



CALTEX

Caltex Australia

**Caltex submission to the House of Representatives
Economics Committee inquiry into the *Competition and
Consumer (Price Signalling) Amendment Bill 2010***

3 February 2011

Contact:

Frank Topham
Manager Government Affairs & Media

Caltex submission to the House of Representatives Economics Committee inquiry into the Competition and Consumer (Price Signalling) Amendment Bill 2010

At a glance

- The case has not been made that there is anti-competitive price signalling that justifies a major extension of competition law
- There are legitimate business reasons for communication of pricing information and if the bill were proceeded with, significant drafting changes would be required to avoid unintended consequences and business uncertainty
- Under the bill as it stands, the Informed Sources price information service would cease, putting the petrol price discount cycle at risk and increasing costs to motorists.

Summary of submission

- Caltex does not believe the legislation (“Billson bill”) is necessary as the case has not been made there is anti-competitive “price signalling” that substantially lessens competition in banking or any other sector. Parliament should reject the bill.
- If extension of the *Competition and Consumer Act* is sought in relation to the matters addressed by the bill, far more extensive consultation should be undertaken before any revised legislation is put to Parliament. Alternative approaches to the issue of “coordinated conduct” have been suggested by competition lawyers and the Law Council.
- While the legislation is not necessary, it avoids some of the seriously adverse impacts that would flow from the Government’s exposure draft of the *Competition and Consumer Amendment Bill (No.1) 2011* in relation to “price signalling” (“Government bill”). Nevertheless, it would also have some seriously adverse impacts including some consequences we believe are unintended.
- If legislation is pursued, the following changes should be made:
 - the reference to “potential competitor” in Sub-section 6 should be deleted or made consistent with the well established language of the Competition and Consumer Act (eg in s4D where it applies to arrangements between competitors, or firms *likely* to be in competition with each other)
 - the meaning of “competitor” in Sub-section 6 should be limited to a competitor in the market in which the goods or services subject of the communication are sold or acquired
 - the reference to “substantial purpose” in Sub-section 8 should be changed to “principal purpose”
 - the “principal purpose” test should be whether the purpose of the communication is to induce a competitor to increase the price at which the goods or services are supplied (or to decrease the price at which the goods or services are acquired), rather than simply vary the price (Sub-section 2(b))
 - the ability to infer purpose from conduct alone should be removed ie Sub-section 3 but if this provision is retained, there should be statutory guidance as to how an inference would be drawn
 - the phrase “public domain” should be clarified in Sub-section 11(c) so it is made clear that the exemption for information “already in the public domain” also extends to public information in any form and communicated by any means, including information which is consistent with public information or which has been generated from publicly available information (eg information transmitted by information aggregators)
 - all historical data should be subject to the exclusion (Sub-section 11) so that only communications explicitly relating to future prices would be covered
 - joint purchasing or sale arrangements should be excluded (whether or not authorised), not just joint ventures.

- While the ACCC has indicated two areas of concern the legislation could address in relation to petrol retailing (namely “price signalling” through Informed Sources and the way in which “understanding” has been interpreted by the Courts in the *Geelong (Leahy)* and *Ballarat (Apco)* petrol price fixing cases), it has not made any public case for regulation and Caltex does not believe such a case can be made.
- Caltex rejects the assertion that petrol retailers engage in “price signalling” through Informed Sources. The purpose of the disclosure of information to Informed Sources is to enable public price information to be efficiently collated so that Caltex is better able to remain competitive on price including the provision of further discounts.
- In Caltex’s view, petrol price cycles are indicative of strong competition, and motorists benefit. Price cycles enable more price-sensitive motorists to purchase petrol at heavily discounted prices by observation of past price cycles, which provides a good guide to when price cycles are likely to occur in the future. They are examples of “Edgeworth cycles”, which also occur overseas and are described in the ACCC’s 2007 petrol price report. That report concluded “the existence of price cycles alone does not seem to provide evidence of a lack of retail competition”.
- If petrol retailing (or the oil industry more generally) were regulated, there would be a number of potential impacts:
 - The communication of pricing information to Informed Sources would potentially be prohibited because it could be alleged to have the purpose of inducing a competitor to vary its prices (paradoxically, this would include price reductions) and have the effect of substantially lessening competition - such disclosure might be illegal even though it does not relate to future prices (the legislation does not distinguish between historical and future prices). There is some uncertainty as to whether the exemption for “information already in the public domain” would apply even though the information is built up from petrol pricing information which has been published on fuel pumps and on price boards. It is unlikely any retailer would continue to participate in the Informed Sources service for fear of prosecution, even though retailers see the service as pro-competitive because it facilitates price discounting.
 - There is some risk the cessation of Informed Sources could eliminate or modify the price discount cycle to the detriment of consumers. For example, less frequent competitor pricing information and longer delays in acquiring the information could stretch out price cycles in time, reduce their amplitude (ie difference between peaks and troughs) or even stop cycles entirely. If this occurred, it would not only deprive many motorists of the opportunity of buying petrol at a deep discount but could increase the average price level by reducing competition. There would need to be considerable confidence by the Parliament that such effects would not occur as a result of the legislation.
 - If retailers had to use manual observation of price boards to collect competitive price information, rather than using the more efficient Informed Sources service, the industry-wide cost to consumers could be of the order of \$40 million per year.
 - There would be impacts on public pricing information:
 - MotorMouth (part of the Informed Sources group) provides information online to the public on petrol, diesel and LPG prices, partially based on electronic data from fuel retailers. MotorMouth could continue legally but might not be viable if fuel retailers ceased providing electronic data to Informed Sources, because the cost of independent data collection would be too high.
 - myPriceboard is a service operated by MotorMouth. It allows fuel retailers to upload data on board prices to post on MotorMouth. Given the ACCC’s concerns over the *Apco* and *Leahy* cases, it could take the view that myPriceboard was being used by smaller retailers as a way to induce competitors to change prices. Retailers might cease to use this service for fear of prosecution. In addition, myPriceboard would not be viable without MotorMouth as a means of posting information.
 - Motoring organisations use data from Motormouth to inform members about price levels and price cycles. The ACCC uses Informed Sources data for the same purpose as well as monitoring of price movements. It is unlikely this information

would continue to be provided if Informed Sources ceased as a consequence of the legislation.

