referred to in clause 12.1 prevents the ACCC from disclosing such information as is:
- (a) required by law;

- (b) permitted by s 155AAA of the Act;
- (c) necessary for the purpose of enforcement action under section 87B of the Act; or
- (d) necessary for the purpose of making such market inquiries as the ACCC thinks fit to assess the impact on competition arising in connection with this Undertaking.

12.5 Nothing in clause 12.1 or the confidential parts of this Undertaking referred to in clause 12.1 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

13 Obligation to procure

13.1 Where the performance of an obligation under the Undertaking requires a Related Body Corporate of Caltex to take or refrain from taking some action, Caltex will procure that Related Body Corporate to take or refrain from taking that action, as the case may be.

14 No Derogation

14.1 This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Caltex of any term of this Undertaking.

14.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Caltex does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

15 Costs

15.1 Caltex must pay all of its own costs incurred in relation to this Undertaking.

16 Notices

Giving Notices

16.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: mergers@accc.gov.au

Attention: Executive General Manager
Mergers and Adjudication Group

With a copy sent to: mergersucu@accc.gov.au

Director, Undertaking Compliance Unit
Coordination and Strategy Branch
Mergers and Adjudication Group

16.2 Any notice or communication to Caltex pursuant to this Undertaking must be sent to:

Attention: Paula Gilardoni and Gina Cass-Gottlieb, Gilbert + Tobin

Email Address: PGilardoni@gtlaw.com.au, GCass-Gottlieb@gtlaw.com.au

16.3 If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

Change of contact details

16.4 Caltex or the ACCC must notify the other party of a change to its contact details within three Business Days.

16.5 Any notice or communication will be sent to the most recently advised contact details and subject to clause 16.3 and 16.4, will be taken to be received.

17 Defined terms and interpretation

Definitions in the Dictionary

17.1 A term or expression starting with a capital letter:

- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
- (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

Interpretation

17.2 Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

Executed as an Undertaking

Executed by **THE COMMON SEAL OF CALTEX AUSTRALIA PETROLEUM PTY LTD ACN 000 032 128**, and affixed in accordance with its Constitution:

S. Hepworth

Signature of director

Peter Lim

Signature of a company secretary

Simon Hepworth

Name of director (print)

Peter Lim

Name of company secretary (print)



Date

15/5/14

Date

15/5/14

Accepted by the Australian Competition and Consumer Commission

pursuant to section 87B of the *Competition and Consumer Act 2010* on:

Michael Schaper

Date *21st May 2014*

And signed on behalf of the Commission:

Chairman

MICHAEL SCHAPER

Date

ACTING CHAIRMAN, ACCC

Schedule 1 Dictionary

Definitions

ACCC means the Australian Competition and Consumer Commission.

Act means the Competition and Consumer Act 2010 (Cth).

Agostino means Commercial Street Pty Ltd (ACN 169 501 008), 34 Bay Road Pty Ltd (ACN 169 501 133), Jubilee Highway Pty Ltd (ACN 169 501 311), and AM/PM Always Pty Ltd (ACN 163 716 381).

Agostino Agreement means the Agreement between Caltex and Agostino relating to the acquisition of all of the Divestiture Businesses as further described in Schedule 5 of the Undertaking.

Agreements means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

Approved Business Sale Agreement means a standard form contract for the divestiture of an Unsold Business which has been approved by the ACCC in accordance with the terms of this Undertaking.

Approved Divestiture Agent means the person appointed under clause 10.14 of this Undertaking.

Approved Independent Manager means the person appointed under clause 8.2 of this Undertaking.

Approved Interim Supply Agreement means any agreement for the supply of goods or services of the kind described in clause 5.12, where that agreement has been approved by the ACCC.

Approved Marketing and Sale Plan means a plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Divestiture Agent will market and effect the divestiture of an Unsold Business.

Approved Purchaser means a person approved by the ACCC under clauses 6.2 or 6.9 of this Undertaking.

Approved Sale and Purchase Agreement means the contract approved by the ACCC in accordance with the terms of this Undertaking, by which an Approved Purchaser will acquire the Divestiture Business from Caltex.

