

CALTEX AUSTRALIA LIMITED SUBMISSION ON THE NATIONAL FUELWATCH (EMPOWERING CONSUMERS) BILL 2008

July 2008

Introduction

About Caltex

Caltex Australia Limited is an Australian company. It is Australia's leading refiner and marketer of petroleum products, which are sold under the Caltex, Caltex Woolworths and Ampol brands. Caltex is the only major refiner and marketer listed on the Australian Stock Exchange.

The company has a national service station network, details of which are summarised in the table below.

National Caltex petrol supply landscape¹		
	Site Operation Type	Totals
Caltex Retail Division	Caltex owned & operated	43
	Caltex commission agent	28
	Caltex franchisee	332
	Independently owned & operated with Caltex brand	100
	Independently owned & operated with own brand	13
Caltex Reseller Division	Caltex owned reseller operated or supplied Caltex branded	299
	Caltex owned reseller operated or supplied Independent branded	76
	Independently owned reseller operated or supplied Caltex brand	441
	Independently owned reseller operated or supplied Independent Brand	167
Woolworths Arrangement	Woolworths (Safeway) Caltex - WOW priced & franchisee or Caltex operated	134
	Woolworths owned & operated with Caltex brand	371
Totals		2004

Caltex sets the price of motor fuel at 170 of these 2004 retail sites.

In addition to Caltex's retail network, the company markets to commercial and industrial customers in the mining, industrial, and transport sectors, some of whom purchase their petroleum products ex-terminal and depot.

Overview of Western Australian FuelWatch scheme

Since 2 January 2001, the Western Australian Government has operated a FuelWatch scheme throughout metropolitan Perth and many regional areas in Western Australia. That scheme is governed by the *Petroleum Products Pricing Act 1983* and the *Petroleum Products Pricing Regulation 2000* (together referred to

¹ Reference: Caltex submission to ACCC 2007 petrol price inquiry.

below as the “**WA legislation**”). The provisions in the WA legislation regarding the FuelWatch scheme are, in Caltex’s view, relatively straight forward.

Those provisions stipulate that a person who offers motor fuel (petrol, LPG or diesel fuel intended for use in motor vehicles) for retail sale on a particular day at a particular place commits an offence unless:

- (a) the person has established the permitted standard retail price for that (kind of motor fuel) sale; and
- (b) the standard retail price at which that kind of motor fuel is offered is that day's permitted standard retail price.

Notification of the permitted standard retail price is to be made between 8.30am and 2.00pm on the day prior to the day for which the price is notified. The notification of a price for a particular day has effect as notification of the same price for each subsequent day until the beginning of a day for which a different price has been notified.

The term “day” is defined as a period of 24 hours beginning immediately after 6.00am. “Retail sale” is not defined, other than to exclude a sale in accordance with an existing agreement or arrangement between the customer and the retailer. The terms “customer” and “retailer” are not defined. Furthermore, the definition of “standard retail price” excludes sales of motor fuel offered for retail sale to a customer who is the subject of an agreement or arrangement affecting price.

Caltex’s comments on the National Fuelwatch (Empowering Consumers) Bill 2008 (“Fuelwatch bill”)

1. Definitions of “retail sale” and “service station”

The Fuelwatch bill defines the term “retail sale” as follows:

“retail sale means sale to another person for that person’s use.”

It would appear that this definition is intended to only capture sales to consumers of “motor fuel”. However, to achieve this result, the term “use” must be read narrowly to mean use of motor fuel by a person in a vehicle or equipment of that person.

If “use” is interpreted more broadly, and taken to mean any dealings with motor fuel by the purchaser of that fuel, which Caltex suggests is the natural meaning of the word “use”² in this context, the definition of retail sale becomes unacceptably broad. On such an interpretation, the definition of “retail sale” would capture, for example, activities such as the resale of motor fuel. This clearly is at odds with the ordinary meaning of retail sale and goes beyond the intended scope of the legislation³.