- Doubt would be created about the legality of certain commercial arrangements that are not anti-competitive and have a legitimate business purpose:
 - Franchisees provide pricing information to Caltex (a fuel wholesaler but also an actual or potential retail competitor) to enable provision of rebates on the wholesale price of fuel (known as “price support”) based on prevailing local competitor prices. Competitor price boards are already in the “public domain”, but the exemption should be clarified through definition of this term, as proposed above.
 - Competitor price spotting by Caltex commission agents (to assist Caltex pricing managers to set the price of its fuel at those sites) or by independent resellers (for the purpose of supporting requests for wholesale price discounts) would be subject to the same legal doubt as information from franchisees, although in practice they would most likely not be impacted because the information is in the public domain. However, the exemption should be clarified.

1. Background to legislation

On 25 October 2010, the Shadow Treasurer the Hon Joe Hockey MP outlined his 9 point plan for banking reform including, as his first point, "Let's give the ACCC power to investigate collusive price signalling (that is, oligopolistic behaviour), which is exactly what Graeme Samuel has called for." On 22 November, Opposition spokesman the Hon Bruce Billson MP introduced the *Competition and Consumer (Price Signalling) Amendment Bill 2011* into Parliament.

The explanatory memorandum provides the rationale for the bill.

This Coalition Private Member's Bill seeks to establish a new head of power under which the Australian Competition and Consumer Commission (ACCC) would be able to investigate and seek penalties for 'price signalling' that produces anti-competitive effects in the Australian market, to the detriment of consumers.

... As recently as August this year, ACCC Commissioner Dr Jill Walker was still making the case that this 'gap in the law' needed to be addressed by 'a European-type prohibition against facilitating or concerted practices to directly target the practices of concern'.

The Government has failed to address the 'price signalling' risk to consumers and the Australian economy where the current trade practices law was said by the ACCC to be unable to deal with the co-ordination of pricing between competitors in the absence of evidence of an understanding to act on this information.

... Price signalling is a facilitating practice by which corporations inform their rivals about price actions and intentions, so as to eliminate uncertainty about the price of their goods or services, thus reducing the inherent risks of competition which would be a feature a workably competitive market.

... This conduct is unilateral and therefore cannot be dealt with under the existing 'price fixing' prohibition where an understanding to exchange information that has the purpose, effect or likely effect of fixing, maintaining or controlling prices is required.

... It is important to recognise that the communication of price-related information can be pro-competitive and beneficial for consumers.

The ability for consumers to compare prices, to be aware of discounting or imminent price increases, to be readily able to efficiently research purchasing decisions and compare rival offers is preserved and protected by the provisions of the Bill that contain the prohibition to anti-competitive price signalling.

It is notable that no evidence has been provided to support the assertion by the ACCC that there is a gap in the law. This assertion has been strongly contested by the Law Council and Business Council of Australia, among other experts, including in submissions on the Government's exposure draft of the Government bill.

The regulatory impact statement for the Government bill states:

It is not possible to accurately estimate the current extent of anti-competitive price signalling and information exchange in Australian markets. However, there is no available evidence, and no theoretical basis on which to conclude that the potential benefits available to Australian businesses from engaging in such anti-competitive conduct differ materially from those available overseas.

The ACCC's ability to gather evidence through its formal information gathering powers to highlight the current extent of the problem is limited. (Treasury RIS on Government bill dated 21/12/10, page 3)

In other words, the lack of evidence to counter the assertion that a competition problem exists is sufficient justification to assume it exists and regulation is therefore required. In Caltex's view, this line of reasoning is invalid, and the lack of evidence to support the Government bill also means there is a lack of evidence to support the Billson bill, as it relies on the same ACCC assertions.

The ACCC has expressed concern over two "price signalling" issues relating to the petrol retailing:

(1) The first issue is the exchange of publicly available pricing information through Informed Sources Pty Ltd. The ACCC states in *Monitoring of the Australian petroleum industry: Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia December 2010*:

Price cycles are a source of concern for many motorists. As noted in the 2009 petrol monitoring report they are also a concern for the ACCC because of the degree of coordination exhibited in the price cycle.

Retail petrol markets in Australia are conducive to coordinated conduct because of the combination of features which characterise them: homogeneous products; numerous small sales; the historically stable market structure; repeated nature of competitive interaction; and barriers to entry, combined with the high degree of communication of retail prices between major players in the market. In these circumstances less competitive outcomes can result.

The high level of transparency in retail petrol pricing, mainly through the Oil Pricewatch system provided by Informed Sources, assists retailers to quickly signal price moves, monitor competitors responses and quickly react to them.

(2) The second issue is previous ACCC concerns in relation to “gaps in the law” emanating from the *Geelong* and *Ballarat* petrol cases, where the court found it necessary that there be some form of commitment by the parties to an alleged “understanding” and where the court was reluctant to draw inferences from the evidence in establishing an “arrangement” or “understanding”.

While Caltex does not agree with the views of the ACCC on “coordinated conduct” and Informed Sources, or the need to change the law in responses to its failed litigation in the *Geelong* and *Ballarat* cases, it is likely the ACCC would want to test any new powers acquired under the proposed legislation.

No competitor would want to be exposed to an ACCC test case so would most likely take a very conservative view of the law. This could result in unintended consequences flowing not from the law itself (ie activities might not in fact be illegal) but a very conservative interpretation of the law.

