Caltex Australia Limited

Submission to review of the competition provisions of the Trade Practices Act

July 2002

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Terms of reference 1(a) and 1(f)

Caltex believes the Act and its administration inappropriately impede the ability of Australian industry to compete locally and internationally.

- The authorisation provisions of the Act do not offer an attractive or feasible route for industry rationalisation. Caltex's submission illustrates how the alternative process of enforceable undertakings may result in adverse outcomes for a merged entity and the industry generally.
- Caltex has concern over the ACCC's attitude to potential further rationalisation of the petroleum industry. The ACCC seems likely to insist that any future asset sales or mergers are biased towards independent retailers and importers, to the detriment of remaining refiner-marketers.
- ***Recommendation 1: Caltex would support proposals that made application of the merger provisions less time-consuming, more certain, and narrower in the scope of key issues to be determined. Most importantly, there should be recognition that many Australian industries (including petroleum refining) operate in global, or at least regional, markets.***

Terms of reference 1(b) and 1(c)

- The Motor Trades Association of Australia and the Petroleum Marketers Association of Australia allege that major oil companies engage from time to time in predatory pricing. Caltex's view is that predatory pricing does not exist in the petroleum industry. Rather, the allegations stem from the perception by independent dealers of major oil company "price support" schemes and competitive pricing strategies.
- It is difficult to argue that major companies engage in predatory pricing when it is the independent retailers that regularly lead discounting and consistently set prices below competitors. While major companies may compete aggressively from time to time, their prices are generally above the independents.
- A change to an "effects" test would expose Caltex's price support system (or indeed any system of competitive pricing behaviour) to potential prosecution unless changes were made. As Caltex has a strict compliance policy and will not take any risk of prosecution, the introduction of a new and untested provision in the Act could lead to a significant reduction in Caltex's ability to meet price competition, either through changes to pricing systems or changes to competitive behaviour under whatever pricing systems Caltex retained or adopted. This could lead to a loss of competitiveness in the market place, particularly if competitors are less risk averse or less likely to be prosecuted (such as small independent retailers or small independent chains). Overall, the outcome for consumers would be higher prices.
- A number of organisations advocate a reversal of the onus of proof for s.46, in conjunction with either the existing "purpose" test or a new "effects" test. This would have the perverse effect of deterring competition rather than promoting competition, to the detriment of the consumer. The combination of "effects" test and reversal of onus of proof would be highly detrimental to competition and the consumer interest.
- ***Recommendation 2: The committee should reject proposals for a change in the s.46 "purpose" test to an "effect" or "purpose or effect" test; reject any reversal of the onus of proof under s.46; and reject proposals for "cease and desist" orders to be incorporated into the Act.***

- ***Recommendation 3: The ACCC is currently only required to prove guilt on the "balance of probabilities" to find a breach of s.46. This is a lower standard of proof than applies to criminal offences (including offences under Part V) where proof is required "beyond reasonable doubt". Given there are substantial penalties for breaches of s.46 (fines of up to $10 million for each act) the committee should consider whether the standard of proof should be raised to the criminal standard not lowered further by a change to the test.***

Term of reference 1(d)

- On 23 April 2002, ACCC officers conducted a "raid" on Caltex premises in Sydney pursuant to authorisations under s.155(2) of the Act, which enable the ACCC to enter premises and seize documents. Caltex was also served with notices under s.155(1), which required Caltex to provide specified information to the ACCC.
- Caltex does not question the ACCC's right to conduct investigations. That clearly is its responsibility under the Act. However, Caltex questions whether a reasonable, independent person would have considered there was sufficient, credible information to warrant the issue of s.155 notices and authorisations in this case. Caltex believes changes should be made to the Act in relation to the issue of s.155 notices and authorisations.
- Caltex also questions the appropriateness of the ACCC's conduct in relation to the media. Its role in relation to an investigation is quite different from its role once there has been a prosecution, successful or unsuccessful, for a breach of the Act.
- Caltex believes the ACCC's media stance and comments on past investigations have unfairly damaged the reputation of Caltex and this is part of a general pattern of media comment that is directed primarily at the ACCC's policy objectives in relation to the petroleum industry, rather than a general concern to ensure compliance with the Act.
- ***Recommendation 4: The ACCC's conduct in its investigation of Caltex has highlighted the need for creation of a mechanism to control the ACCC's conduct. A code of conduct should be established, overseen by an independent board. The submission makes specific recommendations as to the contents of a code of conduct, particularly in relation to the media.***
- ***Recommendation 5: A board should be created that is responsible for ensuring greater accountability of the ACCC to the public in the administration of the Act. One role of the board would be to ensure compliance with the code of conduct. The intention of such a board would not be to emasculate the ACCC but to increase its accountability.***
- ***Recommendation 6: The Act should be amended so as to require the ACCC to obtain judicial approval prior to the issue of a s.155(2) authorisation. This would ensure that a qualified and independent arbiter gave proper (and impartial) consideration to the question of whether or not the material that the ACCC relied upon was sufficient for the ACCC to reasonably form the view that the person named was actually engaging in conduct or had engaged in conduct that constituted or may constitute a contravention of the Act.***
- ***Recommendation 7: The Federal Magistrates Act 1999 should be amended to extend the jurisdiction of the Federal Magistrates Service to facilitate the recommended judicial review process, such that Federal magistrates be required, and have the requisite authority, to approve the issue of a s.155(2) authorisation.***
- ***Recommendation 8: In relation to s.155(1), the Act should be amended so as to require the ACCC, the Chairperson or the Deputy Chairperson:***

- ***to have reason to believe that a person (the first person) has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of the Act; and***
- ***to believe that a person (not necessarily being the first person) is capable of furnishing information, producing documents or giving evidence relating to a matter, so far as the first person is concerned, that constitutes, or may constitute, a contravention of this Act; and***
- ***require the Commission to obtain judicial approval prior to the issue of a s.155(1) notice.***

- The ACCC has for many years had a significant role in relation to petroleum pricing and marketing regulation and policy. The ACCC's policy perspective appears to significantly affect its role in enforcing and ensuring compliance with the Act, leading to repeated public insinuations of anti-competitive or illegal activity. This is unacceptable as the ACCC's enforcement role should not be compromised or appear to be compromised by its policy agenda.
- ***Recommendation 9: The ACCC's role in enforcing the Act should be separated from its policy role, by creating a separate enforcement commission. The ACCC would become a regulator and policy adviser, with no role in relation to enforcement of the Act.***

2. Terms of reference 1(a) and 1(f)

"(a) inappropriately impede the ability of Australian industry to compete locally and internationally;
…
(f) are flexible and responsive to the transitional needs of industries undergoing ... structural and/or regulatory change."

The merger of Caltex Australia Limited and Ampol Limited in 1995 was a major step in rationalisation of the Australian oil industry. In previous years, Esso, Amoco, Total and Golden Fleece had all been taken over in an ongoing process of rationalisation. Caltex and Ampol were the fourth and fifth largest remaining (out of five) refiner-marketers of petroleum products and their future viability was questionable in the highly competitive petroleum market. As a merged entity, the company became the largest refiner-marketer and was able to achieve substantial cost savings, for example through sale of surplus assets.

The parties informed the Trade Practices Commission (TPC) in November 1994 that they were considering a proposal to merge their businesses and advised they would be seeking informal clearance from the TPC. In February 1995, the TPC formed the view that the proposed merger would be likely to substantially lessen competition in the supply of petroleum products in a number of geographic areas (approximately state and territory boundaries) in contravention of s.50 of the Act. The TPC was particularly concerned about the effect of the merger on the supply of petroleum products to independent wholesalers and retailers.

An enforceable undertaking by the parties was agreed in March 1995, which facilitated the potential for the importation, storage and distribution and sale of petroleum products by companies independent of major oil companies, which the TPC considered important in keeping down prices to consumers.

Some specific conditions included:

- sale of six specified seaboard terminals or storage facilities
- during the first six years, the merged company would offer to sell at least 1000 megalitres of petrol to independents per year
- the merged entity would offer to sell a specified minimum volume for a specified number of years to at least one new independent wholesaler
- sale of 20 depots
- sale of 35 metropolitan and 15 country retail sites
- release of all vendors of businesses to Ampol or Caltex from existing contractual obligations restricting their participation in the petroleum industry for a period exceeding 5 years.

The enforceable undertakings attached to the merger gave the TPC the opportunity to engineer the petroleum market towards greater imports and independents. Mitsui, then subsequently Trafigura, became major importers, primarily through terminals in Sydney and Melbourne. The principals of Liberty were released from their previous obligations pursuant to the sale of Solo Oil to Ampol Limited and were able to enter the market directly. Woolworths' move into petrol discount retailing was facilitated by the increased viability of imported supply that resulted from the larger independent market. Liberty became the fifth major force in retailing through an aggressive discounting strategy, before disposing of its retail business to Woolworths in 2001. Woolworths is now the fifth major force in retail, together with Caltex, BP, Mobil and Shell. In addition, there are several substantial independent chains carrying their own brands (e.g. Gull, United, 7-11, Matilda) or major brands.

