

COMPETITION AND CONSUMER ACT 2010

**UNDERTAKING TO THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION GIVEN
FOR THE PURPOSES OF SECTION 87B**

BY

CALTEX AUSTRALIA PETROLEUM PTY LTD

ACN 000 032 128

1 Person giving this undertaking

- 1.1 This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Caltex Australia Petroleum Pty Ltd (ACN 000 032 128) (**Caltex**) of 2 Market Street, Sydney, pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

2 Background

- 2.1 Caltex and its related bodies corporate carry on business in Australia consisting of (among other things) fuel refining, and wholesale and retail fuel supply. Caltex's business relevantly includes the following:
- (a) the retail sale of motor fuel to motorists from petrol stations displaying the Caltex brand and operated by Caltex or an agent of Caltex;
 - (b) the licensing or franchising of the Caltex brand to other petrol stations displaying the Caltex brand and operated by companies not related to Caltex; and
 - (c) the wholesale supply of motor fuel to other companies.
- 2.2 From 2012 to 2014 the ACCC conducted an investigation into arrangements for the supply in Australia of an electronic retail price information exchange service (the **Oil PriceWatch Service**) between Informed Sources (Australia) Pty Ltd (ACN 003 714 332) (**Informed Sources**) and Caltex and as between Informed Sources and other companies. The ACCC is concerned that subscription to the Oil PriceWatch Service by the petrol retailer subscribers to the service facilitated non-rivalrous behaviour in the retail sale of petrol in Melbourne.
- 2.3 On 20 August 2014, the ACCC commenced proceedings in the Federal Court of Australia against Informed Sources, Caltex and other petrol retailers alleging that they contravened section 45 of the CCA (the **Proceedings**). The ACCC alleges that the arrangements between Informed Sources and petrol retailers, through the Oil PriceWatch Service, had, and in the future would continue to have, the effect or likely effect of substantially lessening competition in markets for the sale of petrol in Melbourne.
- 2.4 While Caltex does not accept that its subscription, the subscription of others, or any previous or future subscription of Caltex or of others to the Oil PriceWatch Service or any

other similar service, has or had or will have any adverse effect on competition in any relevant market in Australia, Caltex and the ACCC have agreed to resolve the Proceedings in accordance with the terms of this Undertaking.

- 2.5 The purpose of this Undertaking is to reduce the potential for adverse effects on competition as alleged by the ACCC arising from the exchange of electronic retail price information between petrol retailers. It does this by giving consumers access to the electronic retail price information in a manner that is as timely as the retailers receive it to assist consumers in making informed decisions as to when and where to purchase petrol. The Undertaking only applies to the extent that petrol retailers subscribe to a petrol price information exchange service (as defined in clause 4.1). Without reducing the availability of the electronic retail price information to consumers, this Undertaking also permits measures to prevent free-riding on the petrol price information exchange service by petrol retailers that do not subscribe to that service.

3 Commencement and Termination of this Undertaking

- 3.1 Subject to clause 3.2, this Undertaking comes into effect when:
- (a) this Undertaking is executed by Caltex;
 - (b) the ACCC accepts the Undertaking so executed; and
 - (c) the Federal Court makes all of the orders set out in Annexure 1 to this Undertaking
- (the **Commencement Date**).
- 3.2 The undertakings in clause 4 will commence on the 150th day after the Commencement Date.
- 3.3 This Undertaking will terminate on the date that is five years after the 150th day after the Commencement Date.

4 Undertakings

- 4.1 Other than with the ACCC's written consent, Caltex will not, and will ensure that its related entities will not, make, enter into or give effect to any contract or arrangement for the acquisition by it of:
- (a) the Oil PriceWatch Service in Australia; or
 - (b) any similar electronic retail petrol price information exchange service concerning the retail price of petrol in Australia that provides Real-time or Near Real-time petrol price information, which:
 - (1) directly or indirectly informs Caltex, or otherwise enables Caltex to determine, that other petrol retailer subscribers will have access to retail petrol price information which Caltex provides to the service; and
 - (2) makes Caltex's receipt of, or access to, retail petrol price information provided by other petrol retailer subscribers to the service, conditional upon Caltex providing retail petrol price information to the service,

(**petrol price information exchange service**) unless the provider of the petrol price information exchange service (**service provider**) agrees with Caltex to arrangements that give effect to the requirements of Annexure 2 (**Mandatory Terms**).