A more fundamental issue with the definition of “retail sale”, however, is its use in connection with the term “service station”. A “service station” is defined to mean:

² See the definition of “use” in the Macquarie Dictionary, which includes “*the act of employing or using, or putting into service*” and “*the state of being employed or used*”.

³ See the objectives of the Fuelwatch Bill as described on page 1 of the Explanatory Memorandum for the Bill.

“a place at which motor fuel is offered for retail sale.”

Even applying the narrower interpretation of “retail sale” set out above, the definition of “service station” is very broad and encompasses any place where a person (including a company and partnership) purchases motor fuel for that person’s own consumption.

In Caltex’s case, such a definition includes those of its terminals and depots where customers purchase “motor fuel” for their own use. Such sales occur at Caltex’s terminals and depots from time to time. Again, this is not consistent with the ordinary meaning of “service station” and goes beyond the intended scope of the Commonwealth Fuelwatch scheme. It also conflicts with state based legislation relating to the display of terminal gate prices (such as in WA and Victoria) and would result in uncertainty as to whether motor fuel could be sold from terminals and depots at a wholesale price that is different to the standard retail price notified under the Fuelwatch scheme.

The approach to defining “service station” and “retail sale” in the Fuelwatch bill differs considerably from the approach taken under the WA legislation. Under the WA legislation, “service station” (or any similar term) is not defined. As noted above, the term “retail sale” is also not defined other than to exclude a sale in accordance with an existing agreement or arrangement between the customer and retailer.

The effect of such an approach is that a “retail sale” is interpreted in accordance with its ordinary or natural meaning, subject to the statutory exclusion, and is restricted to sales of motor fuel to consumers at places ordinarily regarded as service stations. Any ambiguity or uncertainty arising because “retail sale” is not defined would be resolved by reference to the objects and intention of the legislation. This approach effectively excludes sales of motor fuel at a wholesale level from Caltex’s terminals and depots.

Caltex suggests that the WA legislation provides a better approach in this regard than specifically defining what constitutes a “retail sale”. At the very least, the Fuelwatch bill should be modified to narrow the definition of “retail sale” and “service station” so that it only captures sales from fuel outlets where motor fuel is sold to the general public.

Caltex suggests the existing definition of “service station” should be modified so that it refers to a place that exclusively or predominantly offers motor fuel for retail sale (subject to Caltex’s comments above about narrowing the definition of “retail sale”).

2. Definition of “petrol retailer”

In Caltex’s view, the definition of “petrol retailer” is ambiguous such that it potentially excludes certain classes of petrol retailers from the application of the Fuelwatch scheme. That ambiguity may also allow petrol retailers to structure their businesses in such a way as to avoid being covered by the scheme.

Caltex recognises that the Commonwealth Government is seeking to rely on the corporations power under the Constitution to enact the national Fuelwatch legislation, which is clearly the reason for drafting the definition of “petrol retailer” by reference to constitutional corporations. However, Caltex believes that the current drafting of that definition has significant implications for the integrity of the Fuelwatch scheme.

As presently defined, a “petrol retailer” does not include a “person” (which encompasses individuals, partnerships and trusts) who has purchased motor fuel they are offering for retail sale from another “person”.

Expressed another way, the Fuelwatch scheme would not include any individual, partnership or trust that purchased motor fuel for retail sale from a wholesaler that is not a constitutional corporation. This may provide opportunities for a petrol retailer to structure their business so as to avoid being captured by the Fuelwatch scheme, such as by operating as a family trust and purchasing fuel from an entity that is not a constitutional corporation.

Further, the scheme only applies to a person who buys motor fuel from a constitutional corporation for retail sale in circumstances where the offer of the motor fuel for sale by that person (i.e. the retailer), or the actual sale of the motor fuel by that person, affects or is capable of affecting the activities, functions, relationships or business of a constitutional corporation (s.5(2)).