The overall effect of the undertaking on the market was to remove at least some benefits from the merger that might otherwise have accrued to the remaining competitors, including Caltex. Industry profitability since the merger has been poor, partly due to low refiner margins but also due to competition from independent retailers and wholesalers that have an advantageous competitive position.

The poor performance is shown by the annual Ernst & Young financial survey of the downstream petroleum industry, conducted for the Australian Institute of Petroleum. The latest survey, for year 2000, showed an underlying industry loss (excluding inventory gains and losses) of $160 million. Earnings for four of the five years 1996 to 2000 were significantly below the yield on government bonds, which is unacceptable to the companies and their shareholders. Three of the four major oil companies reported very large losses in 2001.

While poor profits have resulted in lower prices to consumers, Australia now has the lowest pre-tax petrol prices in the OECD. It therefore is arguable that the conditions forced on the merger through the undertaking took insufficient, if any, account of the need to achieve a strong and internationally competitive refining industry.

This exemplifies a common business criticism of the ACCC and its application of the Act, that it is focussed on consumer prices to the detriment of industry policy. While this may have short term benefits for consumers in terms of prices, it has longer term disadvantages in terms of investment and employment and, possibly, the continued presence of some major brands in the market.

Caltex has concern over the ACCC's attitude to potential further rationalisation of the petroleum industry. Very substantial investment is needed for government-mandated cleaner fuels, for which cost recovery is essential. However, the ACCC seems biased towards policy advice that favours independent retailers, wholesalers and importers over local manufacturers and marketers (e.g. its advice on MTBE – see section 4.5) and continues through public statements to undermine the reputation of the industry, as documented in subsequent sections. The ACCC therefore seems likely to insist that any future asset sales or mergers are biased towards independents and importers, to the detriment of remaining refiner-marketers.

Petroleum refining operates in an international market because it is fully exposed to imports. Australian ex-refinery prices reflect the alternative cost of imports and the netback from exports. The actual percentage of imports is not high but this is a result of local refiners selling at whatever price is necessary to keep refinery production high to cover high fixed costs. In addition, three of the major refiners (Caltex is the exception) are part of global networks and decisions on key investments and production strategies are largely made overseas, taking into account regional supply and demand and corporate interests.

The importance of a more balanced approach to industry policy in relation to industry rationalisation has been recognised by Federal Cabinet through the 1999 Downstream Petroleum Products Action Agenda (DPPAA), which remains current policy. Action 15 of the DPPAA states

> The Government will support on a case by case basis the restructuring of the refining industry, for example through joint venture refinery arrangements where it is convinced of the net public benefits of such action. This support could be manifest in a number of ways, including by giving specific positive support to industry proposals for authorisation which are put before the ACCC.

The authorisation provisions of the Act do not offer an attractive or feasible route for industry rationalisation. Other submissions, for example that of the Business Council of Australia, take up this issue. Caltex's submission simply illustrates how the alternative process of enforceable undertakings may result in adverse outcomes for a merged entity and the industry generally.

In summary, Caltex believes the Act and its administration inappropriately impede the ability of Australian industry to compete locally and internationally.

Recommendation 1: Caltex would support proposals that made application of the merger provisions less time-consuming, more certain, and narrower in the scope of key issues to be determined. Most importantly, there should be recognition that many Australian industries (including petroleum refining) operate in global, or at least regional, markets.

3. Terms of reference 1(b) and 1(c)

"(b) provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;

(c) promote competitive trading which benefits consumers in terms of services and price"

3.1 Allegations of predatory pricing

The Motor Trades Association of Australia (MTAA), which through the Australian Service Stations Association is a peak body of state service station associations, and the Petroleum Marketers Association of Australia (PMAA), which represents certain service station operators, mainly in Victoria, allege that major oil companies engage from time to time in predatory pricing. Companies alleged to engage in this practice include the four refiner-marketers (BP, Caltex, Mobil and Shell) and Woolworths. The purpose of the alleged predatory pricing would presumably be to drive smaller competitors out of business in order to increase market share and subsequently increase prices.

The MTAA asserts major oil companies have market power and misuse that power by engaging in predatory pricing with the purpose of lessening competition from MTAA's service station constituency. However, because the MTAA asserts it is difficult to prove misuse of market power according to the test currently in s.46 of the Act, it has argued (in its submission to the inquiry by the Senate Legal and Constitutional References Committee into s.46 and s.50 of the Act) in favour of the replacement of the s.46 "purpose" test with a "purpose or effects" test.

Contrary to the MTAA claims, s.46 has in fact become a powerful weapon which is being increasingly used by the ACCC and competitors to attack business practices targeted at competitors. In the recent Federal Court decision in *ACCC v Universal Music* and *ACCC v Warner Music,* the traditional concepts of s.46 were challenged, with a finding that each of Universal and Warner had substantial market power for the purposes of s.46, even though they each only had a market share of 15-18% in the same market. This decision came despite the fact there were several other competitors in the market and recent parallel importation laws augmented import competition.

The current review of the Act is seen by the MTAA as the centrepiece of any regulatory reform policy for the oil industry. It advocates explicit definition of predatory pricing as a misuse of market power under s.46, with a provision that corporations should not sell at "unreasonably low

prices". (The ACCC would interpret what is meant by "unreasonably low prices".) The objective of dealers is national terminal gate pricing (regulated or unregulated) with an effective ban of discounting below the terminal gate price. As the ACCC would most likely never contemplate an explicit ban on discounting, the TPA changes would be a back door way of achieving the same outcome.

Caltex's view is that predatory pricing does not exist in the petroleum industry. Rather, the allegations stem from the perception by independent dealers of major oil company "price support" schemes and competitive pricing strategies. There has also been a small number of occasions on which retail prices in Melbourne in particular have been below the published spot terminal gate price (TGP). As MTAA/PMAA regard "retailing below cost" as predatory pricing, a negative retail margin relative to TGP is seen as an indicator of predatory pricing. Caltex does not agree with this.

By way of background, some oil companies provide "price support" to franchised service stations, where the company owns the assets (including land, buildings and equipment) and sells fuel at wholesale to the franchisee. The franchisee has sole responsibility for setting the retail price.

In Caltex's case, fuel is sold to franchisees at the wholesale list price. Where necessary to meet competition, Caltex provides a rebate on the metered volume of sales over a specified period. Fuel also is sold to independent retailers under supply contracts at a negotiated discount off the list price. In Victoria, independents may also purchase fuel at a price based on the published TGP.

Major urban petrol markets tend to follow a similar pattern every one to two weeks, with long periods of discounting followed by sharp increases in wholesale and retail prices. In general (and possibly in every case), retail discounting is led by independent retailers in pursuit of greater petrol sales. One of the major oil companies is generally the first to stop discounting. These companies typically have a more comprehensive retail offer than independents, including substantial convenience stores, and are less reliant on fuel sales volumes.

It is difficult to argue that major companies engage in predatory pricing when it is the independent retailers that lead discounting and consistently set prices below competitors. While major companies may compete aggressively from time to time, their prices are generally above the independents. On occasions, rebates paid by Caltex under price support result in a net wholesale price below TGP. However, Caltex is not engaging in predatory pricing but meeting competition.

The attached data for Melbourne from 14 August 2001 to 26 May 2002 examines occasions on which retail prices have been below the Caltex TGP. (Publication of TGPs under Victorian regulation started on 14 August 2001.)

The first observation is there were very few days in the data period on which the average retail price was below the Caltex TGP (which is reasonably representative of market TGPs) – only 18 out of 286 days. (Chart 1) The number of days on which the average retail price for any of the four refiner-marketers was below TGP was between 18 and 21 days, less than the independent chains, Liberty and Metro (25 and 26 days respectively), and similar to 7-11 (20 days). The Caltex numbers include branded independents, some of which are well known discounters.

There was a period of 8 days in September 2001 in which average prices of major oil companies were below TGP. In almost all other instances, major oil company prices were below TGP for only one or two days. Close examination of the September data (Chart 2) shows Liberty and Metro driving down the price below TGP at the bottom of the discount cycle. Similar behaviour is shown in Charts 3 and 4 for February and March 2002 respectively.

Most of the occasions when prices were below TGP were when wholesale prices were rising sharply, as a flow-on from international price increases, and then mostly in September 2001. In such circumstances, retail prices tend to reflect the historical costs of the key price-setters i.e. typically independent retailers, but terminal gate prices reflect current costs. Therefore, what appears to be selling below cost may in fact be selling at zero or a small margin relative to actual cost. Where retail prices are in fact below cost, this probably reflects very short run competitive dynamics aimed at retaining market share. Given that these episodes typically last only one or two days and the amount of retail price below TGP is not large, they could not be considered to constitute predatory pricing. Predatory pricing would have to be substantial and prolonged selling below cost so as to seriously damage a competitor, undertaken with the purpose of achieving that outcome.

In September 2001, some Caltex independent customers were purchasing at a wholesale price that the supply contract provisions provided be set by Caltex weekly, which benefited them in a rising market by allowing them to purchase at a wholesale price up to a week out of date. This gave them a cost advantage over competitors on daily pricing (such as TGP) or price support mechanisms, in addition to what one would expect from holding inventory at historical cost in a rising market. On the other hand, weekly pricing was a disadvantage in a falling market.