Approved Separation and Management Plan means a plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Manager will:

- (a) separate an Unsold Business from any business to be retained by Caltex; and
- (b) manage and operate an Unsold Business independently of Caltex and any retained business.

Approved Technical Assistance Agreement means any agreement for the supply of Technical Assistance, where that agreement has been approved by the ACCC.

Approved Terms of Appointment means the terms of appointment for the Undertaking Appointments, as approved by the ACCC in accordance with the terms of this Undertaking.

Associated Entity has the meaning given by section 50AAA of the Corporations Act.

Business Day means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

Caltex means Caltex Australia Petroleum Pty Ltd (ACN 000 032 128).

Commencement Date has the meaning given to it in clause 3.1 of this Undertaking.

Completion Date means the date on which Caltex and the Approved Purchaser complete the divestiture of the Divestiture Businesses.

Consents means any Government Consents or Third Party Consents.

Control Date means the date on the Proposed Acquisition is completed.

Corporations Act means the Corporations Act 2001 (Cth).

Divestiture Businesses means the assets described in Confidential Schedule 4.

Entities Connected has the meaning given by section 64B of the Corporations Act.

Government Consents means any consents from any government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the conduct of the Divestiture Business.

Initial Sale Period is defined in clause 1 of Schedule 5 to this Undertaking.

Material Change means any change to the structure, attributes, extent or operations of the Divestiture Businesses or product or service sold by a Divestiture Businesses that may affect, or impact on, the competitiveness of the Divestiture Businesses.

Material Contract means any Agreement that is necessary for the operation of the Divestiture Business.

Proposed Acquisition is defined in clause 2.3 of this Undertaking.

Proposed Divestiture Agent means a person named in a Proposed Divestiture Notice.

Proposed Divestiture Agent Notice means a completed notice in the form of Schedule 3 to this Undertaking provided to the ACCC with all required attachments in relation to the Proposed Divestiture Agent.

Proposed Independent Manager means a person named in a Proposed Independent Manager Notice.

Proposed Independent Manager Notice means a completed notice in the form of Schedule 3 to this Undertaking provided to the ACCC with all required attachments in relation to the Proposed Independent Manager.

Proposed Purchaser means a person named in a Proposed Purchaser Notice.

Proposed Purchaser Notice has the meaning given to it in clause 6.8 of this Undertaking.

Public Section 87B Undertakings Register means the ACCC's public register of section 87B undertakings, available at www.accc.gov.au.

Related Bodies Corporate has the meaning given to it by section 50 of the Corporations Act.

Related Entities has the meaning given to it by section 9 of the Corporations Act.

Related Parties has the meaning given to it by section 228 of the Corporations Act.

Subsidiary has the meaning given by section 4A of the Act.

Technical Assistance includes advising on technical knowledge documentation, supporting the Approved Purchaser on acquiring specific assets necessary for the ongoing conduct of a Divestiture Business, providing staff with suitable experience and skills to assist and/or advice on technical issues, assisting in training for the Approved Purchaser's staff, and providing guidance on regulatory and legal aspects relating to the transfer of or application for licences.

Third Party Consents means any consents (excluding Government Consents) required by the Approved Purchaser and necessary for the conduct of the Divestiture Business to the assignment, novation, sale, sub-licensing or transfer of any assets, licences, material contracts, permits or approvals used in the Divestiture Business.

Transferred Personnel has the meaning given to it in clause 5.8(a) of this Undertaking.

Transferred Services has the meaning given to it in clause 5.8(b) of this Undertaking.

Undertaking is a reference to all provisions of this document, including its Schedules and as varied from time to time under section 87B of the Act.

Undertaking Appointments has the meaning given to it in Schedule 3 to this Undertaking.

Unsold Business has the meaning given to it in clause 8.1 to this Undertaking.

Interpretation

- 1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
 - (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
 - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
 - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
 - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any

subordinate legislation or regulations issued under that legislation or legislative provision;

- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
 - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
 - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
 - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would, have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
 - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this

Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;

- (p) in performing its obligations under this Undertaking, Caltex will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
 - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
 - (ii) a party includes its successors and permitted assigns; and
 - (iii) a monetary amount is in Australian dollars.

