LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Fuel Price Disclosure Bill Scrutiny Committee

Inquiry into the Draft Fuel Price Disclosure Bill

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Chair’s Preface

High fuel prices have long been a challenge for people in the Northern Territory. While we know that most things are more expensive in the Northern Territory, it is clear that the fuel pricing went beyond any reasonable ‘Territory factor’ in 2012 when the prices started to increase considerably due to increases in the retail margin.

The Government sought to understand the reasons for increased retail margins through the *Fuel Summit* and this Inquiry. Despite these efforts, it is still unclear what factors caused fuel prices to change so dramatically. The ACCC has identified that fuel prices in the Territory have been considerably high for a number of years and recently started an investigation into fuel pricing in Darwin.

Since the *Fuel Summit*, fuel prices have reduced significantly, which is a real benefit for Territorians. It appears that the ongoing scrutiny since the Summit and commencement of the ACCC investigation has reduced prices, at least for the short term. Whether this is a long term solution remains to be seen.

The Committee found a number of issues with the Draft Bill, particularly in relation to the red tape and administrative costs it creates, and the lack of consultation and appeal rights regarding publishing commercially sensitive information. There were also concerns raised about the breadth of the powers to make laws that is delegated through the Draft Bill that is not subject to parliamentary review. These issues would need to be thoroughly investigated by the Government before progressing further with this Bill.

The Committee believes that the Government should await the outcome of the ACCC investigation to consider its findings and gain a better understanding of what is reasonable in terms of fuel prices in the Darwin market. The best outcome for Territorians would be for fuel prices and retail margins to stay at or below a level comparable with the pre 2012 prices without the need for government intervention. However, if there continues to be a failure in the Territory fuel market, intervention, such as price disclosure laws, should be considered.

Gerry Wood MLA

Chair

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Acronyms and Abbreviations

AANT	Automobile Associate of the Northern Territory
ACCC	Australian Competition and Consumer Commission
AIP	Australian Institute of Petroleum
AUD	Australian dollar
cpl	Cents per litre
GST	Goods and services tax
IPP	Import Parity Price
Mogas 95	Singapore Mogas 95
RULP	Regular unleaded petrol
TGP	Terminal gate price
USD	United States dollar

Terms of Reference

The Legislative Assembly resolved on 22 October 2014 that:

1. This Parliament appoints a Select Committee named the Fuel Price Disclosure Bill Scrutiny Committee to scrutinise the draft Fuel Price Disclosure Bill prepared by the Office of the Parliamentary Counsel dated 14 October 2014.
2. The Committee will enquire into the effect of the bill in meeting its aims of better informing motorists of the price structure of fuel and promoting price competition.
3. The Committee will enquire into mechanisms for setting a price motivator exemption to be gazetted under the bill.
4. The Committee's membership shall comprise three Government Members, who shall be the Members for Daly, Blain and Arafura; two opposition members and the Member for Nelson, who shall be the Chair.
5. The Committee may elect a Deputy Chair of the committee, who may act as the Chair when the Chair is absent from a meeting or there is no Chair of the Committee.
6. A quorum of the Committee shall be three Members of the Committee.
7. The Committee is to report by the April 2015 Parliament sittings.
8. The provisions of this resolution have effect notwithstanding anything contained in the Standing Orders.

Executive Summary

The rising retail fuel prices in the Northern Territory have been of concern to the Government and consumers for a number of years. Whilst fuel has always been more expensive in the Territory than other parts of the country, there was a noticeable shift in the fuel market from 2012 which saw significant increases in the price differential between the Territory and the national average. The change also coincided with a dramatic increase in the retail margin, that is, the difference between the wholesale and retail price. The Northern Territory fuel market became upwardly sticky; it did not respond to downward movements in wholesale prices, with retail prices remaining high despite worldwide reductions in the price of crude oil.

In response to the consistently high retail fuel prices, the Government held a *Fuel Summit* in October 2014 to engage with stakeholders to ascertain what factors were driving fuel prices to such extremes. The Government heard a range of arguments regarding why prices are higher in regional markets; however, the driver behind the market changes in 2012 remained unidentified.

The Government put out the Draft Fuel Price Disclosure Bill in October 2014 and established the Fuel Price Disclosure Bill Scrutiny Committee to evaluate the effectiveness of the Draft Bill in increasing consumer awareness of fuel pricing structures and promoting price competition. As part of the Inquiry, the Committee was tasked with considering mechanisms for establishing a price motivator exemption.