2. Outline of legislation and general comments

2.1 Outline of legislation

The explanatory memorandum outlines key features of the bill:

The definition of unlawful anti-competitive 'price signalling' detailed in the Bill contains three elements specifically designed to ensure that pro-competitive and pro-consumer price-related communication is not impeded while the anti-competitive price-related communication that facilitates co-ordination to distort markets and disadvantage consumers is captured as unlawful.

The characteristics of unlawful 'price signalling' requires price-related information to be communicated to a competitor, for the purpose of inducing the competitor to vary its price, with the effect or likely effect of substantially lessening competition. [These are the three elements.]

The acts of 'communication' addressed by the Bill are not limited to only those addressed or directed to a particular competitor or designed as being expressly for the competitor's attention. It includes acts of communication more broadly including broadcasts without a particular defined audience and public announcements.

The Bill provides that inducing or encouraging price variations can be found to be the purpose of a communication so long as it is a substantial purpose of a number of, or possibly many, purposes.

The Bill makes it possible for a Court to infer that the purpose of communication by a corporation about price-related information was to encourage a rival to vary a price having considered the evidence, conduct of the parties involved and relevant circumstances.

The 'substantially lessening competition' test is a recognised threshold in the Trade Practices Act and is selected to ensure that anti-competitive effects manifested in identical prices and parallel price movements in competitive markets are captured. For oligopolistic markets and markets with competition deficits, it is open for the courts to conclude that even the more modest anti-competitive infringements amount to a substantial lessening of competition.

... Specific exclusions from the unlawful conduct of 'price signalling' are defined to ensure that the Bill does not impinge on the communication of price-related information that is not anti-competitive, specifically addressed by other provisions, or which may be a required by statute or common law. The Bill expressly excludes the communication of pricing information already in the public domain and for the principal purpose of conveying price variations between suppliers and customers where the entities concerned might also be competitors.

The Bill provides for the ACCC to receive, consider and grant an authorisation for conduct that may offend the price signalling prohibition, where the Commission is satisfied that the public benefit of authorised conduct outweighs the likely detriment to the public constituted by any lessening of competition.

2.2 General issues arising from legislation

2.2.1 Price signalling test is in three parts

Price signalling is defined in the bill as follows:

- (2) For this section, a corporation engages in **price signalling** if:
- (a) it communicates price-related information to a competitor; and
 - (b) it does so for the purpose of inducing or encouraging the competitor to vary the price at which it supplies or acquires, offers to supply or acquire, or proposes to supply or acquire, goods or services; and
 - (c) the communication of that information has, or is likely to have, the effect of substantially lessening competition in the market for those goods or services, or in another market.

This three part test is subject to important qualifications and exclusions, as discussed below.

2.2.2 Communicates price-related information to a competitor

“Communicates” includes “any means, direct or indirect, public or private”, which would capture the Informed Sources data service as this would constitute an indirect communication to competitors.

The meaning of “competitor” includes “any entity that is in actual or potential competition with the corporation” (Sub-section 6). In practice, it would be impossible to know in many circumstances whether someone is a “potential competitor” and there is no test in the bill as to whether a company could reasonably know someone is a potential competitor.

The phrase “potential competitor” is not defined and should be deleted, due to the breadth and uncertainty of the term. If not deleted, it should be made consistent with the well established language of the *Competition and Consumer Act* (eg in s4D where it applies to arrangements between competitors, or firms *likely* to be in competition with each other).

The meaning of “competitor” in Sub-section 6 should also be limited to a competitor in the market in which the goods or services subject of the communication are sold or acquired.

2.2.3 Purpose test – purpose of inducing competitor to vary price

An important difference from the Government bill is the presence of a competition test for all price communications (ie no *per se* prohibition as in s44ZZX of the Government bill). This recognises there may be legitimate grounds for the communication of pricing information, as demonstrated in Caltex’s submission to Treasury on the Government bill and in the appendix to this submission. Caltex has recommended that the *per se* prohibition on private disclosure of pricing information in the Government bill be removed, so sees the absence of such a prohibition in this bill and the provision of a competition test as a superior approach to the issue.

On the other hand, as in the Government bill, communication can be unilateral and purpose may be inferred from conduct alone (Sub-section 3). This provision is intended to avoid the need for a “meeting of minds”. However, there is clearly a risk that an anti-competitive purpose will be inferred, on the balance of probabilities, when no such purpose exists. The ability to infer purpose from conduct alone should be removed. If this provision is retained, there should be statutory guidance as to how an inference would be drawn.

In our view, particularly in light of the fact that an anti-competitive purpose may be inferred, it is important to ensure that only communications with the *principal* purpose of substantially lessening competition are caught. It is possible to construe multiple purposes upon any given communication and accordingly, the reference to “substantial purpose” in Sub-section 8 should be changed to “principal purpose”.

Another issue is the provision in the bill relating to the term “vary”: “a competitor varies its prices for goods and services after receiving a communication if it offers them, or offers to acquire them, at prices or on terms or conditions that differ materially from those that would have applied if it had not received that communication”. This requires the construction of a hypothetical that could be quite contentious as it requires speculation on behaviour that can’t be observed. In oligopolistic markets (in reality, most Australian markets for goods or services), companies gain experience in anticipating the actions of competitors, so that normal market behaviour could be interpreted as a response to another competitor’s communications.

Given the intent of the legislation to capture anti-competitive conduct, the purpose test should only apply to the inducement of competitors to *increase prices* (in the case of supplies), or to *decrease prices* (in the case of acquisitions).

2.2.4 Effects test - has the effect or likely effect of substantially lessening competition

The addition of an effects test provides an additional safeguard to avoiding the capture of communication of neutral and pro-competitive information. This means that even if communication of price-related information is inferred (incorrectly) to have an anti-competitive purpose, it must be shown to substantially lessen competition. This is a more difficult test than in the Government bill, which requires a public disclosure of information not to have the purpose of substantially lessening competition, regardless of the effect.