Schedule 2 Proposed Purchaser Notice Form

Please note in relation to information given on or in relation to this form, giving false or misleading information is a serious offence.

The completed form with requested documents attached may be provided to the ACCC using the following method:

Email:

Subject line: Proposed Purchaser Notice – Undertaking to the ACCC under s 87B of the Competition and Consumer Act 2010 by Caltex

Address: mergers@acc.gov.au

Attention: Executive General Manager - Mergers and Adjudication Group

With an email copy sent to:

Address: mergersucu@acc.gov.au

Attention: Director, Undertaking Compliance Unit - Coordination and Strategy Branch - Mergers and Adjudication Group

2 In relation to the Proposed Purchaser, please provide the following information:

- (a) Name of the Proposed Purchaser;
- (b) Address;
- (c) Contact name;
- (d) Telephone number; and
- (e) Other contact details.

3 Please attach a submission containing the following information to this form:

- (a) a description of the business carried on by the Proposed Purchaser including the locations in which the Proposed Purchaser carries on its business.
- (b) details of the Proposed Purchaser's experience in the relevant market/s.
- (c) the names of the owner/s and/or the directors of the Proposed Purchaser.
- (d) a section addressing the factors set out in clause 6.10 of this Undertaking, including any information adverse to the Proposed Purchaser, in the power, possession or control of Caltex;
- (e) details of any of the following types of relationships between Caltex and the Proposed Purchaser or confirmation that no such relationship exists whether within Australia or outside of Australia:
 - (i) Caltex and the Proposed Purchaser are Associated Entities;
 - (ii) Caltex is an Entity Connected with the Proposed Purchaser;

- (iii) the Proposed Purchaser is an Entity Connected with Caltex;
- (iv) Caltex and the Proposed Purchaser are Related Entities;
- (v) Caltex and the Proposed Purchaser are Related Parties;
- (vi) any Related Party, Related Entity or Entity Connected with Caltex is a Related Party, Related Entity or Entity Connected with the Proposed Purchaser;
- (vii) Caltex and the Proposed Purchaser have a contractual relationship or had one within the past three years, other than those attached to this form;
- (viii) the Proposed Purchaser is a supplier of Caltex or has been in the past three years;
- (ix) Caltex is a supplier of the Proposed Purchaser or has been in the past three years; and
- (x) any other relationship between Caltex and the Proposed Purchaser that allows one to affect the business decisions of the other.

4 Please also attach to this form:

- (a) the finalised draft of the sale and purchase agreement / business sale agreement for approval by the ACCC in accordance with this Undertaking.
- (b) the finalised draft of any Technical Assistance Agreement for approval by the ACCC in accordance with this Undertaking.
- (c) the finalised draft of any Interim Supply Agreement for approval by the ACCC in accordance with this Undertaking.
- (d) any documents required to support the information provided by Caltex pursuant to this form.

Schedule 3 Undertaking Appointments

This form sets out the information required by the ACCC in relation to proposed appointment of the following positions under the Undertaking:

- Independent Manager; or
- Divestiture Agent,

(the **Undertaking Appointments**).

This form is to be used for each of the above appointments.

Please note in relation to information given on in relation to this form, giving false or misleading information is a serious offence.

Method of Delivery to the ACCC

The completed Undertaking Appointment form, along with the additional requested information is to be provided to the ACCC with the subject line:

“Independent Auditor”/“Divestiture Agent”/“Independent Manager” Form –
Undertaking to the ACCC under s 87B of the Competition and Consumer Act 2010
by Caltex

To the below email addresses:

Email: mergers@accc.gov.au

Attention: Executive General Manager Mergers and Adjudication Group

With a copy sent to:

Email: mergersucu@accc.gov.au

Attention: Director, Undertaking Compliance Unit, Merger Coordination and Strategy Branch

Information Required

- 1 Proposed Undertaking Appointment Details:
 - (a) the name of the Proposed Undertaking Appointment; and
 - (b) the name of the proposed Undertaking Appointment's employer and contact details including:
 - (i) Address;
 - (ii) Contact name;
 - (iii) Telephone number;
 - (iv) Other contact details.
- 2 A submission containing the following information:

- (a) details of Undertaking Appointment's qualifications and experience relevant to his or her proposed role pursuant to this Undertaking;
 - (b) the names of the owner/s and/or the directors of the Undertaking Appointment's employer;
 - (c) details of any of the following types of relationships between Caltex and the Undertaking Appointment or the Undertaking Appointment's employer or confirmation that no such relationship exists whether within Australia or outside of Australia:
 - (i) Caltex and the Undertaking Appointment's employer are Associated Entities;
 - (ii) Caltex is an Entity Connected with the Undertaking Appointment's employer;
 - (iii) the Undertaking Appointment is an Entity Connected with Caltex;
 - (iv) Caltex and the Undertaking Appointment are Related Entities;
 - (v) Caltex and the Undertaking Appointment are Related Parties;
 - (vi) any Related Party, Related Entity or Entity Connected with Caltex is a Related Party, Related Entity or Entity Connected with the Undertaking Appointment;
 - (vii) Caltex and the Undertaking Appointment have a contractual relationship or had one within the past three years, other than those attached to this form;
 - (viii) the Undertaking Appointment is a supplier of Caltex or has been in the past three years;
 - (ix) Caltex is a supplier of the Undertaking Appointment or has been in the past three years; and
 - (x) any other relationship between Caltex and the Undertaking Appointment that allows one to affect the business decisions of the other.
- 3 A document outlining the terms of appointment for the proposed Undertaking Appointment.
- 4 The ACCC also requires the following information in relation to the relevant Undertaking Appointment:
- (a) Proposed Divestiture Agent:
 - (i) The finalised draft business sale agreement drafted by the Proposed Divestiture Agent in consultation with Caltex. The draft business sale agreement is to provide for the divestiture of the Unsold Business.
 - (ii) The Proposed Divestiture Agent's draft marketing and sale plan for the Unsold Business.
 - (b) Proposed Independent Manager:
 - (i) The finalised draft separation and management plan for the Divestiture Businesses detailing the measures and timing to be implemented by Caltex's and the Approved Independent Manager in order to fulfil Caltex's and the

Approved Independent Manager's obligations pursuant to this Undertaking. This plan is to be drafted by the Proposed Independent Manager in consultation with Caltex to achieve the objectives of the Undertaking including:

- (A) the intended mode of operation of the Divestiture Businesses until completion of its divestiture;
- (B) separation measures to ensure the Divestiture Businesses is operated in a manner which is financially and operationally separate from Caltex, including the;
 - separation of the books and records of the Divestiture Businesses from those of Caltex;
 - severance of the Divestiture Business's participation in any private shared information technology networks, to the extent possible without compromising the viability of the Divestiture Business;
 - implementation of specific electronic, information and physical security measures to maintain the confidentiality of any competitively sensitive information of the Divestiture Business; and
 - severance of arrangements to share personnel and plant between the Divestiture Businesses and any businesses to be retained by Caltex, to the extent possible without compromising the viability of the Divestiture Business;
- (ii) details of contracts for the provision of goods or services to the Divestiture Businesses which will expire after the completion of the divestiture of the Divestiture Businesses to the Approved Purchaser and the actions which will be taken to ensure they are replaced, renewed and/or renegotiated on commercial terms favourable to the Divestiture Business;
- (iii) personnel planning to maintain appropriate personnel levels and ensure that the Divestiture Businesses has access to all personnel necessary to operate the Divestiture Business;
- (iv) any Material Changes to the Divestiture Businesses required in order to fulfil Caltex's and the Approved Independent Manager's obligations pursuant to this Undertaking;
- (v) the cooperation required from the Proposed Independent Manager with Caltex in relation to the divestiture of the Divestiture Business, including:
 - (A) the method by which due diligence information, site visits and personnel interviews by and to prospective purchasers of the Divestiture Businesses will be managed; and
 - (B) the method by which the Proposed Independent Manager and Caltex will preserve the confidentiality of the Divestiture Business's competitively sensitive information from Caltex and its advisers throughout this process.
 - (C) a protocol whereby the Proposed Independent Manager can provide any information requested by Caltex without disclosing the details of

the Divestiture Business's competitively sensitive information to Caltex.

Schedule 4 Confidential

Schedule 5 Confidential

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