

FACSIMILE TRANSMITTAL

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To: <i>Sen Stephens</i>	From: <i>M Delaney</i>
Date: <i>3-12-03</i>	Fax No: 02 6273 2738
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# Motor Trades Association of Australia

Senator Ursula Stephens  
 Chair  
 Economics References Committee  
 The Senate  
 Parliament House  
 CANBERRA ACT 2600



Dear Senator

Further to my letter to you yesterday in relation to the Caltex and Woolworths joint venture arrangements, I have now received the attached letter from the Australian Competition and Consumer Commission, which outlines, further, proposed new arrangements for the Caltex and Woolworths petrol arrangement. That letter has necessitated this response.

Under the proposed new joint venture arrangements, Australian Independent Retailers Pty Ltd (AIR), a company in which both Caltex and Woolworths have a shareholding interest, will purchase petrol and diesel from Caltex for sale at jointly branded sites operated by Caltex. It is intended that Caltex will act as a commission agent of AIR at those sites and AIR will be responsible for setting the price of fuel at those sites, under direction from Woolworths. Woolworths will also control the level of the discount voucher arrangement. The companies intend to meet their obligations under the Trade Practices Act 1974 in respect of third line forcing by Woolworths employing one or more Notifications lodged with the Commission dating from 1996. MTAA has proposed to the ACCC that it should determine that those Notifications were lodged in other circumstances and for different purposes from that for which they are now intended to be applied.

MTAA's views on what is now proposed are that:

- Caltex and Woolworths effectively intend to shut-out two other oil companies and most all of their franchisees from the part of the market that they can corner;
- they thus effectively want to restructure the petroleum market in their own interest so that it becomes a duopoly with Coles/Shell; and
- the Trade Practices Act is supposed to govern whether and if this should be allowed; and so it should, given the possibly profoundly anti-competitive outcomes that might produce.

When confronted by the Commission with this statutory review process under the Act what do Caltex and Woolworths do in response? They redesign their formerly proposed joint

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venture to turn it into something that doesn't look like a joint venture but which in every other respect is identical to one in market and market structure outcomes.

These are the large corporations which loudly and vigorously proclaim that the Trade Practices Act works, that it doesn't need amendment and that the Parliament's intentions for it are being secured.

The leaders of these businesses are the men who pledge compliance with the words and the spirit of the Act; yet when it comes to narrow corporate and self-interest they behave absolutely inconsistently with it as this new stratagem demonstrates.

This behaviour is in contrast to recent statements by both Woolworths and Caltex. Mr Corbett told your Inquiry into the Trade Practices Act on 30 October, that *'I as a chief executive could not sustain for a moment a policy in our organisation that was contrary to the Trade Practices Act'* (Hansard, Senate References, E6, Thursday 30 October 2003). Mr Reeves, Managing Director of Caltex told franchisees in a letter dated 19 November 2003 that his Company's values state that it will *'meet the highest ethical standards and operate in a socially responsible manner'* and that Caltex will *'treat all people with fairness, respect and dignity'*.

If they succeed in this new, varied endeavour MTAA believes that they will have defeated the processes and probably the terms of section 50 of the Trade Practices Act. They will have also, we believe, defeated the processes and probably the terms of section 47 dealing with third-line forcing. They will have also defeated the intentions and spirit of the Petroleum Retailing Marketing Sites Act. This latter point is being pursued with the Minister for Industry, Tourism and Resources, the Hon Ian Macfarlane MP.

As a result of the Boral decision, MTAA believes that the companies will in this endeavour be beyond the reach of section 46 of the Trade Practices Act; naturally they do not believe that section 46 needs parliamentary address to secure the Parliament's original intention, as proposed to your Committee by the ACCC.

MTAA believes that Australian consumers must be 'future-proofed' against these developments, which we consider to be anti-competitive and which can only lead to a fuel duopoly. The arrangements will confer enormous pricing powers on the two grocer/two oil company duopoly. Thus it is our view, and we have advised the ACCC of it, that the Commission should urgently seek from the Federal Court an injunction restraining the two companies from further rolling out their arrangements until such time as the Commission has had an opportunity to fully consider the market and market structure implications of what is proposed by Woolworths and Caltex. I would only observe in passing that a 'cease and desist order' power may have assisted the Commission in this matter.