From this understanding of the market, one would expect retail prices to be close to TGP (and sometimes below) in a rising market and significantly above TGP in a falling market. This is what is observed from the data.

3.2 "Purpose or effects" test

As noted above, the MTAA/PMAA argue in favour of the replacement of the s.46 "purpose" test with a "purpose or effects" test. A number of organisations, including the ACCC, advocate such a test or a simpler "effects" test.

A change to an "effects" test would expose Caltex's price support system (or indeed any system of competitive pricing behaviour) to potential prosecution unless changes were made. As Caltex has a strict compliance policy and will not take any risk of prosecution, the introduction of a new and untested provision in the Act could lead to a significant reduction in our ability to meet price competition, either through changes to our pricing systems or changes to competitive behaviour under whatever pricing systems we retain or adopt.

This could lead to a loss of competitiveness in the marketplace, particularly if competitors are less risk averse or less likely to be prosecuted (such as small independent retailers or small independent chains). Overall, the outcome for consumers would be higher prices.

In order to reduce the risk of prosecution, Caltex could seek guidelines on pricing from the ACCC. For example, the guidelines could provide that if retail prices at Caltex franchised, commission agent or company operated service stations were not less than Caltex's TGP, Caltex or a franchisee would not be prosecuted for a breach of s.46 of the Act. However, as this would effectively stop deep discounting, the ACCC would be most unlikely to agree to such guidelines.

3.3 Reversal of onus of proof

A number of organisations advocate a reversal of the onus of proof for s.46, in conjunction with either the existing “purpose” test or a new “effects” test.

Reversing the onus of proof means removing the presumption of innocence which is a fundamental tenet of Australia's legal system and most liberal democracies. The presumption of innocence means that a person is deemed innocent until the State can prove the person’s guilt before an independent court of law. Reversing the onus of proof means a person is deemed guilty unless he or she can prove innocence. Such radical departures from basic human rights are normally only taken during times of national emergencies such as in times of war or persistent terrorism. The review should note the Act applies to acts by individuals as well as by corporations.

The reversal of the onus of proof under the price exploitation provisions of the Act, which have now expired, should not be seen as a precedent. These provisions were no less objectionable for the fact they were enacted for a period of three years up to 30 June 2002. However, they could also be seen as a once-off measure to cope with the effects of a major change to the tax system and were not a permanent change to the Act.

There is also the danger that allowing a reverse onus of proof for s.46 sets a precedent for similar intrusions of civil liberties in other regulatory areas such as immigration, social security and drug offences. To avoid such an erosion, the review needs to consider what peculiar features of s.46 require a departure from the normal burden of proof that is not justified in other regulatory areas.

The ACCC is currently only required to prove guilt on the "balance of probabilities" to find a breach of s.46. This is a lower standard of proof than applies to criminal offences (including offences under Part V) where proof is required "beyond reasonable doubt". Given there are substantial penalties for breaches of s.46 (fines of up to $10 million for each act) it is arguable the standard of proof should be raised to the criminal standard not lowered further by a change to the test.

It is not clear exactly how the reverse onus would apply. The ACCC probably would have to prove that the corporation or individual concerned (1) held a substantial degree of market power and (2) took advantage of that power.

The individual or corporation would then have the onus of proof to show that it did not use that power for one of the proscribed purposes or effects, e.g. eliminating or substantially damaging a competitor.

Under s.82, any person who suffers loss or damage by virtue of a breach of s.46 can take action to recover compensation for that loss or damage. This means that, if the only requirement on an applicant was to demonstrate that a corporation had a substantial degree of market power and then the reverse onus of proof applied, then *any* action, even legitimate competitive actions, by a corporation with substantial market power is open to challenge by the ACCC or its competitors, and the corporation bears the burden and cost of proving its actions were legitimate.

The net result would be that a corporation with substantial market power would be reluctant to take competitive action such as legitimate price cutting, for fear of the costs (including legal costs, the costs of expert witnesses and management time) of proving the action was legitimate; and the competitor would have a weapon to prevent competitive action by that corporation.

This would have the perverse effect of deterring competition rather than promoting competition, to the detriment of the consumer. This outcome would be similar to the "effects" test. The combination of "effects" test and reversal of onus of proof would be very detrimental to competition and the consumer interest.

3.4 "Cease and desist" orders

It has been suggested by the MTAA that the ACCC should be able to issue "cease and desist" orders for possible breaches of the provisions of s.46. Caltex believes "cease and desist" orders would be a further brake on competition, particularly if the ACCC, as enforcer of the Act had a conflict with policy objectives (e.g. promoting independents at the expense of major oil companies) and used orders to intervene in markets to achieve structural objectives. If such orders were introduced into the Act, it would be absolutely essential to separate the policy and enforcement functions of the ACCC as discussed in section 4.1.6 below.

The Act already contains provisions appropriate to address the MTAA concerns. By virtue of s.80 of the Act, the ACCC, or any person concerned about a possible breach of s.46, already has a statutory entitlement to make application to the Federal Court seeking the grant of a final (restraining or requirement) injunction or the grant of an interim injunction pending a determination by the Court of an application for a final injunction.

3.5 Recommendations re s.46 of Act

Recommendation 2: The committee should reject proposals for a change in the s.46 "purpose" test to an "effect" or "purpose or effect" test; reject any reversal of the onus of proof under s.46; and reject proposals for "cease and desist" orders to be incorporated into the Act.

Recommendation 3: The ACCC is currently only required to prove guilt on the "balance of probabilities" to find a breach of s.46. This is a lower standard of proof than applies to criminal offences (including offences under Part V) where proof is required "beyond reasonable doubt". Given there are substantial penalties for breaches of s.46 (fines of up to $10 million for each act) the committee should consider whether the standard of proof should be raised to the criminal standard not lowered further by a change to the test.

4. Term of reference 1(d)

"(d) provide adequate protection for the commercial affairs and reputation of individuals and corporations ..."

4.1 ACCC investigation of Caltex, April 2002

4.1.1 Information provided to ACCC

On 23 April 2002, ACCC officers conducted a "raid" on Caltex premises in Sydney pursuant to notices under s.155(2) of the Act, which enable the ACCC to enter premises and seize documents. Caltex was also served with notices under s.155(1), which required Caltex to provide specified information to the ACCC.

The raid followed information from an anonymous "whistleblower", who wrote to the ACCC in December 2001 alleging price collusion by three major oil companies. According to media reports, the whistleblower's husband provided more information to the ACCC in late December. Finally, the whistleblower wrote to the ACCC on 2 March 2002. On the basis of all the information, the ACCC formed the view that an investigation was justified. Caltex is not in a

position to assess whether this view was in fact justified as the ACCC has refused to provide Caltex with the relevant information.

According to Professor Fels,

> Now the initial letter did have some allegations and some slightly limited information, but frankly was rather hard to investigate. The more recent letter had some more information and also some documents, which appeared to be serious. I assume, at this stage, that it wasn't fraudulent or an invention of this person. But certainly that is what has triggered the investigation. (Transcript of ACCC media conference, 24.4.02)

Professor Fels also commented on the specific nature of the allegations contained within the whistleblower's correspondence:

> There is some definite, concrete information before us in documents which has to be followed up in a very specific manner, and then the whistleblower says more generally that she considers that there has been I think serious collusion on prices … it basically alleges some collusion in a few specific matters … there was a communication, there appeared to be, I put it this way, the document on its face suggested that there was a communication between one company and another that shouldn't have happened. (Transcript of ACCC media conference, 24.4.02)

Clearly, the information on which the ACCC acted was very limited. Acting ACCC Chairman, Sitesh Bhojani, subsequently said

> The information has been useful in conducting investigations but more information is now sought to further assist in continuing what may be an important consumer issue. (ACCC media release, 7.6.02. NB. While it is not explicit, it is believed this media release refers to the investigation.)

Caltex has reviewed all of its documents obtained by the ACCC at the time of the raids. In our view, there is no evidence of any breach of the Act. Shell has stated "We've had a team of external lawyers and internal lawyers since April 23 … We've outlaid probably $300,000 already and found nothing." (Geelong Advertiser 11/6/02). Caltex Chairman Dick Warburton said

> Shell, Mobil and Caltex have closely studied all the details demanded by the ACCC plus other data and we do not believe there is any case or evidence of wrongdoing. (Speech to AICD, Perth, 14.6.02)

Mr Warburton also clearly expressed Caltex's concerns over the process of justice in this investigation, focussing on one of the central issues for Caltex in this submission, which is the presumption of innocence and the need to protect the reputation of those under investigation:

> None of us in Shell, Mobil or Caltex can be absolutely certain that some person did not do something which breached the Act. But if they did, it would have been in spite of very clear direction from the Board and management plus constant staff education programs of the need to understand and follow the Act. Caltex staff know that a deliberate breach of the Act could lead to termination.
> …
> I am well aware that I run a big personal risk [of public embarrassment] if something is found. However, this is by no means the first time the ACCC has inferred guilt without a chance for the victim to deny it, and I believe that is very wrong – particularly from such a position of power. (Speech to AICD, Perth, 14.6.02)

In summary, we do not question the ACCC's role to conduct investigations. That clearly is their responsibility under the Act. However, we question whether a reasonable, independent person would have considered there was sufficient, credible information in the whistleblower's allegations to warrant the issue of s.155 notices. Caltex believes changes should be made to the Act in relation to the issue of s.155 notices, as discussed in section 4.4 below.