In Caltex’s view, this qualification creates an unacceptable level of uncertainty about the application of the Fuelwatch scheme, for two principal reasons:

- (a) Firstly, it is difficult to imagine how a retail sale of motor fuel, or an offer of motor fuel for retail sale, by a person (an individual, partnership or trust) is capable of having any effect on a constitutional corporation. Typically, persons retailing fuel other than as a constitutional corporation are smaller fuel retailers. It is most unlikely that retail sales by such smaller retailers will affect constitutional corporations. For example, Caltex sells motor fuel to franchisees, who sell the fuel in their own right. Once a franchisee takes ownership of the motor fuel, there is no direct relationship between the retail sale of that fuel and Caltex’s business activities.
- (b) Secondly, assuming that retail sales of motor fuel are in fact capable of affecting a constitutional corporation, the Fuelwatch bill is silent on the nature and degree of the affect that such retail sales must have on constitutional corporations in order for the requirement to be met. For example, if Caltex supplied motor fuel to an independent retailer trading as an individual, would the retail sales of motor fuel by that retailer, which assist that independent retailer to continue to trade, meet the test of affecting the activities, functions, relationships or business of Caltex on the basis that the independent retailer may be in a position to place further orders with Caltex? This question is not answered by the Fuelwatch bill and is illustrative of the ambiguity the definition of “petrol retailer” creates. In Caltex’s view, that ambiguity is a significant short coming of the Fuelwatch bill.

Clearly, if some fuel retailers are excluded from the Fuelwatch scheme, the objectives of empowering consumers to make informed decisions regarding the purchase of fuel, reducing consumer search costs and eliminating intraday price volatility are compromised.

A more fundamental issue, however, is that if some retailers are not covered by the Fuelwatch scheme, the scheme becomes fundamentally unfair for those retailers covered by the scheme. Retailers outside the scheme would be able to move their prices at will, allowing them the benefit of analysing the posted prices of competitors in their local area and best positioning themselves to take advantage of market conditions on a daily basis. Caltex submits that such an outcome significantly

undermines the Fuelwatch scheme and grossly disadvantages those retailers covered by the scheme.

Caltex believes that the Fuelwatch bill should be amended to ensure there is no ambiguity about the application of the Fuelwatch scheme to all retailers of motor fuel. If constitutional constraints mean that such an outcome is not possible, it may be necessary to consider a uniform state-based legislative regime.

3. “Standard price” and the 24 hour rule

The Fuelwatch bill stipulates that petrol retailers must notify the ACCC of the “standard price” for each grade of motor fuel by 2:00pm on the day before that standard price is to apply (where a day is the period of 24 hours from 6am to 6am the following day). The “standard price” is defined to be the price at which the petrol retailer offers a kind of motor fuel for retail sale, excluding any shopper docket or other discounts.

Section 10(2) of the Fuelwatch bill states that the petrol retailer must offer each grade of motor fuel at the standard price “at all times during that part of the fixed price period during which the service station is open for business”. On a literal reading of this provision, a petrol retailer is prevented from offering any discounts on the standard price of any grade of motor fuel. In effect, this would mean that shopper docket schemes and other discounts offered at a retail level would become illegal.

The above outcome is reinforced by statements made in the second reading speech for the Fuelwatch bill presented by Mr Chris Bowen in May 2008. In that speech, Mr Bowen said:

“Civil penalties will apply if ... a petrol retailer notifies the ACCC of its price for fuel, but sells that fuel at another price.

The requirement to sell the fuel at, and not above or below, the notified price is crucial to the design of the Fuelwatch scheme”.

Caltex believes that the approach in the Fuelwatch bill of excluding “shopper docket and other discounts” (s.5(1)) from the definition of “standard price” does not allow for discounts, or the offer of discounts, as fuel must be sold at the notified standard price in accordance with s.10(2).

To make shopper docket and other discount schemes unlawful is, in Caltex’s submission, anti-competitive and contrary to the ACCC’s public position on shopper docket schemes, namely that such schemes are beneficial for consumers on the basis that they lower petrol prices and increase non-price competition⁴. It would also have enormous ramifications for the structure and operation of the modern retail petroleum market. Caltex notes that the Government has not made any statement indicating that its intention is to eliminate shopper docket and other discount arrangements.