If the 'roll-out' of the co-branded sites continues, as we expect that it will absent intervention by the Commission or decision by the Courts, the damage to our independent and franchisee members, of all brands, will be irreparable. Those franchisees and other Caltex and Ampol branded dealers who are not to be part of the new arrangements stand to lose their businesses (and possibly therefore their homes) and those who have signed new agreements since 14 February 2003 have been misled and deceived and stand to lose their upfront capital investment (which they will not have had an opportunity to recover) and many years of income. For those sites which may be seen as part of the new arrangements (under terms

which are not yet available to them) the value of their current businesses have already been undermined by the 'roll-out' of sites. We have already expressed to the Commission our concerns about vertical and horizontal integration and the impact on both the grocery and the fuel (wholesale and retail) markets of these arrangements. Those concerns have not been at all diminished by the new corporate structure proposed by the parties; indeed they are compounded!

Caltex and Woolworths propose their new arrangements as being on an interim basis and as MTAA is advised by ACCC, they will continue negotiations in relation to longer term arrangements. This appears to us to mean that once the co-branded sites are established, it is open to the parties to revert to their original proposal to the ACCC; albeit that they will have been established on a different basis and the *status quo ante* may not be secured.

In addition to the matter of an injunction referred to above, MTAA believes that the Commission must now under s50 investigate the acquisition by Caltex of shares in Australian Independent Retailers Pty Ltd, re-open for market inquiries all of the third line forcing notifications lodged with the ACCC by either or all of Australian Independent Retailers Pty Ltd, Woolworths Limited and Caltex Australia Limited since 1996 and urgently intervene with Caltex on behalf of CANAG in relation to the damage being done to franchisees (and other Caltex and Ampol dealers') businesses. In relation to all of those matters I would ask that you consider proposing to the Senate that it give formal direction to the Australian Competition and Consumer Commission to investigate those issues.

MTAA believes that the conduct being engaged in by both Caltex and Woolworths is intolerable and is contrived specifically to avoid the provisions of the Trade Practices Act and if allowed to go unchallenged by the Commission will set a new and highly undesirable standard of corporate behaviour which instead of focussing on compliance with the Act, will focus on avoidance. These stratagems in our view bring into being an hitherto unknown practice, a novelty, which can be described as Trade Practices Act evasion or avoidance as an antonym of compliance.

MTAA believes that your Committee should urgently consider this matter and make enquiries of Caltex and Woolworths as to the treatment of their franchisees and their commitment to complying with the spirit and intention of the *Trade Practices Act*.

If you require any further information, I am happy to discuss these matters with you.

Yours sincerely



**MICHAEL DELANEY**  
**Executive Director**

3 December 2003



**Australian Competition & Consumer Commission**

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Contact Officer: Jennifer Moore  
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2 December 2003

Mr Michael Delaney  
Executive Director  
Motor Trades Association of Australia

*M*  
*2/12*

Via fax: 02 6273 2738

Dear Mr Delaney

**Proposed new arrangements between Woolworths Limited and Caltex Australia Limited.**

I refer to the letter dated 1 October 2003 from the Australian Competition and Consumer Commission (the Commission) regarding a proposed joint venture between Woolworths Limited (Woolworths) and Caltex Australia Limited (Caltex) (together referred to as the Parties) for the retailing of petrol.

I am writing to you today to advise that the Parties have informed the Commission that the nature of the arrangements whereby Woolworths will sell petrol at selected Caltex sites, have changed. The Parties have advised the Commission that they are no longer relying on the joint venture arrangements previously negotiated and that a simpler structure has been negotiated. The Parties have stated that the new interim arrangements are intended to be in place in the short term with a view to negotiations continuing in relation to long term arrangements. An outline of the new interim arrangements prepared by the Parties is at Attachment A to this letter.