Caltex also questions the appropriateness of the ACCC's conduct in relation to the media, which is discussed in the following section.

4.1.2 Media reporting of investigation

On 24 April 2002, *The Daily Telegraph* published a front page story entitled "Petrol raids". A large photograph showed four people in Martin Place. The photo appeared to have been carefully staged. The caption to the photo read, "ACCC officers carry boxes of documents from Caltex headquarters in Martin Place yesterday."

However, the caption was false. This was well known to the ACCC yet no action was taken by the ACCC to correct the gross misrepresentation of the actions of its officers, for example by requesting the *Telegraph* to print a correction or apology. The false information that the boxes contained Caltex documents was very damaging to Caltex's reputation as it implied substantial (presumably incriminating) evidence had been collected. A photo of ACCC officers without boxes would not have conveyed this impression but presumably not have been newsworthy. The caption and the ACCC's response were summarised by the ABC TV program *Media Watch*:

> The ACCC did take a few documents from Caltex but on computer disc many hours after Rohan Kelly took the pic which the Tele splashed on page one suggesting without actually saying that those fat boxes were full of seized documents. So what's in the boxes? The ACCC told Media Watch:
>
> "The boxes contained documents and equipment belonging to the ACCC … It was never stated, implied or suggested that any of the material being returned to the ACCC Sydney office at this stage belonged to Caltex." Lin Enright statement. (ABC TV *Media Watch* 27.6.02)

The exact relationship between the ACCC and the *Telegraph* in this matter has not been revealed by the parties concerned. When questioned on this matter, Prof Fels stated,

> The Commission normally, as I think you all know, follows a policy of not kind of leaking things, despite frequent requests from some of you…. We generally, with [indistinct] of this sort, just make a general announcement.
>
> We generally don't follow the practice of announcing that we have an investigation, we only announce the outcome, or that we're going to court because once you're in court it's all public.
>
> But in this particular case, there was a complication that the lady [referring to the whistleblower] had provided a fair bit of information to one newspaper, and they were entitled to publish it, but we did request them not to publish that information until we had done an investigation – it could have threatened it. We then released them from that obligation yesterday. We told them that we had started an investigation and they said could they have a photo of the people leaving the premises, and then they published them now. (ACCC media conference 24.4.02)

According to Alan Kohler of the *Australian Financial Review* (AFR 25.6.02), the ACCC briefed Kathy Lipari of the *Telegraph* at the ACCC's Sydney offices at 11am on 23 April and

subsequently arranged for photographer Rohan Kelly to photograph ACCC officers leaving Caltex's Sydney premises at about 2.30 pm.

Whatever the details, Caltex believes it was entirely inappropriate for ACCC officers to have participated in the photograph and for the ACCC to have engaged in any way in media comment relating to the investigation. The only appropriate response should have been for the ACCC to respond with no comment and request the media not to take photographs of its officers (and certainly not arrange for their photo to be taken).

Professor Fels has argued,

> They [the *Telegraph*] did hold off until we had done our entry into the premises, and once they gave it the big push, all the TV stations, including yours, wanted interviews, and they got them. We are an accountable body, and we have to explain what we are doing. (Ch 7 *Sunday Sunrise* 28.4.02)

Caltex does not agree with this position. The role in relation to an investigation is quite different from the ACCC's role once there has been a prosecution, successful or unsuccessful, for a breach of the Act. In such circumstances, the ACCC has argued it has a role to inform the public about enforcement of the Act and Caltex agrees with this. In the case of a successful prosecution, the ACCC is entitled to fairly publicise the illegal action and the outcome of the prosecution, so as to deter potential offences by others. In the case of an unsuccessful prosecution, we believe the ACCC has a duty to state that the persons prosecuted are innocent of the charges laid.

The ACCC has argued that there is nothing wrong in publicising an investigation:

> The critics deliberately ignore the role of public information in the justice system. Media statements help educate business and consumers about the law, act as a deterrent … Through such statements, the ACCC explains its actions against those alleged to have breached the law and those penalised for breaches. (Professor Fels, *Canberra Times* 19.6.02)

One must seriously question whether it is legitimate to publicise investigations of innocent parties i.e. those alleged to have breached the law, to educate business and consumers and act as a deterrent.

In defence of this position, the ACCC has argued:

> David Koch: Isn't it the reality that because of the publicity surrounding these raids, the oil companies are presumed guilty, anyhow?
>
> Allan Fels: No, I think most Australians understand the difference between investigating something and a court reaching a conclusion that someone has broken the law. It has been a distinction made in the law for hundreds of years. (Ch7 *Sunday Sunrise,* 28.4.02)

Professor Fels' assertion in this matter is not correct. A market survey conducted for Caltex in early June indicated 70% of respondents were aware of the ACCC investigations. 30% identified Caltex as being investigated. Of these, 74% believed the allegations (generally perceived as price fixing) were true, 17% were not sure and only 4% believed they were not true.

In summary, the ACCC's conduct in this investigation has highlighted the need for a mechanism to control its conduct, in the form of a code of conduct and oversight body, as discussed in section 4.3 below.

4.1.3 ACCC comments to Senate on current investigation

On 6 June 2002, ACCC Chief Executive Officer Brian Cassidy appeared before a hearing of the Senate Economics Legislation Committee. Speaking on behalf of the ACCC, Mr Cassidy answered a question from Senator Allison as to whether the recent Rolah McCabe court case would have "encouraged some fairly hasty document destruction elsewhere". Mr Cassidy said,

> ... looking at the McCabe case in Australia and the Enron case in the US has led us to worries about document destruction in several of the investigations we are undertaking at the moment. Indeed ... that was part of the background to our entering a number of oil company premises in Sydney in late April. (Hansard, 6 June 2002, p E430)

On 12 June 2002, Caltex wrote to the Committee to express its concern at the statements made by Mr Cassidy. Caltex also wrote to Professor Allan Fels requesting an apology for the statements by the ACCC.

Mr Cassidy failed to put forward any basis whatsoever for his making the very serious and highly defamatory allegation that it was possible Caltex would have engaged in unlawful document destruction if it had become aware it was to be investigated by the Commission. The reason Mr Cassidy failed to put forward any basis for his offensive comments is because none exists.

The ACCC is currently investigating the oil companies. In these circumstances, it is entirely inappropriate for its Chief Executive Officer to make comments about the entities under investigation. His comments betray the Commission's predisposition to a particular view about those entities and, given the absence of any basis for his comments, suggest a lack of fairness.

4.2 Media comment on past investigations

Caltex believes the ACCC's media stance and comments on past investigations have unfairly damaged the reputation of Caltex and this is part of a general pattern of media comment that is directed primarily at the ACCC's policy objectives in relation to the petroleum industry, rather than a general concern to ensure compliance with the Act.

On 22 August 2000, the ACCC issued a media release in response to a media release from an Opposition member of Parliament concerning allegations that Shell had not passed on the benefits of the Fuel Sales Grant, contrary to the price exploitation provisions of the Act. The ACCC revealed it was investigating "another major oil company". Following media speculation, Caltex issued a media release on 23 August confirming it was the other oil company.

The investigation continued for many months, during which the ACCC implied to the media that serious charges were likely, to the serious detriment of Caltex's reputation. For example,

> So it's a pretty serious situation. Having said that we have not concluded that the oil companies are guilty but it is a serious investigation. (2UE *John Laws* program 23.8.00)

At 4 pm on 1 June 2001 (Friday afternoon, well after news deadlines), Caltex received a letter and news release from the ACCC advising the end of the investigation. The media release stated,

> As a result of this investigation the ACCC did not establish a failure to pass on the FSG to customers …The evidence therefore does not support a case that fuel prices were unreasonably high [in contravention of the Act] …The ACCC also investigated alleged breaches by Shell, Mobil and BP … While the material supplied by some of the oil majors, and in particular by Shell, may have been open to an interpretation that the oil companies …

The ACCC did not say the companies were innocent of the allegations, which is any person's entitlement before the law, but rather inferred the companies were guilty but insufficient evidence had been found to lay charges.

This appears to be a consistent view of the major oil companies represented in ACCC comments to the media or other bodies. For example,

> Howard Sattler: Do you still suspect collusion is going on?
>
> Prof Fels: Not necessarily. The oil companies are so close to one another that they don't technically necessarily breach the law, they can, kind of, signal through their prices to one another through price leadership and other means without picking up the phone and taking the unlawful step.
> …
> Prof Fels: We also lost a case not so long ago … The court was not prepared to say it was collusion, we thought it was collusion, the court did not agree with us and we lost the case.
>
> Howard Sattler: Alright, but it's going to be a lot more difficult to catch them next time, isn't it, because I mean, having been caught out, if they're going to get up to that sort of thing they're going to be a lot more circumspect about who they tell.
>
> Prof Fels: That's correct and to a degree they know so much about one another they don't have to necessarily talk to do this. (2SM *Howard Sattler* program 26.4.01)

Such statements from the ACCC are unjustified and inappropriate. If the ACCC has sufficient information to believe there has been a breach of the Act, it should investigate and, if there is sufficient evidence, prosecute. The ACCC also knows markets are fiercely competitive and is wrong to imply oil companies are skirting the boundaries of illegal activity and there is "not necessarily" collusion (but by implication could be).

