COMPETITION POLICY REVIEW

Submission by the Australian Automobile Association
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EXECUTIVE SUMMARY

The Australian Automobile Association (AAA) is the peak organisation representing Australia’s motoring clubs. The AAA’s constituent clubs are the NRMA Motoring and Services, RACV, RACQ, RAC (WA), RAA (SA), RACT, AANT and the RACA. Combined, these clubs represent more than seven million Australian members, and advocate on behalf of all road users.

The AAA appreciates the opportunity to provide input into the Competition Policy Review. As the representative of a significant group of consumers, the AAA believes that Australia’s competition laws need to facilitate an environment in which businesses are able to compete efficiently and consumers are the beneficiaries of wide range of choice and fair prices.

The areas of greatest interest to motorists regarding this review relate to issues of vehicle data ownership and fuel prices. Australia’s competition laws should ensure that consumers are able to access and own the data generated by their vehicles and encourage strong competition in the retail fuel market.

The Australian Automobile Association believes that the Competition Policy Review should:

- Investigate current legislation’s ability to address the restriction of vehicle data. If necessary the review should recommend an amendment to the CCA to ensure that consumers have access to and control of their vehicle data.

- Support the development of a national information standard for fuel price boards as the best way to bring about national, industry-wide compliance.

- Examine and consider various options to improve fuel price transparency and negate the potential detrimental effects brought on by the sharing of price information between petrol retailers.

- Address shortcomings in the CCA which restrict its ability to effectively deal with excessive fuel discounts by amending section 46(1) to incorporate the concept of collective dominance.

- Investigation of the Australian wholesale fuel supply and distribution markets with particular reference to the lack of competition in regional towns.

- Enable the CCA’s acquisition and mergers framework to monitor post-acquisition growth to protect consumers from creeping acquisitions by existing major fuel retailers.
ACCESS AND OWNERSHIP OF VEHICLE DATA

The AAA’s chief area of concern in terms of competition policy is the potential consumer detriment arising from a lack of clearly defined ownership and control of vehicle data and technical information.

Vehicle communications and telematics technologies have progressed rapidly in recent years and with the emergence of the ‘connected car’ there is a concern that vehicle manufacturers are looking to restrict access to data produced by vehicles to advance their own commercial interests.

In the past, debate has focused on the need for manufacturers to share the information needed to service and repair vehicles with independent repairers. However, emerging technologies, particularly in-vehicle telematics, may have implications beyond the service and repair industry. Services such as roadside assistance and usage-based car insurance will also be affected if consumers are restricted from accessing vehicle data and providing it to their preferred service provider.

Precluding consumer access to vehicle data would constitute an attempt on the part of motor vehicle manufacturers to engage in a tying arrangement, which would see the conditioning the sale of one good (motor vehicle) on the purchase of another (servicing/repairs, roadside assistance and usage-based car insurance, etc.). This will restrict consumer choice and result in motorists paying higher prices for ancillary services.

The AAA believes that scope exists for the Australian Competition and Consumer Commission (ACCC) to investigate the restriction of vehicle data by manufacturers through section 46(1) of the Competition and Consumer Act 2010 (CCA).

RECOMMENDATION:

The review panel should investigate whether current competition laws adequately address the restriction of vehicle data. If necessary the review should recommend an amendment to the CCA to ensure that consumers determine who can have access to their vehicle data.

FUEL MARKET ISSUES

The AAA also has concerns over the level of competition in Australia’s fuel market. The evidence suggests that there have been steep increases in petrol price margins over the past six years, with the largest increases being recorded in regional markets.

Fuel is a significant and essential expense for many Australian households, which serves to highlight the need for effective competition in the retail and wholesale fuel markets. The AAA believes there are a number of existing issues within the retail and wholesale fuel markets which require consideration in this review of competition law.

Fuel Price Boards

Motorists rely on fuel price boards at retail petrol stations to decide on where and when to fill up their car. However, misleading price boards make it more difficult for consumers to make an informed choice about which petrol station is offering the cheapest fuel.
Fuel price boards should only show the generally available, undiscounted price. If there are any conditional special offers available, they should be clearly advertised and not represented as being available to everyone. Fuel that is out of stock should not be advertised on the price board.