The Draft Bill centres on the premise that fuel retailers would be required by Gazette notice to periodically disclose cost and profit information relating to the business of fuel retailing to the Commissioner of Consumer Affairs, who would analyse and publish fuel retail pricing information.

The Committee found that a considerable amount of information is already publically available to consumers which identifies the different components within the retail fuel pricing structure. However, this information does not provide a breakdown of the operating costs and profits contained within the retail margin. It is evident that the high retail fuel prices in the Northern Territory since 2012 are attributable to increased retail margins, not changes in crude oil, wholesale fuel prices or a weakening Australian dollar.

The Committee considered the notion of a price motivator exemption and whether such a mechanism would be effective in reducing retail fuel prices. The general concept of a price motivator exemption is that if a retailer prices below a certain amount or within a specified range, they would be exempt from disclosing information to the Commissioner. The Committee did not receive any evidence to suggest that such a mechanism would decrease retail fuel prices.

There are a range of business models and operating structures within the Northern Territory fuel market. These differences between fuel retailers may lead to complications in analysing and comparing the cost and profits structures of retailers to ascertain meaningful data.

The Committee notes that a number of concerns about the Draft Bill were raised by fuel companies. There is potential that commercial-in-confidence information disclosed to the Commissioner may be released to the public and competitors through the Commissioners publications. Under the proposed framework, there is no consultation with retailers prior to publishing information, nor are there administrative appeal avenues if a retailer does not want commercially sensitive information to be published.

It has been suggested by fuel companies that the cost to retailers of complying with regulatory intervention is likely to be passed on to consumers, which may have the unintended consequence of increasing retail fuel prices.

During the course of the Inquiry, the Australian Competition and Consumer Commission (ACCC) announced a micro market investigation into all levels of the supply chain in the Darwin fuel market. It is anticipated that the findings of this investigation will be released in the second half of 2015.

A distinctive change in the Northern Territory fuel market has been observed since the *Fuel Summit* in October 2014. Retail fuel prices have decreased significantly in the six months prior to the tabling of this report. Furthermore, the price differential between the Territory and the national average has reduced, as has the retail margin in the Territory. It appears that the heightened and sustained scrutiny of retail fuel prices has resulted in the market becoming much more responsive to downward movements in wholesale prices and these are being reflected at the petrol bowser.

The Committee recommends that in light of the current ACCC investigation and the recent reductions in retail fuel prices, the Government postpone any regulatory intervention in the Northern Territory fuel market pending the findings of the ACCC report and the stability of reduced retail margins.

Recommendations

Recommendation 1

The Committee recommends a price motivator not be included within any disclosure requirements made under the Draft Bill.

Recommendation 2

The Committee recommends that the Government follow its usual procedures prior to introducing any fuel price disclosure bill into the Assembly and submit it to the Regulation Impact Unit for a comprehensive analysis of the costs and benefits to businesses, community and the Government.

Recommendation 3

The Committee recommends that before the Draft Bill is introduced into the Assembly it is amended to make any rule making powers that may significantly impact on a person's rights subject to disallowance by the Assembly.

Recommendation 4

The Committee recommends that any bill introduced into the Assembly should only delegate legislative power for purposes specified in the bill.

Recommendation 5

The Committee recommends that further consideration be given to the appropriate level of consultation and appeal rights prior to introducing any fuel price disclosure bill into the Assembly.

Recommendation 6

The Committee recommends that:

a) The Government does not introduce a fuel price disclosure bill prior to the outcome of the ACCC's investigation into the Darwin fuel market; and

b) If after the ACCC's investigation into the Darwin fuel market the Government considers fuel price disclosure laws are warranted, the Draft Bill be reviewed in light of the Committee's recommendations and the ACCC investigation.

1 Introduction

Aim of the Draft Bill

1.1 The aims of the Draft Fuel Price Disclosure Bill (the Draft Bill) are 'to ensure transparency in the Northern Territory's automotive fuel retail market and to make automotive fuel retailers more accountable to consumers'.[1]

1.2 The Committee heard that the intent of the Draft Bill is to 'create a legislative framework encouraging transparency and accountability in the market through disclosure of information by fuel industry in relation to their costs and profits' and 'it is directed at retail. That is clear from the way in which the bill is drafted'.[2]

Conduct of the inquiry

1.3 The Legislative Assembly established the Committee on 22 October 2014.

1.4 At its meeting on 23 October 2014, the Committee called for submissions by 1 December 2014. The call for submissions was advertised on the Assembly's website and in the NT News. The Committee also directly contacted a number of organisations to advise them of the call for submissions.