The ACCC also makes reference from time to time to the conviction of Ampol Limited for pricing fixing in 1993/94 involving a single employee. For example,

> …the Commission has taken oil companies to court. It's won some cases – it's lost some cases on collusion. We had Ampol fined three and a half million dollars not so long ago. (Ch 10 *Meet the Press*, 29.4.01)

The ACCC infers that Caltex Australia was guilty of a breach of the Act because Ampol is one of Caltex's brands. The Ampol brand has continued to be used at some service stations following the merger of Caltex and Ampol in 1995 and the subsequent takeover of the merged body, Australian Petroleum, by Caltex in 1997. ACCC's continued references to the Ampol case are unfair to Caltex and its employees and are detrimental to Caltex's reputation.

Similar inappropriate comment to the media in relation to the electricity supply industry was censured by Mr Justice Finn in the Federal Court[1]. Justice Finn said

[1] Electricity Supply Association of Australia Ltd v. Australian Competition and Consumer Commission [2001] FCA 1296.

> In his evidence, Professor Fels indicated on a number of occasions that, in light of the issues that have achieved prominence in this proceeding, he would have been more careful in what he said in press releases and comments to the media ... I would merely suggest that, as the agency responsible for policing s.52 of the Trade Practices Act, it [the ACCC] properly can be expected to set the example of care in its own representations to the public.
> ...
> The stances so taken may constitute good public theatre. Whether they represent good public administration is another matter.
> ...
> The stance taken by the ACCC, in at least some of the instances in which threats were made against ESAA and the suppliers, could quite reasonably be interpreted as simply an attempt to stifle debate. It would be censurable for so powerful and influential a public agency to take such a course.

4.3 Code of conduct and oversight body

The conduct of the ACCC in relation to the current investigation and its general conduct in the media provide a strong case for the ACCC to be bound by a media code of conduct. The code of conduct could include the following.

The ACCC should:

- avoid commenting on any proposed or current investigation or discussing it with the media
- avoid commenting on any proposed or current investigation in a public forum where it is likely to be reported by the media
- only comment on a current investigation where there has been a significant misrepresentation of the investigation and then only to the extent that it is necessary to correct the misrepresentation
- at all times stress the presumption of innocence of persons under investigation or prosecution or found not guilty by a court
- accurately comment on unsuccessful prosecutions and in doing so make clear that the person/s prosecuted are innocent of the charges
- not suggest the prosecution case was “not proven” as this has no meaning under Australian law
- not make inferences of unlawful behaviour when discussing market conduct in relation to its role as a competition regulator
- not comment in a way that impugns the reputation of a company or person (except when announcing the outcome of a successful prosecution)
- make clear the identity of persons or companies and on which it is commenting, particularly where business names or brands have changed ownership over time
- ensure that all comments are accurate, balanced and fair.

The code of conduct could be extended to cover the behaviour of ACCC officers during investigations but we have not sought to elaborate on this issue in the submission. For example, during the raid on a Caltex subsidiary, which trades under the name Metropolitan Fuel Distributors (MFD), ACCC officers photographed staff and used mobile phones and flash cameras (contrary to safety rules at the fuel distribution terminal). The ACCC later apologised in writing for this behaviour.

Caltex believes the ACCC should have an oversight body, in the form of a board that would be responsible for ensuring greater accountability of the ACCC to the public in the administration of the Act. One role of the board would be to ensure compliance with the media code of

conduct. (If the functions of the ACCC were split into separate bodies, as recommended in section 4.5, the board would oversee both bodies.)

The ACCC argues that it is accountable to Parliament and, in the case of investigations and prosecutions, to the courts. While this is correct, these bodies are not directly representative of the broad range of community interests and in Caltex's view have proven to be less than fully effective in ensuring appropriate administration of the Act, as documented clearly in the preceding sections.

The intention of such a board would not be to emasculate the ACCC but to increase its accountability. Caltex believes in a strong and effective Trade Practices Act. Our concern is with its administration and the way in which the reputation of companies like Caltex can be systematically tarnished without justification.

The board should consist of consumers, small and big business representatives, and legal and social welfare experts. They should be of high position, integrity and experience.

The model of the board operation is open to debate but models such as the Reserve Bank, Board of Taxation, FIRB and the new Inspector General of Taxation should be studied. The board should not stand between the ACCC Chairman and Parliament (as for the Reserve Bank Board) but nevertheless the current Chairman of the ACCC should have a responsibility to the board in relation to its charter to ensure public accountability. The board would report to Parliament.

Recommendation 4: The ACCC's conduct in its investigation of Caltex has highlighted the need for creation of a mechanism to control the ACCC's conduct. A code of conduct should be established, overseen by an independent board.

Recommendation 5: A board should be created that is responsible for ensuring greater accountability of the ACCC to the public in the administration of the Act. One role of the board would be to ensure compliance with the code of conduct.

4.4 Issues relating to s.155 notices and authorisations

4.4.1 Court approval of s.155(2) authorisations

The power which s.155(2) vests in the Commission is a power of entry onto premises for the purpose of inspection of documents and the making of copies of documents strictly in circumstances where the Commission has reason to believe that a person (in this case Caltex and MFD respectively) *has* engaged in, or *is* engaging in, conduct (as distinct from '*may*' have engaged in, or may be engaging in, conduct) that constitutes, or may constitute, a contravention of the Act.

It clearly is not a power that can be exercised in circumstances where the Commission is merely making a bare assertion that a person *may* have engaged in or may be engaging in conduct that constitutes, or may constitute, a contravention of the Act. In other words it is not appropriate for the Commission to issue a s.155(2) authorisation on the basis of a mere belief that a person *may* have engaged in conduct that constitutes or may constitute a contravention.

The only means by which a person served with a s.155(2) authorisation has of gaining some insight as to whether the Commission has the requisite belief that the person is actually engaging in conduct or has engaged in conduct (the pre-requisite to issue of a valid s.155(2) authorisation)

is to consider the contents of the notice. The necessary relationship between the documents and/or information sought and the matter in respect of which it is sought, should be apparent from the contents of the notice. This requires a sufficient description of the contravention matter to enable the relationship to be discerned.

In Caltex and MFD's case there was an apparent material failure of the subject 23 April 2002 s.155(2) authorisations to disclose the necessary relationship between the documents sought and the contravention matter in respect of which it is sought. There is a distinct absence of description of the contravention matter in the Caltex/MFD notices, as such making it impossible to enable that relationship to be discerned.

The s.155(2) authorisations issued to Caltex make it very clear the Commission is uncertain of any date in relation to the allegations and that the Commission is uncertain whether Caltex made or only attempted to make agreements with others. In relation to many of the allegations it is apparent the Commission has no idea of the identity of the person or persons Caltex is either alleged to have made or attempted to have made agreements and no idea of any particular instances of conduct.

To illustrate the point consider paragraphs (c), (d) and (f) of the s.155(2) authorisations served on Caltex on 23 April 2002, which can be read in the following manner:

> At a time **unknown** to the Commission but estimated to be between 1 January, 1999 and the date of this Notice Caltex made, or attempted to make, or gave effect to, or attempted to give effect to, an agreement or agreements:
>
> (c) with certain distributors (defined as "persons who carry on the business of the wholesale supply of petroleum products [defined as "including base oil, diesel, petrol and lubricating oils"] to retailers or other distributors"), **unknown** to the Commission but operating [**somewhere**] in the Sydney metropolitan area, regarding fixing, controlling or maintaining prices of petroleum products supplied by [**unknown**] distributor supplied retailers to [**unknown**] end users
>
> (d) with certain distributors, **unknown** to the Commission but operating [**somewhere**] in the North Coast area of New South Wales, regarding fixing, controlling or maintaining prices of petroleum products supplied by [**unknown**] distributor supplied retailers to [**unknown**] end users
>
> (f) with other manufacturers (defined as "persons [**unknown]** who carry on the business of producing petroleum products") or distributors [**unknown]** regarding fixing, controlling or maintaining the resale price of petrol in Sydney **or** in Melbourne **or in** Brisbane [**uncertain*]***

In similar manner in relation to the s.155(2) authorisations issued to MFD the Commission is uncertain of any date in relation to the allegations, the Commission is uncertain whether MFD made or only attempted to make agreements with others and the Commission has no idea of the identity of the person or persons MFD is either alleged to have made or attempted to have made agreements and no idea of any particular instances of conduct.