Although a number of state and territories have taken action to regulate fuel price boards, many motorists across the country do not benefit from clear and accurate fuel price advertising. The AAA submits that there are a number of common contraventions of the CCA occurring throughout Australia due to the misleading and confusing representations on fuel price boards.

**RECOMMENDATION:**

The review panel should support the development of a national information standard for fuel price boards as the best way to bring about national industry-wide compliance.

**Price Information in the Retail Petrol Market**

The AAA and the motoring clubs have long sought greater accessibility to petrol pricing information. Petrol companies exchange pricing information on an exclusive basis in significant detail and in near real time. Consumers should have some level of comfort that this information in not being used to facilitate price fixing. A potential solution would be to improve transparency through making the same pricing information being shared between petrol retailers available to consumers.

The AAA understands that this issue is subject to a formal investigation by the ACCC, and it is hoped that the investigation concludes in time to inform the recommendations of this review.

**RECOMMENDATION:**

Examine and consider various options to improve fuel price transparency and negate the potential detrimental effects brought on by the sharing of price information between petrol retailers.

**Shopper Docket Discounts in the Retail Petrol Market**

Another key concern for the motoring clubs is the impact that sustained shopper docket fuel discounting by the major supermarket retailers will have on long-term competition in the fuel market.

The AAA acknowledges that this particular issue was subject to an ACCC investigation, which resulted in an enforceable undertaking between the ACCC and Coles and Woolworths. Since then, the ACCC has initiated proceedings against the supermarkets for breaching the agreement, but the Federal Court upheld the supermarkets’ right to bundle a supermarket fuel offer with a petrol station offer and in effect offer a combined discount greater than 4 cpl. Given the Federal Court action, there appears to be a need to revisit the CCA to ensure that supermarkets do not misuse their market power.
The AAA remains concerned that significant discounts may restrict the ability of independent service stations to compete. A major concern with the existing legislation is that it is unable to respond to the abuse of market power in the event that a number of firms are acting in a co-ordinated manner as it only relates to single firm conduct.

**RECOMMENDATION:**

This review should address shortcomings in the CCA which restrict its ability to effectively deal with excessive fuel discounts by amending section 46(1) to incorporate the concept of collective dominance.

Competition in the Wholesale Fuel Market

The AAA is concerned about the wider implications for competition in the wholesale fuel supply and distribution markets.

Four refiner-wholesalers had more than a 90 per cent share of wholesale petrol sales volumes in 2012-13. Independent wholesalers are unable to compete against the big four oil companies which constrain competition in the retail fuel market. The situation is particularly concerning in regional areas where motorists are clearly paying excessive prices for their fuel.

**RECOMMENDATION:**

The AAA believes that as part of the Competition Policy Review process the Government should undertake a full scale investigation of the Australian wholesale fuel supply and distribution markets with particular reference to the lack of competition in regional areas.

Mergers and Acquisitions in the Retail Fuel Market

Another area of concern is whether the CCA’s mergers and acquisitions powers remain current for an evolving fuel industry.

It appears that once the ACCC has assessed and approved a merger or acquisition, they no longer monitor these companies despite the fact that some companies will still have their fuel retailing business grow organically after an acquisition is approved. It is important that post acquisition growth is closely monitored to protect consumers from market creep by existing major fuel retailers.

**RECOMMENDATION:**

The CCA’s acquisition and mergers framework should monitor post-acquisition growth to protect consumers from creeping acquisitions by existing major fuel retailers.
SUBMISSION

ACCESS AND OWNERSHIP OF VEHICLE DATA

An emerging area of concern for Australia’s motoring clubs is the potential consumer detriment arising from a lack of clearly defined ownership and control for consumers relating to vehicle data and technical information.

Vehicle communications and telematics technologies have progressed rapidly in recent years and with the emergence of the ‘connected car’ there is a concern that vehicle manufacturers are looking to restrict access to and control of the data produced by vehicles to advance their own commercial interests. There is an immediate and significant risk that emerging industry practices are impeding consumer choice and restricting the ability of third party service providers from competing.

In the past, debate has focused on the need for manufacturers to share the information needed to service and repair vehicles with independent repairers. In Australia, a consultation process on these issues culminated in a report by the Commonwealth Consumer Affairs Advisory Council (CCAAC): Sharing of repair information in the automotive industry.