- 4.2 For the avoidance of doubt, Caltex shall not be in breach of its undertaking in clause 4.1 only by reason that the service provider has failed to comply with the Mandatory Terms.
- 4.3 If Caltex is a party to a contract or arrangement with a service provider in the form referred to in clause 4.1, Caltex will:
- (a) within 14 days of becoming aware that the service provider has failed to comply with the Mandatory Terms, notify the service provider and the ACCC of the non-compliance and the reasons for the non-compliance; and
 - (b) terminate the contract or arrangement with the service provider if the service provider has failed to remedy the non-compliance within 30 days of Caltex's notification, except where the service provider has been unable to comply due to system outages or force majeure.
- 4.4 For the purposes of this clause 4 and Annexure 2, **Real-time or Near Real-time petrol price information** means petrol price information that is provided by, and disseminated to, subscribers within 48 hours of the time that is recorded in the subscriber's system as the time that the petrol price information was created.

5 Review of Undertaking

- 5.1 If:
- (a) Caltex is unable to comply with its obligations under this Undertaking; or
 - (b) legislative provisions are enacted that prohibit the conduct identified in clause 4.1 of this Undertaking or the Mandatory Terms; or
 - (c) Caltex or the ACCC believes that it is necessary to vary this Undertaking due to changed circumstances (including any material change in the retail fuel markets or Caltex's business),

then Caltex and the ACCC agree that they will review the Undertaking and negotiate in good faith variation or withdrawal of all or any of the terms of the Undertaking in light of such circumstances.

6 Information

- 6.1 For the purposes of monitoring compliance with this Undertaking, the ACCC may:
- (a) make reasonable inquiries of Caltex relating to Caltex's obligations in clause 4 of this Undertaking (including compliance by a service provider with the Mandatory Terms) and Caltex will respond to such inquiries within a reasonable period of time; and
 - (b) make reasonable requests of Caltex to furnish information and produce documents within Caltex's custody, power or control to the ACCC relating to Caltex's obligations in clause 4 of this Undertaking (including compliance by a

service provider with the Mandatory Terms) at a time and in the form specified by the ACCC, and Caltex will comply with any such requirement.

- 6.2 Nothing in clause 6.1 requires Caltex to provide information or documents to the ACCC in respect of which Caltex has a claim of legal professional or other privilege.

7 Acknowledgments

7.1 Caltex acknowledges that:

- (a) the ACCC will make this Undertaking publicly available, including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- (b) the ACCC will, from time to time, make public reference to this Undertaking including in news media statements and in ACCC publications; and
- (c) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

8 Obligation to procure

- 8.1 Where the performance of an obligation under this 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.

Executed as an undertaking

Signed for

Caltex Australia Petroleum Pty Ltd

by its authorised officer

sign here ▶



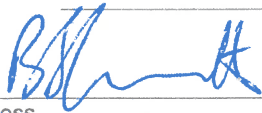
Executive General Manager, Legal
and Corporate Affairs

print name

PETER LIM

in the presence of

sign here ▶



Witness

print name

BEN EVERITT

Date: 22 DECEMBER 2015

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the
Competition and Consumer Act 2010:

Signed on behalf of the Commission:



Chairman

Date:

22/12/15

Annexure 1

Short minute of order

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL**

No VID 450 of 2014

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**
Applicant

INFORMED SOURCES (AUSTRALIA) PTY LTD (ACN 003 714 332)
And others named in the Schedule
Respondents

THE COURT ORDERS BY CONSENT THAT:

1. The proceedings against the Third Respondent be discontinued.
2. There be no order as to costs.

THE COURT NOTES:

3. The Third Respondent has agreed to give the Applicant an undertaking pursuant to section 87B of the Competition and Consumer Act 2010 in the form attached to these orders.