For example, if it was inferred that data was supplied to Informed Sources for the purpose of inducing a competitor to vary its prices upwards and/or downwards during a price cycle, it would also be necessary to show the effect of substantially lessening competition. A watch point is whether this test would be applied in the entire context of the behaviour (ie whether, in the case of price cycles, the entire price cycle phase is considered, not just the much shorter price increase or “restoration” phase). In our view, it is artificial to break up each phase of the price cycle and to consider it in isolation.

However, even if the whole cycle were taken into account, the ACCC takes the view that communication of price information via Informed Sources is a “facilitating practice” that increases the stability of the discount cycle and is anti-competitive. Despite our contrary views, we are concerned that the communication of price information via Informed Sources could be used as a test case for the new legislation.

2.2.5 Exclusions

The transmission or re-transmission of price-related information already in the public domain” is excluded. This is a sensible exemption which is not included in the Government bill.

However, the phrase “public domain” should be clarified in Sub-section 11(c). It should be made clear that the exemption for information “already in the public domain” also extends to public information in any form and communicated by any means, including information which is consistent with public information or which has been generated from publicly available information (eg information transmitted by information aggregators).

The reason for this clarification is that the information collected by Informed Sources is *consistent* with that on price boards and fuel pumps but not all prices are shown on price boards (and industry sites may not all have price boards); the Informed Sources data is actually from card swipes or sampling of operator console prices that is the same numerically as price boards and pumps where these prices are displayed. It therefore is uncertain what “already in the public domain” means and whether the card/console data constitutes “transmission of ... price-related data already in the public domain”.

In addition, all historical data should be subject to the exclusion in Sub-section 11, so that only communications explicitly relating to future prices would be covered. This would ensure that Informed Sources data, which is all historical by the time it is communicated indirectly to competitors, is not captured by the prohibition on price signalling.

2.3 Recommended changes to legislation

Caltex does not support the bill as no significant evidence has been presented to demonstrate the need for such legislation. However, if the bill were proceeded with, the following changes should be made:

- The reference to “potential competitor” in Sub-section 6 should be deleted or made consistent with the well established language of the Competition and Consumer Act (eg in s4D where it applies to arrangements between competitors, or firms likely to be in competition with each other).
- The meaning of “competitor” in Sub-section 6 should be limited to a competitor in the market in which the goods or services subject of the communication are sold or acquired.
- The reference to “substantial purpose” in Sub-section 8 should be changed to “principal purpose”.
- The “principal purpose” test should be whether the purpose of the communication is to induce a competitor to increase the price at which the goods or services are supplied (or to decrease the price at which the goods or services are acquired), rather than simply vary the price.
- The ability to infer purpose from conduct alone should be removed ie Sub-section 3. If this provision is retained, there should be statutory guidance as to how an inference would be drawn.

- The phrase “public domain” should be clarified in Sub-section 11(c). It should be made clear that the exemption for information “already in the public domain” also extends to public information in any form and communicated by any means, including information which is consistent with public information or which has been generated from publicly available information (eg information transmitted by information aggregators).
- All historical data should be subject to exclusion (Sub-section 11) so that only communications explicitly relating to future prices would be covered.
- Joint purchasing or sale arrangements should be excluded (whether or not authorised), not just joint ventures.

3. Oil industry issues

3.1 Regulation of concern to Caltex

Although the ACCC has expressed concern over two issues in its recent petroleum industry monitoring reports and some other public statements, it has not justified those concerns with sound econometric analysis or robust economic theory.

In Caltex's view, there would be no net benefit in imposing the proposed regulation on petrol retailing or the oil industry more generally. If extension of the *Competition and Consumer Act* is sought in relation to the matters addressed by the bill, far more extensive consultation should be undertaken before any revised legislation is put to Parliament. Alternative approaches to the issue of "coordinated conduct" have been suggested by competition lawyers and the Law Council.

The treatment of the banking sector does not give cause for confidence that legislation will be based on evidence. It is asserted that certain senior executives engaged in "price signalling" to competitors through public statements about factors influencing future pricing decisions. While the statements were asserted to have an anti-competitive purpose, it is also quite reasonable to interpret them as part of a legitimate public debate about factors affecting funding costs.

Ironically, it seems unlikely the statements made would have been captured by the proposed legislation as the communications were arguably not for the purpose of inducing competitors to vary their prices.

Despite this, the proposed regulation of banking and other sectors would increase compliance costs, create business uncertainty and stifle legitimate and productive public debate on important business issues for fear of any references to price being interpreted as being illegal. There could also be other unintended consequences for business operations, as discussed in the appendix.

3.2 ACCC assertion of "price signalling" by Informed Sources

Informed Sources Pty Ltd is an Australian company that provides information to subscribers on recent prices in the retail market for petrol, diesel and LPG. Subscribers include Caltex, BP, Coles Express, Woolworths and 7 Eleven and information is provided on a site by site basis every 15 to 30 minutes. This information helps to drive discounting as the highly competitive nature of petrol retailing means it is important to stay competitive on price to maintain fuel sales and attract customers to service station convenience stores.

Caltex understands Informed Sources has other subscribers who buy information from them including several independent retail and distributor chains carrying Caltex, BP and Mobil branding. The information is also provided to the ACCC and motoring organisations so they can provide information to consumers.

The data is largely sourced from records of historical fuel purchases (there is some manual spotting of price boards by Informed Sources) and is comprised of prices already in the public domain. As such there is no signalling of future prices. Without Informed Sources or a similar information service, competitors would have to collect competitor price information in another way. If sharing of historical information were prohibited under the proposed legislation, data would have to be acquired unilaterally.