The report’s main recommendation was for the automotive industry to develop a voluntary code to improve access to vehicle service and repair information. There is currently a working group of relevant stakeholders working to develop a voluntary code of conduct between independent automotive repairers and car manufacturers to allow repairers access to the data they need to service modern cars.

In addition to the concerns in the aftermarket repair industry, there are number of commercial services which would be affected in an environment where data access is tightly controlled by vehicle manufacturers. In-vehicle telematics provides the opportunity for vehicle manufacturers/importers to dominate the market for the provision of roadside assistance. In-car telematics devices will enable drivers to contact roadside assistance at the ‘touch of a button’. It is critical that vehicle owners have the right to choose which roadside assistance provider is contacted in this way.

Similarly, in-vehicle telematics also provides the opportunity for motor vehicle manufacturers/importers to dominate car insurance markets as they move towards usage based insurance or pay as you drive products if third-party insurance providers are denied access to in-vehicle telematics on vehicle usage.

As these technologies develop and the data generated by vehicles becomes more sophisticated, a range of ancillary products and services will emerge. Companies that provide innovative services or products which require access to certain types of vehicle data should not be prevented from competing against vehicle manufacturers. Vehicle manufacturers should not be given any unfair competitive advantage by cutting potential competitors out of the market. They should not be in a position to use a claim of proprietary rights of data systems as a reason for not allowing consumers and third parties to be granted access.
Consumer Detriment Arising from the Restriction of Vehicle Data

In almost all other cases, when a consumer purchases a good, they determine who has access, and for what purpose, to the data or information generated by that good. In turn, motorists should not be prevented from accessing the data generated by their vehicles or prevented from choosing providers of ancillary services.

A motorist should be able to reasonably assume that they have ownership and control over the data that their vehicle produces, either in relation to the vehicle’s performance, operation or security. All electronic data captured and stored within the vehicle’s electronic systems should be made available to the owner or a third party nominated by the owner, such as their preferred vehicle repairer or roadside assistance provider. Any restriction on access and ownership of vehicle data would constitute significant erosion in consumer choice.

Consumers who are compelled to use the vehicle manufacturer as the provider of a given ancillary service will also potentially pay higher prices for these services. For example, in the vehicle service and repair industry, independent repairers generally offer repairs at a lower price than authorised repairers. By locking out independent service providers who compete on the basis of price, consumers will have little choice but to accept the prices determined by vehicle manufacturers.

This can also have implications from a road safety perspective; in that motor vehicle owners have an obligation to maintain their vehicle in a safe, roadworthy and reliable condition. To do this, they should have a right to choose any supplier to provide this service for them. Lack of choice and pricing considerations should not act as disincentives for motorists to have their vehicles serviced regularly. Allowing only one service provider (i.e. the vehicle manufacturer) to access vehicle data about an accident, breakdown or other safety feature of a vehicle may place not only the driver, but other motorists in danger of an adverse safety situation.

The AAA is concerned about a lack of protection of motorists’ rights and the potential for preventing, limiting or restricting consumers from accessing their vehicle data, thereby inhibiting third parties from supplying services to consumers.

Vehicle Data Restriction as a Tying Arrangement

Precluding consumer access to vehicle data would constitute an attempt on the part of motor vehicle manufacturers to engage in a tying arrangement.

CCAAC has stated that it “would be concerned if manufacturers were engaging in conduct that effectively ‘tied’ or ‘bundled’ the supply of a new car with servicing by a dealership if this impacted on competition in the supply of automotive repair services.”

Tying refers to conditioning the sale of one good on the purchase of another. In this case, motor vehicle manufacturers would condition the sale of a motor vehicle on the purchase of services, such as servicing/repairs, roadside assistance and usage-based car insurance.

A deliberate policy of withholding vehicle data from the consumers and their service providers could constitute anti-competitive exclusionary conduct. It will serve to “lock-in” consumers into paying higher prices while limiting their freedom to choose ancillary services.

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2 Church, R; Ware, R, *Industrial Organization: A Strategic Approach*, 2000
While the charging of higher prices is generally used as a signal for others to enter the market and compete away any excessive profits, the withholding of vehicle data will raise barriers to entry and serve to protect any excessive profits generated by third party service providers. Thus restriction of vehicle data will serve to injure competitors through excluding them from the market altogether, and in turn injure consumers through providing manufacturers with the capacity to raise prices for the provision of selected services.