The subject notices to MFD can be read in the following manner:

> At a time **unknown** to the Commission but estimated to be between 1 January, 1999 and the date of this Notice MFD made, or attempted to make, or gave effect to, or attempted to give effect to, an agreement or agreements with certain distributors, **unknown** to the Commission but operating [**somewhere**] in the Sydney metropolitan area, regarding fixing, controlling or maintaining prices of petroleum products [defined as "including base oil, diesel, petrol and lubricating oils"] supplied by [**unknown**] distributor supplied retailers to [**unknown]** end users.

As a result a serious question mark must exist as regards whether the ACCC:
(a) had in fact formed a view that Caltex/MFD had engaged in conduct (that constituted or may constitute a contravention); or
(b) if so formed, whether that view about conduct was taken upon a reasonable basis.

Unfortunately for both Caltex and MFD, they each find themselves left in no better position than remaining particularly suspicious about the validity of the ACCC's view on conduct, as neither is privy to the information which the Commission relied upon to assert that it held the requisite view and so (purport) to validly issue the subject s.155(2) authorisations.

The power of mandated entry on to a person's premises, which s.155(2) vests in the Commission, is not an arbitrary power. It must be exercised in good faith and not taken for a collateral purpose or without regard to the burden imposed on the recipient. An allegation of (Part IV) conduct in breach of the Act (which includes contravention, attempted contravention or being in any way, directly or indirectly, knowingly concerned) is such as to potentially expose a person to very serious consequences. This includes an exposure to liabilities for damages/compensation, for a corporation, a penalty liability of up to $10,000,000 per breach and for individuals a penalty liability of up to $500,000 per breach, in circumstances where the burden of proof rests merely on the balance of probabilities (i.e. the civil standard).

Although it is correct to acknowledge that it is open to a person served with a s.155(2) authorisation to commence proceedings to have the notice set aside, there are genuine obstacles to that course of action that need to be recognised:

- firstly, the person will be at a significant disadvantage in embarking on (costly) legal proceedings in circumstance where, almost certainly, the person will have no knowledge of the particular material relied upon by the Commission to form its view that conduct was being, or had been engaged in; and
- secondly, there is a strong likelihood of that the prosecution of proceedings will attract criticism, which will be aired publicly; almost certainly, the Commission's reaction to any challenge to its notice would be the issue of a media release accusing the person of using legal tactics, and seeking to rely upon technicalities, in an attempt to frustrate a regulator pursuing the proper conduct of an investigation, taken in public interest.

The Act should be amended so as to require the ACCC to obtain judicial approval prior to the issue of a s.155(2) authorisation. This would ensure that a qualified and independent arbiter gave proper (and impartial) consideration to the question of whether or not the material which the Commission relied upon was sufficient for it (the Commission) to reasonably form the view that the person named was actually engaging in conduct or had engaged in conduct that constituted or may constitute a contravention of the Act.

The Commission, as a regulator charged with an implicit duty to act fairly, should have no objection to the introduction of a step designed to ensure the impartiality of process. Moreover, the ACCC has commented in relation to the review of the Act for Australia to adopt international best practice in trade practices law. This should include a requirement for judicial review of s.155(2) authorisations.

The need for a regulatory authority to obtain a warrant in order to enter and search premises, and to seize documents, is a common feature of antitrust regimes in other jurisdictions.

- New Zealand's *Commerce Act* allows the Commerce Commission to authorise its officers to enter and search premises, and to seize documents or things, only if a warrant has been issued by the court.
- In Canada, the *Competition Act* requires the Competition Bureau to obtain a warrant from the court in order for its officers to enter and search premises, and to seize records to examine and copy them. The Bureau can only dispense with the need for a warrant if it is not practical to obtain a warrant in the circumstances.
- The situation in the United Kingdom under its *Competition Act* is mixed. Some powers to enter premises exist without the need for a warrant. However, in order for the Office of Fair Trading to exercise the broadest scope of powers (which mirror the ACCC's powers under s.155(2)), a warrant is required.
- In the United States, the Federal Trade Commission cannot obtain authorisation to search premises and seize documents without judicial review because of the constitutional limitations applying by virtue of the Fourth Amendment (i.e. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").
- Even in Australia, under the *Australian Securities and Investments Commission Act*, ASIC officers are not authorised to enter premises in order to enforce ASIC's right to inspect company books. To access books, ASIC must obtain a warrant from a magistrate authorising a member of the Australian Federal Police to enter and search premises and seize the books.

Recommendation 6: The Act should be amended so as to require the ACCC to obtain judicial approval prior to the issue of a s.155(2) authorisation.

Recommendation 7: The Federal Magistrates Act 1999 should be amended to extend the jurisdiction of the Federal Magistrates Service to facilitate the recommended judicial review process, such that Federal magistrates be required, and have the requisite authority, to approve the issue of a s.155(2) authorisation.

4.4.2 Amendment of s.155(1) and court approval of s.155(1) notices

As for s.155(2) as discussed above, the power of mandated appearance before the Commission, the mandated furnishing of information and mandated production of documents, which s.155(1) vests in the Commission, is not an arbitrary power. It must be exercised in good faith and not taken for a collateral purpose or without regard to the burden imposed on the recipient. If the recipient may be the person against which an allegation of (Part IV) conduct in breach of the Act (which includes contravention, attempted contravention or being in any way, directly or indirectly, knowingly concerned) is made, this potentially exposes that person to very serious consequences. This includes an exposure to liabilities for damages/compensation, for a corporation, a penalty liability of up to $10,000,000 per breach and for individuals a penalty liability of up to $500,000 per breach, in circumstances where the burden of proof rests merely on the balance of probabilities (i.e. the civil standard).

A person is not to refuse or fail to comply with a s.155(1) notice to the extent that the person is capable of complying with it; in purported compliance with such a notice, knowingly furnish information or give evidence that is false or misleading; or obstruct or hinder an authorised

officer. A person who contravenes those requirements is guilty of an offence punishable on conviction by fine or (in the case of an individual) imprisonment.

A person is not excused from furnishing information or producing or permitting the inspection of a document on the ground that the information or document may tend to incriminate the person.

Recommendation 8: In relation to s.155(1), the Act should be amended so as to require the ACCC, the Chairperson or the Deputy Chairperson:

- *to have reason to believe that a person (the first person) has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of the Act; and*
- *to believe that a person (not necessarily being the first person) is capable of furnishing information, producing documents or giving evidence relating to a matter, so far as the first person is concerned, that constitutes, or may constitute, a contravention of this Act; and*
- *require the Commission to obtain judicial approval prior to the issue of a s.155(1) notice.*

4.5 Split of policy and compliance functions of ACCC

The ACCC and its antecedent organisations (Trade Practices Commission, Prices Justification Tribunal) have for many years had a significant role in relation to petroleum pricing and marketing regulation and policy. For example, the ACCC has:

- regulated the maximum wholesale price of petrol under the *Prices Surveillance Act* until the removal of surveillance in 1998
- reported to the government on measures that could be taken to reduce the variability of fuel prices from day to day
- provided numerous reports to government on prices in specific markets and at specific times, such as public holidays
- helped to expand the role of independent marketers, particularly Liberty, and importers through the undertakings associated with the Caltex/Ampol merger
- provided advice to the government on the implications of banning the chemical MTBE from petrol, consistent with similar action in the US
- provided advice to the Minister for the Environment expressing concern over the sale of ethanol/petrol blends.

On some issues, Caltex is fully in agreement with the views of the ACCC and, indeed, would seek to work with the ACCC to achieve common objectives. These include labelling of ethanol/petrol blends and increasing the transparency of petrol prices.

Caltex also supports the general stance of the ACCC against regulation and in favour of competition. For example, Caltex agrees with the view often expressed by the ACCC that price volatility in major urban areas is a result of competition, not manipulation, and regulation to limit volatility would disadvantage consumers.

However, the ACCC appears to have a deep-seated view that major oil companies do not compete and without additional competition would effectively (but not necessarily illegally) collude against the consumer. For example,

> It is the imports and the independents … who hopefully will expand and be the real competitors. (Mr Hank Spier of ACCC to Senate committee, Hansard E109 18.9.96)

> You've got to have an independent sector to put pressure on the big four oil companies. (Prof Fels, Ch 9 *Business Sunday* 18.8.96)
>
> Competition [from Liberty Oil],that is the only thing that will keep the oil industry honest. (Prof Fels, ABC TV *The 7.30 Report*, 23.5.96)
>
> Of course there are complaints from established people within the oil industry. They don't like competition. (Prof Fels, ABC TV *The 7.30 Report*, 23.5.96)
>
> We want to have a good look at the agreements between the oil companies – the borrow and loan arrangements, the refinery exchange, the joint terminalling. We think that with four oil companies only left they're getting a bit close together on these matters. (Prof Fels, Ch 9 *Business Sunday* 18.8.96)

The ACCC has also commented that certain behaviour, although legal, is not appropriate. Such value judgements are not appropriate from a body charged with the enforcement of law, which must rely on unbiased assessment of facts.

For example, in relation to price increases that occurred prior to Anzac Day 2001, Professor Fels commented:

> The oil companies are being cynical and opportunistic raising prices at Anzac Day. It is un-Australian behaviour, especially on Anzac Day. (*Daily Telegraph* 26.4.01)

The ACCC would have known that prices in major urban areas typically display a weekly discounting cycle and the price increases before Anzac Day would almost certainly have been consistent with the movement of this cycle, not evidence of the kind of behaviour alleged by the ACCC.