If manual observation of competitor prices were carried out (ie spotting of price boards) for the Caltex network of 700 sites, Caltex has estimated the cost as approximately \$8 million per year. This is many times the cost of data collection by means of Informed Sources. If competitors faced similar costs, competitive forces would most likely result in higher prices to consumers in order to recover the increased costs of data collection. Based on Caltex's market share, the industry-wide increased cost to consumers could be of the order of \$40 million per year.

While the ACCC presumably has no problem with Informed Sources data being used to enhance discounting (typically six days of the week), it sees an issue when prices increase (one day of the week):

Informed Sources provides subscribers with regular and timely information on retail prices for all subscribers' retail sites as well as many sites owned by companies that do not subscribe to the service. This allows market participants to have near real time data on prices that other participants are changing. When any market player moves its price, that move is quickly communicated to other competitors who can see how the rest of market reacts to the price move. (*Monitoring of the Australian petroleum industry 2010*, page 190)

Caltex sees the information provided by Informed Sources as pro-competitive but the ACCC sees it as anti-competitive, at least on one day of the week:

Price cycles are a source of concern for many motorists. As noted in the 2009 petrol monitoring report they are also a concern for the ACCC because of the degree of coordination exhibited in the price cycle.

Retail petrol markets in Australia are conducive to coordinated conduct because of the combination of features which characterise them: homogeneous products; numerous small sales; the historically stable market structure; repeated nature of competitive interaction; and barriers to entry, combined with the high degree of communication of retail prices between major players in the market. In these circumstances less competitive outcomes can result.

The high level of transparency in retail petrol pricing, mainly through the Oil Pricewatch system provided by Informed Sources, assists retailers to quickly signal price moves, monitor competitors' responses and quickly react to them. (*Monitoring of the Australian petroleum industry 2010*, page 190)

Caltex rejects the assertion that retailers "quickly signal price moves" through Informed Sources. There is no "price signalling" as the information does not relate to future prices and is publicly available. The purpose of the disclosure of information to Informed Sources is to enable public price information to be efficiently collated so that Caltex is better able to remain competitive on price.

Petrol price cycles are indicative of strong competition that benefits motorists. Price cycles enable more price-sensitive motorists to purchase petrol at heavily discounting prices by observing past price cycles, which provides a good guide to when price cycles are likely to occur in the future. They are examples of so-called "Edgeworth cycles", which also occur overseas and are described in the ACCC's 2007 petrol price report, which concluded "the existence of price cycles alone does not seem to provide evidence of a lack of retail competition". That petrol price cycling is pro-competitive and benefits motorists is supported by a number of international studies that conclude petrol prices are typically lower in markets where petrol price cycling occurs.

Cycles occur because petrol is a fairly homogenous product, brand loyalty is weak and consumers are price sensitive and switch between retailers for very small price differences. It is this price sensitivity which drives retailers to undercut competitors to gain market share. Retailers play a war of attrition until the bottom of the cycle, when one of them eventually increases its price. It is unprofitable and therefore unsustainable for retailers to remain at the bottom of the cycle, so other retailers follow over time with their own price increases. There are no anti-competitive elements in this process. On the contrary, the process is driven by strong competition.

3.3 ACCC assertion of legal loophole in relation to anti-competitive conduct

Section 44ZZRD of the Competition and Consumer Act (equivalent to Section 45A of the former Trade Practices Act) requires that in order for illegal price fixing to be proven, there must be a "contract, arrangement or understanding" between two or more parties. This involves some communication between the parties, a "meeting of the minds" and a commitment by at least one of the parties. The ACCC failed in the *Geelong* and *Ballarat* cases to achieve convictions based on the previous price fixing provisions because there was no commitment by parties receiving the price information to act in any particular way. In addition, courts were reluctant to infer an arrangement or understanding from mere parallel conduct.

The ACCC in 2007 urged the government to consider changes to the law to allow an "understanding" to be inferred from conduct but this extension of the then Trade Practices Act was strongly opposed as unnecessary, including by the Law Council and the Business Council of Australia.

The proposed legislation removes the need for any “meeting of the minds” as communication of price-related information to a competitor would be illegal (subject to the purpose and effects tests) and purpose can be inferred from conduct alone. It is clear that these new provisions would remove the barriers perceived by the ACCC as blocking successful prosecutions in the *Geelong* and *Ballarat* cases.

It seems likely the ACCC would seek an early test case of the legislation, most likely in relation to the Informed Sources data service, should it continue.

4. Impacts on Caltex

The appendix provides details of a number of impacts in relation to the provision of public information and potentially to commercial arrangements. It shows there are various commercial arrangements involving the communication of information between competitors, including private communications, that are not anti-competitive and in many cases are essential to competitive market operation eg fuel card operation.

For completeness and to enable comparisons to be made, a number of examples are included in the appendix that would be affected by the Government bill but are unlikely to be affected by the Billson bill.

4.1 Petrol price cycles/Informed Sources

The communication of pricing information to Informed Sources would not necessarily be illegal. However, based on the ACCC's statements to date, there is significant risk that communication of retail price data to Informed Sources would lead to prosecution even if only to test the law. As a result, it is likely Caltex and other competitors would cease using Informed Sources. Retailers would need to obtain competitor pricing information in other (less efficient) ways such as manual price spotting.

Informed Sources also provides data to the ACCC and motoring clubs which is partially based on electronic data from fuel retailers. If the exchange of historical data through Informed Sources was discontinued, this data would not be available.

Authorisation of the current Informed Sources data model is unlikely given the ACCC's views. It could be authorised by the ACCC in modified form but it seems clear this would not occur unless the information was modified in such a way that would most likely make it of little commercial value.

If Caltex is correct and price cycles are the result of a high level of competition – this is supported by academic theory and empirical evidence – the elimination of Informed Sources would not affect price cycles longer term. It is possible there would be in interim period of cycle disruption as competitors arranged alternative sources of information, but once this occurred there would be no change except for high prices due to higher industry-wide costs of data collection.