Making discounting illegal would also prevent Caltex from supplying motor fuel to business customers at a discount via Caltex’s “StarCard” product. StarCard is a

⁴ As set out in Chapter 12 of the ACCC report *Petrol prices and Australian consumers – report of the ACCC inquiry into the price of unleaded petrol* – 18 December 2007; and the ACCC report *Assessing shopper docket petrol discounts and acquisitions in the petrol and grocery sectors* – February 2004.

business to business proprietary fuel card facility that enables purchases of motor fuel and non-fuel products from Caltex and Ampol branded retail outlets. Presently, Caltex enters into either a stand-alone StarCard agreement or a term petroleum product supply agreement with many business customers where motor fuel is sold via StarCards at a fixed discount off the prevailing pump price (which may be a price set by an independent retailer), or according to a price formula that results in a discount off the prevailing pump price.

To illustrate the prevalence of Caltex's StarCard product, Caltex presently has agreements in place with five state governments under which most state government departments purchase motor fuel via a StarCard account at a discount off the prevailing pump price. Caltex also has StarCard agreements in place with some of Australia's largest companies for use in their vehicle fleets.

The present drafting of the Fuelwatch bill would prevent Caltex offering or continuing to offer discounts via its StarCard product, which Caltex submits is contrary to the stated aim of the Fuelwatch scheme of reducing prices paid by purchasers of motor fuel. It would also potentially place Caltex in a position where it is in breach of the contractual arrangements with its commercial customers or give rise to the early termination of those contracts.

As stated in the introduction, the WA FuelWatch scheme specifically excludes sales of motor fuel offered for retail sale to a customer who is the subject of an agreement or arrangement affecting price. Caltex submits that it is important the Fuelwatch bill be amended to follow the approach in the WA legislation in order to avoid the consequences stated above.

If in fact it is not the Government's intention to eliminate shopper docket and other discount arrangements, the Fuelwatch bill will need to be amended to make such a position clear, for example by adding a new paragraph in section 10 clarifying the effect of the Fuelwatch scheme on discounting arrangements. However, the drafting could be very difficult if the intention is to allow shopper dockets but exclude other types of discounts, particularly as it is quite unclear what types of discount would be considered inconsistent with Fuelwatch.

In making any amendments in that regard, Caltex submits that consideration needs to be given to potential means by which petrol retailers may subvert the intention of the Fuelwatch scheme only some forms of discounting are allowed. If various contrived discounting schemes that resulted in intraday price variations were implemented by petrol retailers, the value consumers place in the notified prices would quickly be eroded as the various discounts would make petrol prices unreliable and less transparent, clearly subverting the intentions of the Fuelwatch scheme.

Caltex believes the Fuelwatch bill should be amended to allow shopper docket and other existing similar discount arrangements to continue by making an express statement to this effect in section 10 of the Bill (mindful of the need to exercise caution to prevent any subversion in the manner indicated above).

4. Window for changing the "standard price"

A flaw in the WA legislation that is repeated in the Fuelwatch bill is no acknowledgement of or defence for genuine operational or mechanical problems in changing price boards at retail sites covered by the Fuelwatch scheme.

Under the Fuelwatch bill, a petrol retailer must sell each grade of motor fuel at the “standard price” for that grade for a 24 hour period, commencing at 6:00am on the day that such standard price applies. That means the price displayed on the price boards and fuel pumps must be held constant for that 24 hour period. If the petrol retailer wishes to change the price for the subsequent 24 hour period, the Fuelwatch bill contemplates the price boards and fuel pump prices being changed to the new price at precisely 6:00am.

This raises several operational issues for Caltex. Firstly, it is not possible for Caltex to change the price of motor fuel at a retail site where a customer or several customers are in the course of purchasing fuel⁵. Rather, Caltex must wait for an opportunity when no transactions are in progress before Caltex’s system will allow the price at a site to be altered. Clearly, petrol retailers will not be able to ensure that no fuel purchases are in progress at exactly 6:00am on a daily basis. Caltex therefore suggests that petrol retailers be allowed a period of time in which motor fuel prices can be adjusted and compliance checks carried out without breaching the 24 hour rule (see further below).