Claims that the abuse of market power in aftermarket is not possible if the primary market is competitive do not stand up to scrutiny. While consumers would be able to protect themselves if they were endowed with perfect foresight and able to engage in life-cycle pricing, such assumptions are not realistic and contrary to the available evidence.

Considerations under Australian Competition Law

Attempts by vehicle manufacturers to obstruct access to data generated from in-vehicle telematics systems that in turn could be used to foreclose on markets for vehicle repair, roadside assistance and usage based car insurance could constitute monopolisation.

Section 46(1) of the CCA prohibits firms with substantial market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor; preventing entry to markets; or deterring or preventing a person from engaging in competitive conduct.

The effectiveness of section 46(1) has been questioned in the past. However, in light of clarifying amendments to the operation of section 46(1) in recent years, the balance has been adequately struck between ensuring that businesses are exposed to the rigours of competition – with all the associated economic benefits – while being protected from the possible anti-competitive consequences associated with firms gaining power from that competitive process.

The AAA believes that scope exists for the ACCC to investigate whether the restriction of vehicle data by manufacturers is a breach of section 46(1) of the CCA. However, the review panel should investigate whether current competition laws adequately address the restriction of vehicle data. If necessary the review should recommend an amendment to the CCA to ensure that consumers determine who can have access to their vehicle data.
Motorists constitute a significant group of consumers and fuel is an essential item for most Australian households. According to our research, fuel is the top concern in terms of motoring costs at 88 per cent. The AAA has concerns over the level of competition in Australia’s fuel market.

The AAA released analysis last year which shows steep increases in petrol price margins over the past six years, with the largest increases being recorded in regional markets including Darwin and regional NT; Perth and regional WA; Hobart and regional Tasmania; and Canberra.

The analysis outlined below demonstrates the scale of the increase in margins. It also shows that motorists in regional areas are paying substantially more than their metro counterparts. Also of concern is the fact that motorists in cities such as Darwin, Canberra and Hobart are paying substantially higher gross retail margins than motorists in cities such as Sydney and Melbourne.

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**Gross Retail Petrol Margins: 2007-08 v 2012-13**

![Graph showing Gross Retail Petrol Margins: 2007-08 v 2012-13](image_url)

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Gross Retail Petrol Margins: 2007-08 v 2012-13 (cents per litre)

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<tr>
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<th>Gross Retail Margins 2007 08 (cpl)</th>
<th>Gross Retail Margins 2012 13 (cpl)</th>
<th>Increase in Gross Retail Margin (cpl)</th>
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<tr>
<td>Adelaide</td>
<td>4.1</td>
<td>5.8</td>
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<tr>
<td>Sydney</td>
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<td>Melbourne</td>
<td>5.6</td>
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<td>4.2</td>
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<tr>
<td>Brisbane</td>
<td>6.5</td>
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This review of competition law needs to get to the bottom of why many Australians are paying too much for fuel. The AAA believes there are a number of existing issues within the retail and wholesale fuel markets which require consideration in this review of competition law. The review panel should specifically address the following fuel market issues:

- Fuel price boards
- Price information in the retail fuel markets
- Shopper docket discounts in the retail fuel market
- Competition in the wholesale fuel markets
- Mergers and acquisitions in the retail fuel markets

**Fuel Price Boards**

Fuel price boards are the predominant method by which motorists are able to observe and compare fuel prices. Fuel price boards serve a vital function in the sales regime, increasing price transparency and promoting competition between fuel retailers.

However, misleading price boards make it more difficult for consumers to make an informed choice about which petrol station is offering the cheapest fuel. The AAA submits that there are a number of common contraventions of the CCA occurring throughout Australia due to the misleading and confusing presentation and representations on fuel price boards. This is supported by reports that recent compliance operations in NSW undertaken by the Office of Fair Trading have identified an alarming rate of misleading petrol price signage.

Legislation currently exists through the CCA which enables enforcement action to be taken to correct the behaviour of fuel retailers, or for the ACCC to educate businesses about their obligations and inform consumers of their rights.
Nevertheless, the AAA supports a nationally consistent approach to fuel price boards. The development of a national information standard is the best way to bring about industry-wide compliance.