As previously stated, the Parties have requested the Commission's view as to whether the proposed acquisition would contravene the *Trade Practices Act 1974* (the Act). The Act contains a number of provisions which prohibit restrictive trade practices, the relevant provision in this instance being s50. Section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

In addition, the Parties had previously lodged an exclusive dealing notification relating to third line forcing conduct by the proposed joint venture company, JVC2, on 17 October 2003. The notification related to a discount of 4 cents per litre off the price of petrol at JVC2 sites on condition that \$30 is spent at Woolworths, Safeway or Big W stores. The Commission has been advised by the Parties that they are no longer seeking to rely on this notification in relation to the new interim arrangements. In engaging in any third line forcing conduct



relating to the new interim arrangements, the Parties intend to rely on notifications lodged from 1996 by Australian Independent Retailers Pty Ltd and Woolworths Limited.

You would be aware that the Parties have started to roll-out co-branded sites in some areas even though the Commission has not come to a final decision on whether the arrangements might contravene the Act. The Parties have rolled out co-branded sites knowing that the Commission may ultimately form the view that the arrangements do in fact contravene the Act.

The Commission has already sought the views of market participants and other interested parties in relation to the broad issues arising out of the Parties entering into an arrangement for petrol retailing. As the new interim arrangements may not alter the types of competition issues that may be raised by interested parties, the Commission intends to rely on previous submissions, including any oral submissions made in the course of market inquiry meetings. However, the Commission would welcome any additional comments in relation to the changes to the arrangements you may wish to make.

Should you wish to make additional comments on the proposed new arrangements as outlined in Attachment A, I would appreciate a response by **Wednesday 10 December 2003**.  
Comments may be:

*Mailed to:*

Jennifer Moore  
Mergers Branch  
ACCC  
PO Box 1199  
Dickson ACT 2602

*Faxed to:*

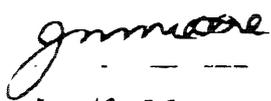
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*Emailed to:*

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Should you wish to discuss any of the issues or the process followed by the Commission, please contact me on (02) 6243 1263 (or by email at the addresses shown above).

Yours sincerely



Jennifer Moore  
Director  
Mergers & Asset Sales

**Attachment A**

**SHORT TERM ARRANGEMENT BETWEEN WOOLWORTHS LIMITED AND CALTEX AUSTRALIA LIMITED**

The interim arrangements between Woolworths and Caltex (Interim Arrangements) consist of the following:

- Woolworths and Caltex each have a shareholding interest in Australian Independent Retailers Pty Limited (AIR). Woolworths has the right to all profits and sole right to appoint and remove all members of the board of directors of AIR.
- AIR has entered into an interim fuel supply agreement with Caltex whereby AIR will purchase petrol and diesel (motor fuel) for retail sale to customers at jointly branded premises occupied and used by Caltex (Caltex Woolworths Sites).
- Caltex will act as commission agent for AIR for the retail sale of motor fuel at the Caltex Woolworths Sites.
- AIR will set the price at which motor fuel is sold at the Caltex Woolworths Sites under direction solely from Woolworths. In this way Woolworths will have exclusive control over the retail pump price and the level of discount redemption offered at the Caltex Woolworths Sites.
- There will be no change to the existing ownership, leases or non-fuel operations of the Caltex Woolworths sites. Caltex will be responsible for employing staff and otherwise conducting the business of the Caltex Woolworths Sites subject to its obligations as a commission agent for AIR in relation to the sale of motor fuel.
- The first Caltex Woolworths Sites were opened under the Interim Arrangements on 21 November 2003 at Chatswood, Beacon Hill and Randwick.
- Woolworths' existing Woolworths Petrol Sites are not part of the Interim Arrangements. There will be no change to operations or branding of these sites under the Interim Arrangements.
- The Interim Arrangements do not include any arrangement for supply of non-fuel products by Woolworths to any Caltex service stations, including Caltex Woolworths Sites.

Negotiations are continuing between Caltex and Woolworths as to final arrangements. Any final arrangements are subject to regulatory review, third party consents and execution of transaction documentation.