However, there is some risk the changes could eliminate or modify the price cycle to the detriment of consumers. For example, less frequent competitor pricing information and longer delays in acquiring the information could stretch out price cycles in time, reduce their amplitude (ie the difference between peaks and troughs) For example, less frequent competitor pricing information and longer delays in acquiring the information could stretch out price cycles in time, reduce their amplitude (ie difference between peaks and troughs) or even stop cycles entirely.

If this occurred, it would not only deprive many motorists of the opportunity of buying petrol at a deep discount but could increase to average price level by reducing competition. There would need to be considerable confidence by the Parliament that such effects would not occur as a result of the legislation. To date, the ACCC has not provided any analysis of the market that would support regulation but has merely expressed a "concern" based on its theory of coordinated conduct in the industry.

4.2 Other public pricing information

- MotorMouth (part of the Informed Sources group) provides information online to the public on petrol, diesel and LPG prices, partially based on electronic data from fuel retailers. MotorMouth could continue legally but might not be viable if fuel retailers ceased providing electronic data to Informed Sources, because the cost of independent data collection would be too high.
- myPriceboard is a service operated by MotorMouth. It allows fuel retailers to upload data on board prices to post on MotorMouth. myPriceboard would not be viable without MotorMouth as a means of posting information. More importantly, retailers would most likely cease using the service to avoid potential prosecution.

- Motoring organisations use data from Motormouth to inform members about price levels and price cycles. The ACCC uses Informed Sources data for the same purpose as well as monitoring of price movements. It is unlikely this information would continue to be provided as a result of the impact of the legislation on Informed Sources.

4.3 Commercial arrangements

- Doubt would be created about the legality of certain commercial arrangements that are not anti-competitive and have a legitimate business purpose:
 - Franchisees provide pricing information to Caltex (a fuel wholesaler but also an actual or potential retail competitor) to enable provision of rebates on the wholesale price of fuel (known as “price support”) based on prevailing local competitor prices. Competitor price boards are already in the “public domain”, but the exemption should be clarified through definition of this term, as proposed above.
 - Competitor price spotting by Caltex commission agents (to assist Caltex pricing managers to set the price of its fuel at those sites) or by independent resellers (for the purpose of supporting requests for wholesale price discounts) would be subject to the same legal doubt as information from franchisees, although in practice they would most likely not be impacted because the information is in the public domain. However, the exemption should be clarified.

APPENDIX A

A.1 Public pricing information

Activity	Description of communication	Price signalling test (first part in grey):	Price signalling test (second part in grey):	Price signalling test (third part in grey):	Exclusions (s11):	Impact
Informed Sources	Informed Sources Pty Limited (IS) collects price data electronically from fuel retailers and supplies collated information to subscribers every 15 to 30 minutes. All data is public, based on historical transactions and some manual observation of price boards. However, not all information is on price boards (although it is on fuel pumps). Price boards are only legally required in NSW and WA. Only the ULP price is legally required to be posted in NSW.	Prices are communicated indirectly to competitors	Communication is not for purpose of encouraging competitors to vary prices. However, the ACCC has asserted IS data is a "facilitating practice" that decreases competition by making price cycles more stable. They could possibly argue that communications about recent price increases have been made for the substantial purpose of inducing competitors to increase prices. No "meeting of minds" is necessary to prove purpose.	The ACCC has argued that IS data reduces competition by increasing the stability of price cycles (and, presumably, increasing average prices).	It is unclear whether the transmission of electronic data from customer transactions is considered in the public domain even though it is generated from publicly available information ie on fuel pumps and may be at least partially on price boards. This should be clarified.	Based on ACCC statements to date, authorisation of the current IS data model is unlikely. As a result, unless exclusions are amended so they unequivocally apply to Informed Sources data, there is significant risk that communication of retail price data to IS would lead to prosecution even if only to test the law. As a result, it is likely Caltex and other retailers would need to obtain competitor pricing information in other (less efficient) ways such as manual price spotting. IS also provides data to the ACCC and motoring clubs which is partially based on electronic data from fuel retailers. If the exchange of historical data through IS was made illegal, this data would not be available.
MotorMouth	MotorMouth is operated by Informed Sources and provides information to the public on petrol, diesel and	Informed Sources is not a competitor of fuel retailers so may collect and publish its own data.	The purpose of the communication is to inform potential customers and not for the purpose of inducing a			MotorMouth could continue but may not be viable if fuel retailers cease providing electronic data to Informed Sources, because the cost of independent data

Activity	Description of communication	Price signalling test (first part in grey):	Price signalling test (second part in grey):	Price signalling test (third part in grey):	Exclusions (s11):	Impact
	LPG prices to the public online, partially based on electronic data from fuel retailers	<ul style="list-style-type: none"> • (2) (a) communicates price-related information to a competitor, and • “communication” is by any means, direct or indirect, public or private (s4) • “competitor” is any entity in actual or potential competition (s6) 	<ul style="list-style-type: none"> • (2)(b) for the purpose of inducing or encouraging the competitor to vary the price of goods or services, and • where “vary” means competitor prices or terms and conditions that differ “materially” from those that would have applied without the communication (s7) • “purpose” may not be the sole purpose but must be “substantial” • purpose may be inferred from conduct 	<ul style="list-style-type: none"> • (2)(c) has the effect of substantially lessening competition in the market for those goods and services, or in another market 	<ul style="list-style-type: none"> • “transmission or re-transmission of price-related information already in the public domain” • communication required by law • communication from corporation to customers/ suppliers to inform of variation in price to be charged or paid • authorised communication 	collection would be too high.
myPriceboard	MotorMouth operates this service which allows fuel retailers to upload data on board prices to post on MotorMouth	This is an indirect disclosure by fuel retailers to the public but is accessible by competitors.	The purpose of the disclosure is to inform potential customers and not for purpose of inducing competitors to change their prices.			myPriceboard would not be viable without MotorMouth as a means of posting information. See above point.
Price boards	Caltex posts prices on sign boards at the sites it operates. This is required by law in NSW and WA.	The communication is to the public, but is accessible by competitors	The purpose of the disclosure is to inform potential customers and not for the purpose of inducing competitors to change prices	It is difficult to see how the communication of price information to customers could be regarded as substantially lessening competition.	Legislation in NSW and WA requires price boards. Principal purpose is to inform customers of variation in price.	Unlikely to be impacted.
Public information given to competitor	Pricing information could theoretically be given to a competitor which is publicly available and is of no competitive value (eg copy of ABS data of petrol prices as part of CPI). This might be done when discussing public policy matters so participants don't have to duplicate collection of public data.	Price-related information is given to a competitor	Purpose is not to induce a competitor to vary prices, but to facilitate public policy discussions.	It is difficult to see how this communication could be regarded as substantially lessening competition.	Information is already in the public domain or based on information in the public domain (eg chart or summary table)	Unlikely to be impacted