In 2012, the AAA conducted an independent survey of Australian motorists on a range of issues, including fuel price advertising. Almost 80 per cent said that they would support consistent display of fuel types and prices on fuel price boards across all service stations.

A number of state and territories have taken action to regulate price boards. Attempts have been made through meetings of the Consumer Affairs Ministers (CAF) to agree on a national information standard, but to date no agreement has been reached and many motorists across the country do not benefit from clear and accurate fuel price advertising.

The AAA believes a national standard should only show the generally available, undiscounted price of fuel. If there are any conditional special offers available, they should be clearly advertised and not represented as being available to everyone. Furthermore, fuel that is out of stock should not be advertised on the price board.

Price Information in the Retail Petrol Market
The AAA and the motoring clubs have long sought greater accessibility to petrol pricing information for consumers. Currently, petrol companies exchange pricing information on an exclusive basis in significant detail and in near real time. This may allow some retailers to make pricing decisions based on the data of other petrol companies within the region they are servicing. The ACCC has expressed concern that the current situation may lessen price competition by allowing petrol retailers to quickly signal price movements, monitor competitors’ responses, and react to them.

This is potentially contrary to the interest of healthy competition in the retail fuel market, particularly as smaller independent petrol retailers often cannot afford to access this data. While major suppliers and retailers have ready access to such information, consumers do not. Australian motoring clubs strive to provide timely information to the public about the availability and pricing of fuel. Under current constraints it is only possible to provide motorists with information on a limited range of fuel products, with a limited number of daily price observations sourced by Clubs at a cost.

The AAA acknowledges that since May 2012, this issue has been subject to a formal investigation by the ACCC, and it is hoped that the investigation concludes in time to inform the recommendations of this review.

The AAA believes the review panel should examine and consider various options to improve price transparency and negate the potential detrimental effects brought on by the sharing of price information between petrol retailers. There are a range of issues the review panel should explore which may help address these concerns, including:

- Improving fuel price transparency.
- Implications of applying price signalling provisions to the retail fuel sector.
- Reviewing whether the current laws are able to adequately combat facilitating practices.
Greater Fuel Price Transparency

Motorists would like to receive as much information about fuel prices as possible to assist them in making decisions about when and where to purchase fuel. However, the AAA is aware that substantially more information is collected on behalf of oil companies and retailers as real time data. It has long been a policy of the AAA to seek greater transparency in fuel pricing in an attempt to create a level playing field between oil companies, fuel retailers and consumers.

AAA considers that increased transparency could be achieved by allowing consumers to access all of the price related information that oil companies receive. The potential anti-competitive effect of existing information disclosures between oil companies could be negated by allowing for public access to this information.

The review should consider ways to improve transparency and accessibility of pricing information for the public as this would negate the concerns over the current practice of price sharing between fuel retailers.

Effects of Applying Price Signalling Provisions to the Retail Fuel Sector

The current price signalling provisions in the CCA are limited in their application and to date they have only been applied to the banking sector. The Australian Government did foreshadow that “[t]here is the capacity in the regulation making power for other sectors to be specified in future, after further review and detailed consideration.”

The AAA believes the review panel should consider the implications of applying price signalling provisions to the fuel retailing sector. In investigating the effects of applying price signalling provisions to the retail fuel sector, the review panel should explore whether any unintended consequences would arise from such a move. In particular, the AAA would caution against the loss of any historical price information for consumers.

Reviewing the Effectiveness of Current Laws to Combat Facilitating Practices

The AAA is supportive of the policy intent behind the price signalling provisions contained in Division 1A of Part IV of the CCA as it seeks to prohibit facilitating practices that can be used to support tacit collusion. There is also a need for a universally applied prohibition against facilitating practices in light of previous court decisions highlighting the limitations of existing approaches to price fixing. (see appendix A).

There have been suggestions that a better approach to combating facilitating practices would be to incorporate the concept of concerted practices drawn from the competition law of the European Union into the CCA. The review panel should consider whether incorporating the concept of concerted practice into section 45 of the CCA would result in enhanced competition in the fuel retail fuel market.