Secondly, it has been Caltex’s experience in WA that circumstances beyond a petrol retailer’s reasonable control can make it difficult for that retailer to change the price boards at precisely 6:00am. This can be for a variety of reasons, ranging from staff illness or other staff issues to an operational emergency at the site.

Caltex notes that the Fuelwatch bill currently contains a limited defence to a failure to comply with the obligation to notify the next day’s standard price (s.8(5)). That defence applies in circumstances where there is a failure in the ACCC’s computing or telecommunications systems, or a failure in the computing or telecommunications systems of the petrol retailer that is beyond the reasonable control of the retailer. This provision, in effect, recognises a petrol retailer should not be held accountable for a failure to notify its standard price for motor fuel where the retailer is prevented from doing so due to circumstances beyond its reasonable control. In light of the issues noted above, Caltex submits that a similar defence should be included in the Fuelwatch bill with respect to the obligation to sell motor fuel, or offer to sell motor fuel, at the notified standard price (s.10).

Caltex notes in passing that the Fuelwatch bill is silent on what price a petrol retailer may charge for motor fuel during a given fixed price period where a communications failure either at the ACCC or the retail site prevents the posting of the standard price the previous day. That is, if a petrol retailer is not required to post its standard prices by 2:00pm because of a defence set out in section 8(5), is the petrol retailer at liberty to charge any price it wishes during the following fixed price period?

The issues highlighted above take on further significance in light of the novel enforcement powers given to the ACCC, namely the ability to issue infringement notices without the need to apply to a court for determination of the alleged breach. In effect, such a penalty regime expands the ACCC’s enforcement powers beyond detection and commencement of court proceedings (as is presently the case), to determination of breaches of the Fuelwatch scheme and the issuing of fines. For a company like Caltex that will be managing compliance at a relatively large number of

⁵ Generally speaking, the purchase of fuel at a retail site commences when a customer lifts a nozzle from the bowser and concludes when the customer has finalised payment for the fuel and other items purchased at the site. The length of time taken to purchase fuel varies considerably, and depends on factors such as the nature of the customer’s vehicle, amount of fuel purchased, maintenance or cleaning performed by a customer on their vehicle, the purchase of non-fuel items and use of amenities by a customer.

retail sites, this raises the prospect of infringement notices being issued with respect to all those site for an inadvertent or unavoidable breach. Caltex submits such an outcome is unreasonably harsh and highlights the need for a reasonable defence to a petrol retailer's obligations under the 24-hour rule.

In light of these issues, Caltex suggests that the Fuelwatch bill be amended in two respects, namely:

- (a) provide for a window of 30 minutes spanning 6:00am in which motor fuel prices may be adjusted and compliance checks carried out without breaching the 24-hour rule; and**
- (b) the inclusion of a defence in s.10, whereby it is not a breach of a petrol retailer's obligation to sell or offer to sell motor fuel at the standard price notified to the ACCC where such failure is caused by events or circumstances beyond the reasonable control of the retailer, provided the petrol retailer is required to remedy the event or circumstance at the earliest practicable time.**

5. Implementation issues

When the national Fuelwatch scheme is implemented, Caltex intends to centrally manage compliance for all the sites at which it controls the price. Caltex also intends to assist its franchisee network with their compliance obligations by, for example, sending each franchised site a daily compliance reminder message. Such compliance measures will require Caltex to install technology at each retail site to facilitate ready communication with the site. While such technology is in place in most retail sites, it is not installed in some regional and remote sites. In light of the fact the geographic coverage of the national Fuelwatch scheme has not yet been proposed, sufficient time should be allowed from when the geographic coverage of the Fuelwatch scheme is finalised to the commencement of the scheme to give Caltex the opportunity to install the technology necessary to ensure compliance can be centrally managed at the sites where Caltex controls the price of motor fuel, and to effectively assist its franchisees to meet their compliance obligations.