Activity	Description of communication	Price signalling test (first part in grey):	Price signalling test (second part in grey):	Price signalling test (third part in grey):	Exclusions (s11):	Impact
Price data to AIP for public information purposes	Information on historical prices is provided to the Australian Institute of Petroleum (AIP) and its consultants (eg Orima) for public reporting purposes, including information that is both public (eg terminal gate prices) and may be private (eg historical prices at retail sites). This information is not to be provided to other AIP members in original form, only in aggregate (eg average prices).	<ul style="list-style-type: none"> • (2) (a) communicates price-related information to a competitor, and • “communication” is by any means, direct or indirect, public or private (s4) • “competitor” is any entity in actual or potential competition (s6) 	<ul style="list-style-type: none"> • (2)(b) for the purpose of inducing or encouraging the competitor to vary the price of goods or services, and • where “vary” means competitor prices or terms and conditions that differ “materially” from those that would have applied without the communication (s7) • “purpose” may not be the sole purpose but must be “substantial” • purpose may be inferred from conduct 	<ul style="list-style-type: none"> • (2)(c) has the effect of substantially lessening competition in the market for those goods and services, or in another market 	<ul style="list-style-type: none"> • “transmission or re-transmission of price-related information already in the public domain” • communication required by law • communication from corporation to customers/ suppliers to inform of variation in price to be charged or paid • authorised communication 	Unlikely to be impacted.

A.2 Commercial pricing information

Activity	Description of communication	Price signalling test (first part in grey):	Price signalling test (second part in grey):	Price signalling test (third part in grey):	Exclusions (s11):	Impact
Competitor price spotting by franchisees	Franchisees purchase petrol from Caltex at the ruling wholesale price. During the course of a price cycle, franchisees may request a rebate on the price of fuel ("price support") based on prevailing local competitor prices. These rebates may be provided by Caltex but are contingent on the rebate effectively being passed on to consumers through the retail price of petrol. This requires Caltex to know the price of petrol being sold by competitors (to assess the request for price support) and the price at which petrol is sold (to ensure the price support is being passed on).	<ul style="list-style-type: none"> • (2) (a) communicates price-related information to a competitor, and • "communication" is by any means, direct or indirect, public or private (s4) • "competitor" is any entity in actual or potential competition (s6) 	<ul style="list-style-type: none"> • (2)(b) for the purpose of inducing or encouraging the competitor to vary the price of goods or services, and • where "vary" means competitor prices that differ "materially" from those that would have applied without the communication (s7) • "purpose" may not be the sole purpose and must be "substantial" • purpose may be inferred from conduct 	<ul style="list-style-type: none"> • (2)(c) has the effect of substantially lessening competition in the market for those goods and services, or in another market <p>It is arguable the information relates only to <u>decreases</u> in prices so does not have the effect of substantially lessening competition. We suggest that the provision is amended so that in a supply context, it only applies to increases in prices.</p>	<ul style="list-style-type: none"> • "transmission or re-transmission of price-related information already in the public domain" • communication required by law • communication from corporation to customers/suppliers to inform of variation in price to be charged or paid • authorised communication <p>Competitor price boards are already in the public domain, but the exemption should be clarified.</p> <p>It is not clear that the exclusion for price communications from suppliers to customers would apply to these communications.</p>	Unlikely to be impacted by reason of the exclusion for public information.
"Meter plan" discounts	Independently operated Caltex resellers (wholesale distributors) may ask Caltex for a wholesale price discount to help them meet retail competition at the sites they operate. This involves resellers providing information on competitors'	A reseller is likely to be a competitor or potential competitor of a Caltex commission agent or company-operated site so the communication of information is caught by the first part of the test.	The purpose of the communication from the reseller is to induce Caltex (as a wholesale supplier) to vary the discount for the supply of goods	It is arguable the information relates only to <u>decreases</u> in prices so does not have the effect of substantially lessening competition. We suggest that the provision is amended so that in a supply context,	<ul style="list-style-type: none"> • communication required by law • communication from corporation to customers/suppliers to inform of variation in price to be charged or paid • authorised communication <p>Competitor price boards are already in the public domain, but the exemption should be clarified.</p> <p>It is not clear that the exclusion for price communications from</p>	Unlikely to be impacted by reason of the exclusion for public information.