The policy outcome from the ACCC's views is that advice to the government on policy matters has been directed at enhancing the role of independent importers, terminal operators, wholesalers and retailers, where a more balanced view of competition in the market might produce different advice.

A case in point is the advice to government in 2001 on MTBE in petrol, where the ACCC appears to have provided advice (which it has refused to make public) supporting continued use. The government subsequently allowed MTBE to be added to petrol until 2004. The significance of the advice and decision is that it allows independent wholesalers and retailers to continue purchasing imported petrol containing this noxious chemical, which is already banned in several states, thereby giving them a cost advantage over major oil companies, which do not add MTBE to locally refined petrol.

In relation to labelling of ethanol/petrol blends, the ACCC investigated the issue following an April 2001 request from the government and found "several fair trading concerns" relating to potentially misleading conduct. In particular, ethanol blends at greater than 10% may damage engines and fuel economy may be significantly reduced. It is well known in the industry that blending of ethanol into petrol by independent service stations in the Sydney/Illawarra area is common, in concentrations of 20% or more, but the blends are not labelled. By blending without labelling, independents are able to discount petrol prices to increase sales (as no excise is payable on ethanol). To date, the ACCC has taken no action to enforce the Act.

One could argue the ACCC, as a policy maker, is entitled to its views and to provide advice to government. However, as illustrated in the preceding sections, the ACCC's policy perspective appears to significantly affect its role in enforcing and ensuring compliance with the Act, leading to repeated public insinuation of anti-competitive or illegal activity. This is unacceptable – the ACCC's enforcement role should not be compromised or appear to be compromised by its policy agenda.

Recommendation 9: The ACCC's role in enforcing the Act should be separated from its policy role, by creating a separate enforcement commission. The ACCC would become a regulator and policy adviser, with no role in relation to enforcement of the Act.

Attachments

Charts
Terms of reference

Chart 1: Retail petrol prices, Melbourne

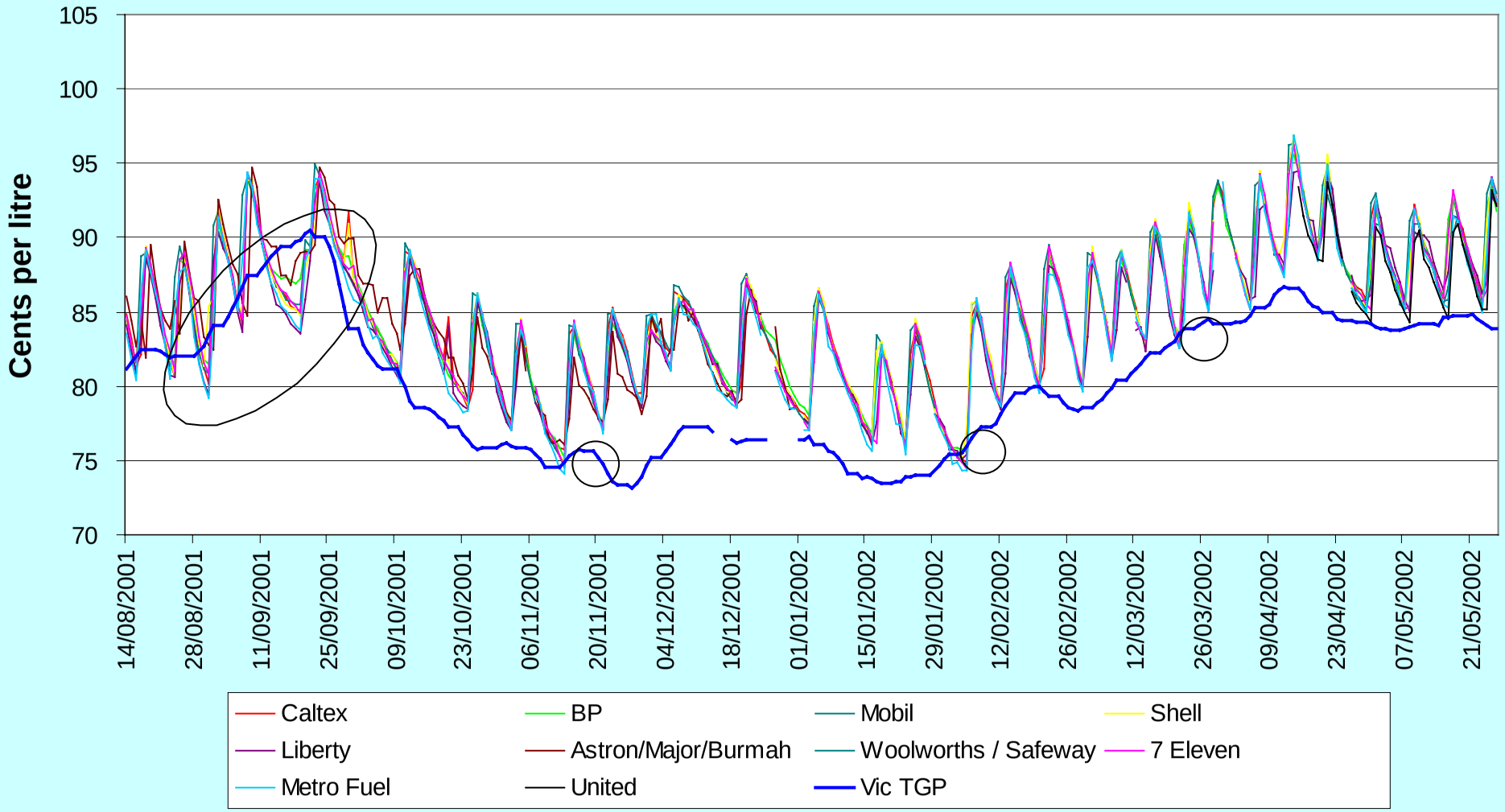


Chart 2: Discounters drive market below TGP (Sept 2001)

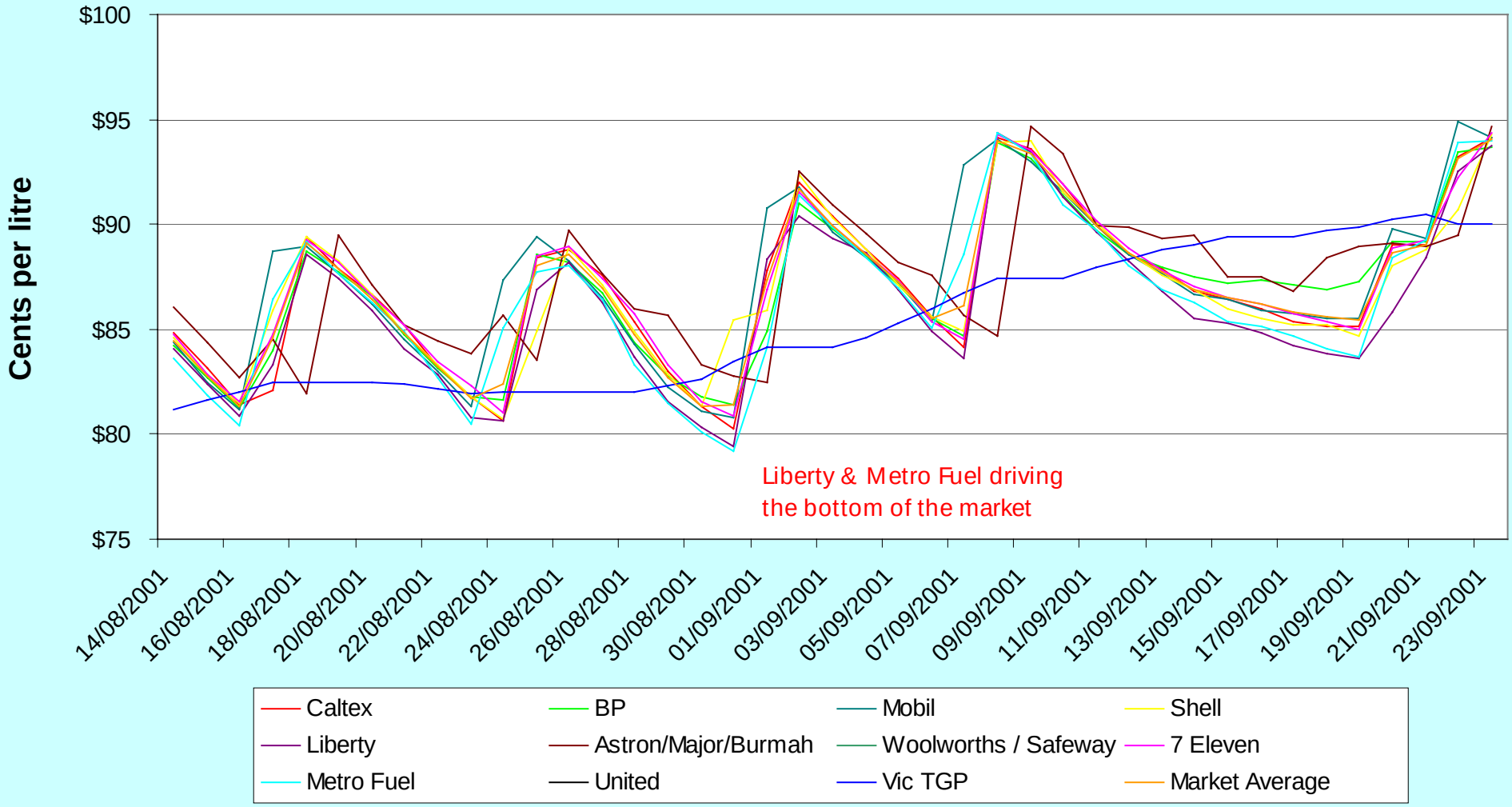


Chart 3: Discounters drive market below TGP (Feb 2002)