Shopper Docket Discounts in the Retail Petrol Market

In recent years, Australia’s major supermarkets, Coles and Woolworths, have commonly offered shoppers who spend a certain amount in their supermarkets a discount on fuel at their retail petrol stations. Motorists routinely qualify for a 4 cpl discount if they are able to present a qualifying shopper docket to the cashier at the petrol station. However, discounts have on occasion reached in excess of 40 cpl.

4 Competition and Consumer Amendment Bill (No.1) 2011: Revised Explanatory Memorandum
The AAA has long expressed concerns over the effects that shopper docket discounts will have on long-term competition in the retail fuel market.

It should be noted that this particular issue was subject to an ACCC investigation, which resulted in an enforceable undertaking between the ACCC and Coles and Woolworths. The undertaking saw the supermarkets agree to limit fuel discounts which are linked to supermarket purchases to a maximum of 4 cpl.

Less than three months after the major supermarkets agreed to the undertaking, the ACCC initiated proceedings against the supermarkets for breaching the agreement. In April 2014, the Federal Court handed down a judgement which upheld Coles and Woolworth’s right to bundle a supermarket fuel offer with a petrol station offer and in effect offer a discount greater than 4 cpl.

It appears that competition concerns regarding shopper docket schemes have not yet been fully addressed and that the major supermarkets maintain the ability to increase the scale of their shopper docket schemes despite the ACCC undertaking.

Bundled discounts can be analogised to predatory pricing insofar as a firm may offer a discount on a given bundle of products that effectively prices one of the products below its rivals’ cost.\(^5\)

A primary concern over bundled pricing strategies is that they may foreclose or exclude equally efficient rivals, even if the discount results in prices that are above the dominant firm’s costs. In this regard, some courts in overseas jurisdictions have ruled that bundled discounts may in some circumstances amount to anticompetitive behaviour even when the dominant firm would not be liable under a predatory pricing test.\(^6\)

Professor Barry Nalebuff of Yale University has coined the term exclusionary bundling which he defines as:

Exclusionary bundling arises when a firm has market power in product \(A\) and faces competition in product \(B\). A firm engages in exclusionary bundling when the incremental price for an \(A-B\) bundle over \(A\) alone is less than the long-run average variable costs of \(B\).\(^7\)

When bundling is exclusionary, it may benefit some consumers in the short term while others may be worse off.\(^8\) This is because the design of the bundle will favour some consumers with certain preferences while it will not align with the preferences of other consumers. However, in the longer-term as the bundling process damages competitive process all consumers will be worse off due to the exit (or lack of entry) of some rivals.

Section 46(1) of the CCA prohibits a single firm with substantial market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor; preventing entry to markets; or deterring or preventing a person from engaging in competitive conduct.


\(^7\) Nalebuff, B, Exclusionary Bundling, The Antitrust Bulletin, 2005

\(^8\) Economic Advisory Group on Competition Policy, An economic approach to Article 82, 2005, European Commission
A major concern with section 46(1) at the present time is that it is unable to respond to the abuse of market power in the event a number of firms are acting in a co-ordinated manner as it only relates to single firm conduct. Section 46(1) would be strengthened if it was amended and broadened to incorporate the concept of collective or joint dominance as allowed for under competition law in the European Union and Canada.

Joint dominance is based on the idea that several firms collectively may share market power and act to maintain that collective market power through anti-competitive means. The AAA believes there are shortcomings in the CCA which restrict its ability to effectively deal with excessive fuel discounts and section 46(1) of the CCA should be amended to address competition problems arising from collective dominance.

Competition in the Wholesale Fuel Market
Developments in the wholesale fuel market has seen the ACCC investigate a number of proposed acquisitions that centre on major players buying out small and regional based fuel wholesalers and distributors.

The AAA is concerned about the wider implications for competition in the wholesale fuel supply and distribution markets. BP, Caltex, Mobil and Shell are the four major refiner-wholesalers in Australia. Refiner-wholesalers distribute fuel directly to company owned or branded sites and also through small independent distributors. These independent distributors are small in number and volume sales.

As documented in the latest ACCC Monitoring of the Australian Petroleum Industry December 2013 report, the four refiner-wholesalers had a 92 per cent share of wholesale petrol sales volumes in 2012-13. Independent wholesalers only had an eight per cent share of the market. This does not enable independent wholesalers to compete against the big four oil companies and does not stimulate additional competition pressure in the retail fuel market.