Date:

Date:

Signed by Matthew Blunn
For and on behalf of the Australian
Government Solicitor

Signed by
[Solicitor for the Third Respondent]

Schedule

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL**

No VID 450 of 2014

Respondents

Second Respondent

BP Australia Pty Ltd (ACN 004 085 616)

Third Respondent

Caltex Australia Petroleum Pty Ltd (ACN 000 032 128)

Fourth Respondent

Woolworths Ltd (ACN 000 014 675)

Sixth Respondent

7-Eleven Stores Pty Ltd (ACN 005 299 427)

Annexure 2
Mandatory Terms

- 1 Subject to clause 3, the service provider must, in a timely manner, make available:
- (a) to third party information service providers, consumer organisations, motorist organisations, research organisations and regulatory agencies carrying on business or operating in Australia (**third party organisations**), all information and data concerning the retail price of petrol offered for sale at individual petrol stations in Australia that the service provider provides to Caltex under the petrol price information exchange service (**petrol price information**), on reasonable commercial terms; and
 - (b) to Australian consumers the petrol price information in a form and to an extent that is usable by consumers in making informed decisions as to when and where to purchase petrol, without charge.

The requirements of sub-clause (b) will be satisfied by: (i) making information available by an app (for the avoidance of doubt, the requirements of sub-clause (b) do not oblige the service provider to publish information on a website); and (ii) in addition, making available to consumers a service which allows consumers to observe: (A) the distribution of subscribers' petrol prices across geographic areas within capital cities (except Perth) as selected by the consumer; and (B) petrol price cycles over time.

For the purposes of this clause, making information and data available in a timely manner means making it available in a manner that is as timely as Caltex receives it from the service provider.

- 2 The service provider must not:
- (a) engage in conduct for the purpose of hindering or preventing consumers or third party organisations from obtaining access to any petrol price information that the service provider has agreed to make available under clause 1; and
 - (b) unreasonably or unfairly discriminate between third party organisations or between a third party organisation and itself or its related bodies corporate in respect of the terms on which the service provider makes available any petrol price information under clause 1.

- 3 Subject to clause 4, the service provider may:
- (a) employ technological or other restrictions or impose licensing restrictions on persons accessing the information; and
 - (b) additionally in respect of a third party organisation, require the third party organisation to employ technological or other restrictions or impose licensing restrictions on persons accessing the information,

but only to the extent reasonably necessary to prevent parties other than consumers and third party organisations from obtaining access to the petrol price information as Real-time or Near Real-time petrol price information without subscribing to the petrol price information exchange service, and provided that such restrictions do not detrimentally affect in a material way the ability of consumers to access the petrol price information in a manner which is as timely as Caltex receives it for the purpose of making informed decisions as to when and where to purchase petrol in the manner referred to in clause 1.

- 4 Prior to employing or imposing restrictions as referred to in clause 3, the service provider must notify the form of any proposed restriction to the Chairman of the ACCC in writing. If

within 10 Business Days of receiving written notification under this clause 4 the ACCC advises the service provider that, in the opinion of the ACCC, the proposed restriction the subject of the notification does not comply with clause 3, the service provider must not employ or impose the restriction unless the following procedures have been complied with and the private arbitrator appointed under these procedures determines that the restriction complies with clause 3:

- (a) The service provider must notify the ACCC in writing that it disputes the ACCC's opinion.
- (b) Within 10 Business Days of receipt of a notice under clause (a), the Chairman of the ACCC will appoint an independent person having suitable qualifications as well as commercial and practical experience of at least 10 years to act as a private arbitrator of the dispute.
- (c) The costs of the arbitrator will be borne by the service provider.

5 In the event of a dispute between the service provider and a third party organisation in relation to the terms on which the service provider makes available the petrol price information to the third party organisation under clause 1, the service provider must comply with the following procedures to resolve the dispute:

- (a) The service provider must notify the third party organisation in writing of the procedures set out in this clause and that the service provider is required to comply with the procedures in this clause and ask the third party organisation whether it wishes to have the dispute resolved in accordance with the procedures in this clause.
- (b) If the third party organisation notifies the service provider that it wishes to have the dispute resolved in accordance with the procedures in this clause and agrees to comply with the arbitration determination, the service provider must use the procedures in this clause to resolve the dispute.
- (c) The service provider must provide written notification of the dispute to the Chairman of the ACCC containing the following information:
 - (1) the contact details for the parties to the dispute;
 - (2) a brief description of the nature of the dispute.
- (d) Within 10 Business Days of receipt of a notice under clause (c), the Chairman of the ACCC will appoint an independent person having suitable qualifications as well as commercial and practical experience of at least 10 years to act as a private arbitrator.
- (e) The service provider agrees to comply with the arbitration determination of the private arbitrator.
- (f) The costs of the arbitrator will be borne equally by the service provider and the third party organisation.