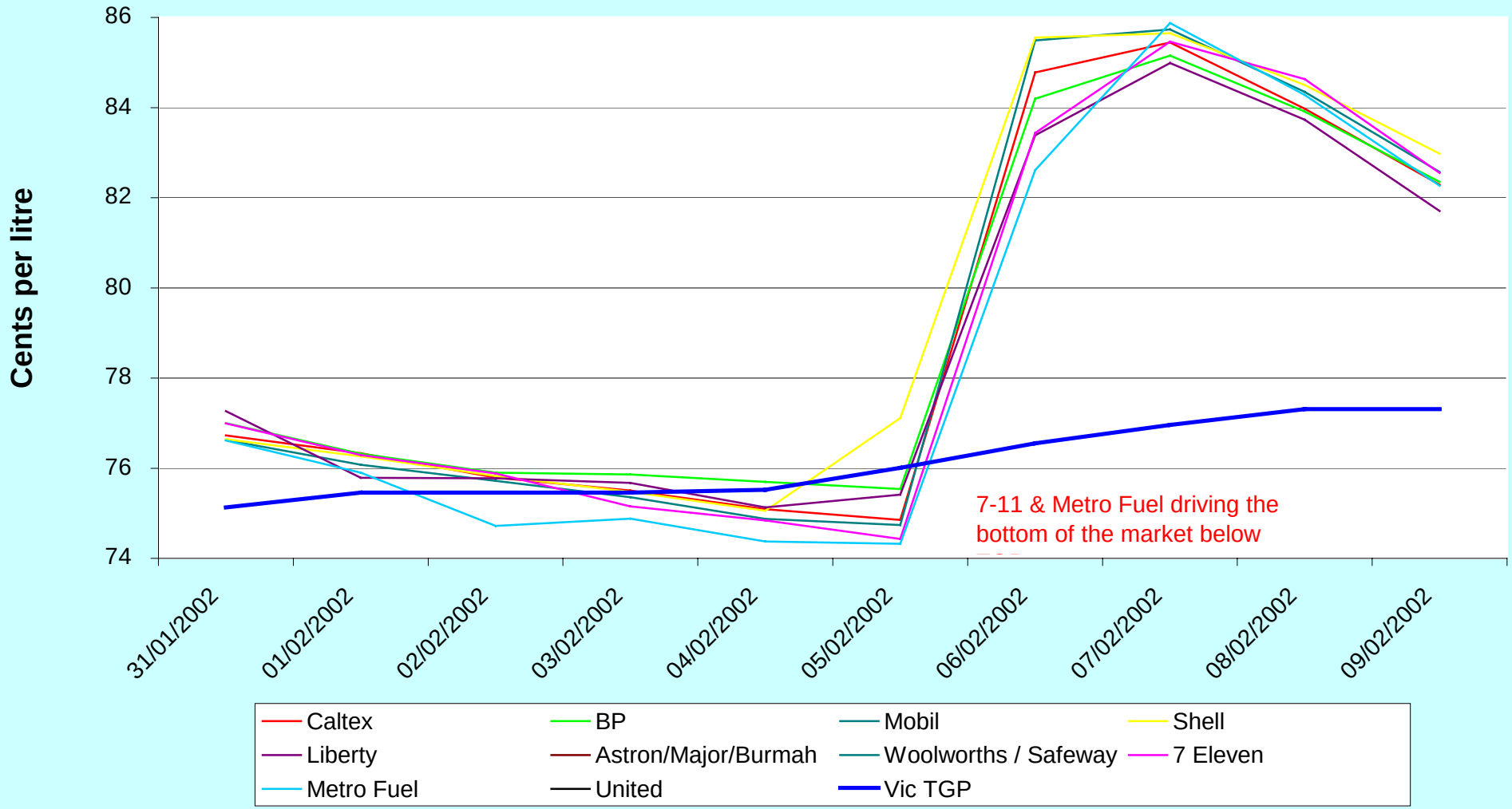
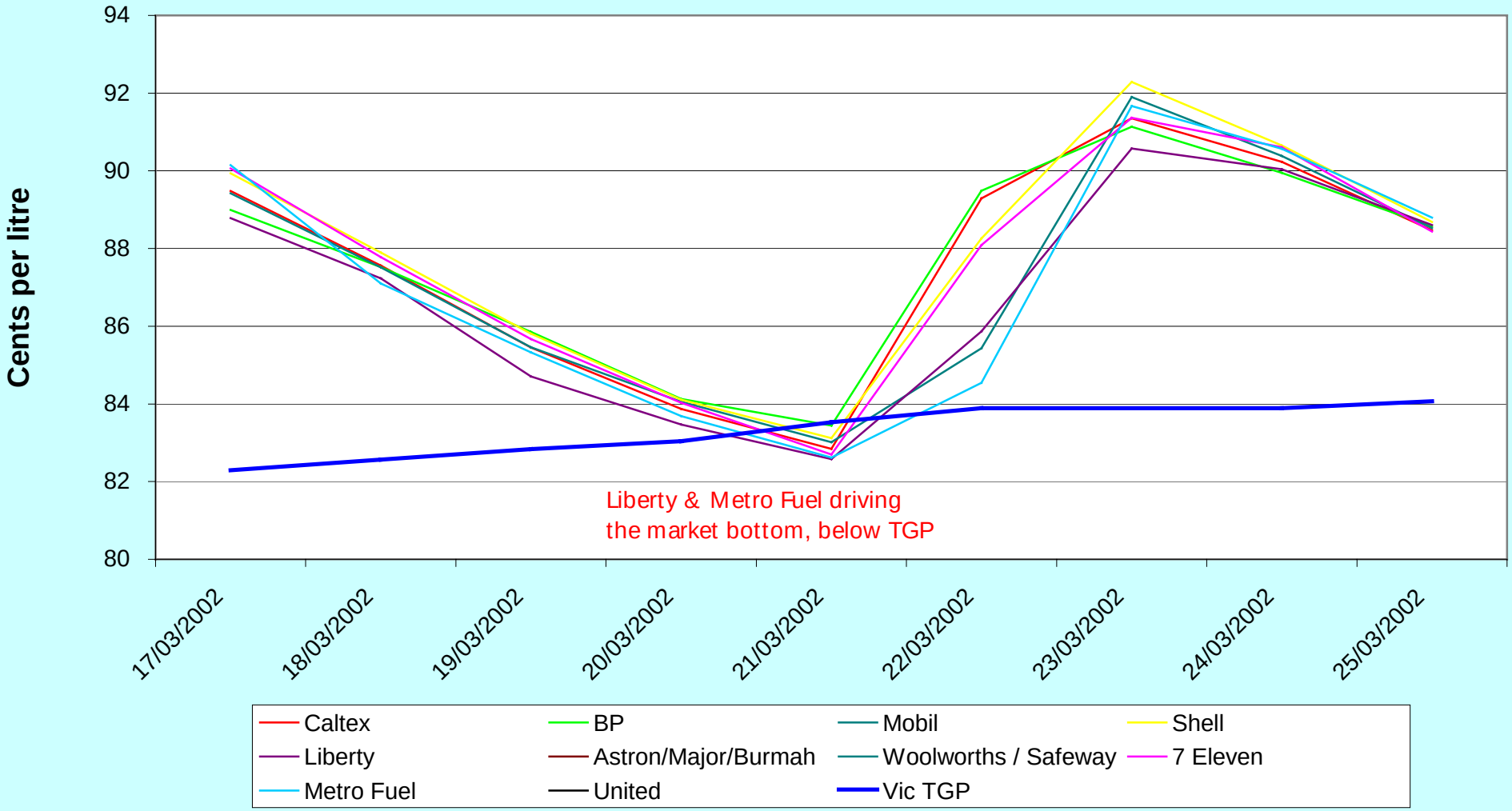


Chart 4: Discounters drive market below TGP (Mar 2002)



ATTACHMENT 1

Review of Trade Practices Act

Terms of reference relevant to Caltex submission

"1. The Committee is asked to review the operation and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:

(a) inappropriately impede the ability of Australian industry to compete locally and internationally;

(b) provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;

(c) promote competitive trading which benefits consumers in terms of services and price;

(d) provide adequate protection for the commercial affairs and reputation of individuals and corporations;

...

(f) are flexible and responsive to the transitional needs of industries undergoing ... structural and/or regulatory change".