We are particularly concerned about the lack of wholesale competition in regional Australia. There is a lack of effective competition in both the wholesale and retail markets due to economies of scale, dealing with lower volume sales, longer distances between regional towns and higher average retail prices when compared with the metropolitan markets.

The AAA believes that as part of the Competition Policy Review process the Government should undertake a full scale investigation of the Australian wholesale fuel supply and distribution markets with particular reference to the lack of competition in regional towns.

The dominance of the big four oil companies in the wholesale market does not benefit motorists and potentially lessens competition in the retail market.

In the past, the ACCC has referred to the oil industry as a ‘comfortable oligopoly’. It would be timely for the Competition Policy Review to examine the competitiveness of the wholesale market, and its mode of operation, and recommend solutions to increase competition in the wholesale market and enhance retail price competition especially in regional Australia.

Mergers and Acquisitions in the Retail Fuel Market
Another area of concern is whether the CCA’s mergers and acquisitions powers remain current for an evolving fuel industry.

It appears that once the ACCC has assessed and approved a merger or acquisition, they no longer monitor these companies unless if due to their greater size, their pricing behaviour changes to become predatory.

However, some companies will still have their fuel retailing business grow organically after an acquisition is approved. This can be through sites which were previously owned but not operational pre-acquisition, becoming operational post-acquisition. Some firms which have fuel retail sites planned but not constructed at the time of acquisition can also experience growth. In addition, further individual acquisition of competitor’s sites can also lead to organic growth.

Acquisitions within the Australia’s fuel industry are expected to continue in the near future. It is imperative that the CCA’s acquisition and mergers framework is enabled to monitor post-acquisition growth to protect consumers from creeping acquisitions by existing major fuel retailers.
Appendix A

**Australian Competition and Consumer Commission v Mobil Oil Australia Limited & Ors [1997] FCA 480**

In 1994 the then Trade Practices Commission (TPC), the predecessor to the Australian Competition and Consumer Commission (ACCC), instituted proceedings against Mobil, BP and Shell for allegedly colluding with each other on setting retail petrol prices. In this matter the TPC originally alleged that from December 1988 (later amended to September 1991) to June 1992 that Mobil, BP and Shell had conveyed to each other information concerning proposed or anticipated petrol price changes at Melbourne and Sydney commission agent retail service station sites. The TPC alleged the companies concerned would all increase their prices on receipt of this information. However, the Federal Court dismissed the claim in 1997 on the basis the evidence presented of conversations didn’t support a price fixing arrangement.


The ACCC instituted proceedings against 16 companies and individuals alleging a number of competitors in the Ballarat region were part of a long-standing arrangement to fix retail petrol prices. In this case, the Federal Court awarded penalties of more than $20 million in May 2005 against the respondents for price fixing conduct. However, two of the respondents successfully appealed against the judgement to the Full Federal Court.

The respondents who successfully appealed were Apco Service Stations and its Managing Director. On appeal the Court did not find that Apco had entered a contract, arrangement or understanding with the other parties to the agreement, despite receiving information regarding its competitors’ pricing. The Court accepted Apco’s contentions that it was not a party to any price-fixing understanding because it did not commit to changing its price based on the information it received. According to the decision:

> Apco was not a party to any understanding that it would fix its prices at the same level as the other respondents or at any particular level or even that it would increase its prices at all.\(^{10}\)

Rather, Apco increased its prices only on 29 out of 69 occasions when it received telephone notification from competitors that they would be increasing their prices.

**Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd & others (Geelong) FCA 794**

The ACCC initiated proceedings against 18 respondents alleging they fixed retail petrol prices in the Victorian city of Geelong during 1999-2000. Some of the respondents even admitted to the arrangement or understanding alleged.

Although there was evidence that petrol retailers made telephone calls to each other about future price increases, the Federal Court held there was little or no difference between telephoning a rival to give them advance notice of prices changes and notifying them using a

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\(^{10}\) Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission [2005] FCAFC 161 at [43]
price board, stating there was 'nothing inherently sinister' about using the telephone to convey price information. On this basis, the Federal Court found this conduct was not sufficient to constitute a contract, arrangement or understanding and therefore was not a breach of the TPA because the initiator was not obliged to provide the information and the recipient was not obliged to act upon the information.