Activity	Description of communication	Price signalling test (first part in grey):	Price signalling test (second part in grey):	Price signalling test (third part in grey):	Exclusions (s11):	Impact
	retail prices to Caltex.	<ul style="list-style-type: none"> • (2) (a) communicates price-related information to a competitor, and • “communication” is by any means, direct or indirect, public or private (s4) • “competitor” is any entity in actual or potential competition (s6) 	<ul style="list-style-type: none"> • (2)(b) for the purpose of inducing or encouraging the competitor to vary the price of goods or services, and • where “vary” means competitor prices that differ “materially” from those that would have applied without the communication (s7) • “purpose” may not be the sole purpose and must be “substantial” • purpose may be inferred from conduct 	<ul style="list-style-type: none"> • (2)(c) has the effect of substantially lessening competition in the market for those goods and services, or in another market 	<ul style="list-style-type: none"> • “transmission or re-transmission of price-related information already in the public domain” • communication required by law • communication from corporation to customers/ suppliers to inform of variation in price to be charged or paid • authorised communication 	
Price spotting by commission agents	Commission agents (CAs) retail fuel that is owned by Caltex and receive a commission in cents per litre. Agents provide competitor price information to Caltex central pricing managers to enable them to set the retail price at the Caltex site. The fuel sale is by Caltex, unlike a “direct purchase” where the fuel sale is by the independent site operator. Caltex has some independently owned sites that are CAs and not franchised	A commission agent could be a competitor of a Caltex company-operated site so the communication of information could be caught by the first part of the test.	The purpose of the communication is to enable Caltex to make pricing decisions at Caltex price controlled sites. However, it could be alleged that a purpose is to induce Caltex (as the owner of fuel in stock at the service station) to vary the price of goods sold by Caltex.	As this is a commission agent site, it is difficult to see how the price spotting communication would have the effect of substantially lessening competition.	Competitor price boards are already in the public domain, but the exemption should be clarified.	Unlikely to be impacted.
Franchisee royalty payments	Caltex charges franchisees a rental and royalty charge based on convenience store sales. To enable this to be calculated, franchisees disclose historical sales information to Caltex.	As a franchisee may be a competitor this communication would be caught.	The communication is for the purpose of enabling the royalty payments to be calculated.	It is difficult to see how the historical sales communication would have the effect of substantially lessening competition.		Unlikely to be impacted.
Woolworths price instruction to Caltex	Caltex operates some sites with company employees as a commission agent for Woolworths. These sites are	Caltex and Woolworths are competitors so the communication of price information by Woolworths	The purpose of the communication is to enable Caltex, as the commission agent, to make pricing changes at Woolworths price	As this is a commission agent site, it is difficult to see how the price direction would have the		Unlikely to be impacted.

Activity	Description of communication	Price signalling test (first part in grey):	Price signalling test (second part in grey):	Price signalling test (third part in grey):	Exclusions (s11):	Impact
employee as CA	within the Caltex Woolworths co-branded network. Woolworths sets the prices at these sites.	to Caltex, in the form of commission agent retail price directions, would be caught.	controlled sites. However, it could be alleged that a purpose is to induce Caltex to vary the price of goods sold by it.	effect of substantially lessening competition.	<ul style="list-style-type: none"> • “transmission or re-transmission of price-related information already in the public domain” • communication required by law • communication from corporation to customers/ suppliers to inform of variation in price to be charged or paid • authorised communication 	
Woolworths price instruction to Caltex franchisee as commission agent	Caltex franchisees operate some sites as commission agents for Woolworths. These sites are within the Caltex Woolworths co-branded network. Woolworths sets the prices at these sites.	Franchisees and Woolworths might be competitors or potential competitors (depending on whether franchisees operate other competing sites) so the communication of price information by Woolworths to franchisees, in the form of commission agent retail price directions, would be caught.	The purpose of the communication is to enable the franchisee, as the commission agent, to make pricing changes at Woolworths price controlled sites. However, it could be alleged that a purpose is to induce the franchisee to vary the price of goods sold by it.	As this is a commission agent site, it is difficult to see how the price direction would have the effect of substantially lessening competition.		Unlikely to be impacted.
StarCard	Caltex offers a range of fuel cards to enable customers to purchase fuel and manage their vehicle fleets. Most of the sites at which these cards are accepted are operated by franchisees (other than commission agents), Woolworths and independently owned and operated sites selling Caltex fuel. In a fuel card transaction, Caltex purchases fuel from the competitor at a price related to the prevailing	The transmission to Caltex of the card sale and the transaction sale price is caught by the first test. The disclosure is necessary as the pump price is needed to bill the StarCard customer.	Purpose of communication is not to induce a competitor to vary a price.	Unlikely to have effect of substantially lessening competition.		Unlikely to be impacted

Activity	Description of communication	Price signalling test (first part in grey):	Price signalling test (second part in grey):	Price signalling test (third part in grey):	Exclusions (s11):	Impact
	pump price and resells it to the fuel card holder at a discount to the pump price.					
Motorpass and Motorcharge cards	<p>Motorpass and Motorcharge work in a similar way to StarCard. In a Motorpass/Motorcharge transaction at a Caltex site, Caltex sells the fuel to card issuer at the point of sale. For that purpose, Caltex gives to the card issuer details of the fuel transaction and the pump price. Caltex is then reimbursed at a discount to the pump price.</p> <p>The card issuer might also resell the historical price information to others who could include Caltex competitors.</p>	<p>The transmission by Caltex to the card issuer of the card sale and the transaction sale price is caught by the first test. The disclosure is necessary as the pump price is needed to bill the customer.</p> <p>If the card issuer resells historical price information to Caltex competitors, this would be caught.</p>	Purpose of communication is not to induce a competitor to vary a price.	Unlikely to have effect of substantially lessening competition.		Unlikely to be impacted
Purchase /sale of crude oil between refiners	A refiner may purchase crude oil from, or sell it to, another refiner.	The communication is caught by this test.			The communication is between a customer and supplier	Unlikely to be impacted
Joint purchases of crude oil	A refiner may purchase crude oil jointly with another refiner to increase the size of a cargo and reduce supply costs.	The communication is caught by this test.	As this is a joint purchase, the purpose is not to induce a competitor to vary prices.	Unlikely to have effect of substantially lessening competition.		Unlikely to be impacted