1.5 The Committee received five submissions and held a public hearing in Darwin on 13 February 2015. Details of the submissions and public hearing are included in Appendix 1.

[1] Honourable John Elferink MLA, *Motion: Establishment of Fuel Price Disclosure Bill Scrutiny Committee*, Hansard, Debates, 22 October 2014.
[2] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, pp. 4 & 11.

2 Fuel Pricing

2.1 Retail fuel prices are made up of a number of key components that determine the end price paid by consumers at the petrol bowser. The building blocks of retail fuel prices include: Singapore Mogas 95, Import Parity Price, Commonwealth fuel excise and taxes, wholesale or terminal gate price and the retail margin. This chapter will explain the key elements within fuel pricing in detail and examine the associated cost and profit components.

Singapore Mogas 95

2.2 The primary determinants of retail fuel prices in Australia are the international price of refined fuel, which, in Australia, is the Singapore Mogas 95 (Mogas 95), and the Australian dollar (AUD) – United States dollar (USD) exchange rate. The Mogas 95 is the international benchmark price in USD for regular unleaded petrol (RULP) in the Asia-Pacific region. The Mogas 95 is influenced by the price of crude oil, predominantly Tapis crude oil, and may also be affected by global supply of crude oil and refined petrol. Decreases in the value of the AUD subsequently lead to increases in the Mogas 95 price in Australian cents per litre (cpl). The Mogas 95 is the most influential factor in determining retail prices; however, wholesalers and retailers within Australia have no control over the value of the Mogas 95.

Import Parity Price

2.3 The Import Parity Price (IPP) is the notional average cost for companies to import fuel into Australia, also known as the 'landed cost' of petrol.[3] The specific value of the IPP is comprised of the Mogas 95 price, along with the associated costs of transporting fuel to Australia and the quality premium charge (see 2.4). In 2013-14 the international benchmark price accounted for 95% of the IPP.[4] The common formula to determine the IPP for RULP is shown below, while Figure 1 outlines the average breakdown of the IPP components:

> IPP (RULP) = Benchmark price of refined petrol (Mogas 95) + Quality premium + Freight + Insurance and loss + Wharfage[5]

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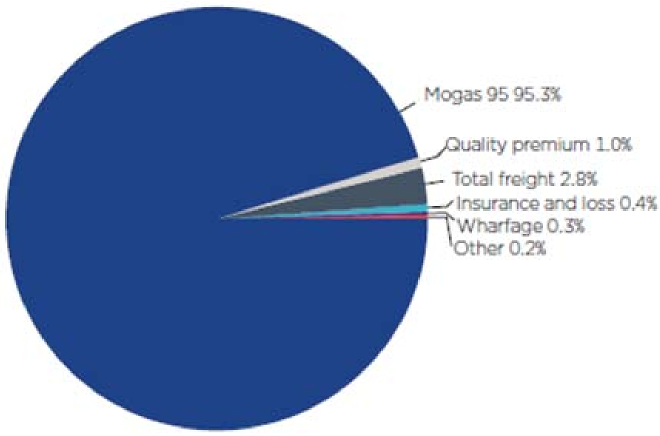
[3] Australian Institute of Petroleum (AIP), *The Australian whole market and fuel prices,* viewed 17 February 2015, <http://www.aip.com.au/industry/dp2011/dp2011_11.htm >.
[4] Australian Competition and Consumer Commission (ACCC), 2014, *Monitoring the Australian petroleum industry,* p. 39.
[5] ACCC, 2011, *Monitoring the Australian petroleum industry,* p.127.

Figure 1: Average breakdown of IPP components



Source: ACCC[6]

2.4 The *Fuel Quality Standards Act 2000* (Cwth) sets out national fuel quality standards for petrol, diesel, autogas and ethanol, which first came into effect in 2002.[7] These standards regulate the quality of fuel that may be imported into Australia and, in turn, sold to retailers. The Australian fuel standard specifications are generally higher than the normal standard of RULP refined within the Asia-Pacific region. This results in Australian importers paying a fuel quality premium, included in the IPP, to source fuel that is refined to the higher Australian standard.

Wholesale fuel price

2.5 The largest component of the wholesale fuel price is the IPP, followed by the Commonwealth government fuel excise of approximately 38cpl and the 10% goods and services tax (GST), which, combined, accounted for 97% of the wholesale price in 2013-14.[8] Also included in the wholesale fuel price is a wholesale margin and operating costs; however, these are a minute proportion of the overall wholesale price. The majority of wholesale transactions occur under commercial-in-confidence contractual arrangements, therefore the actual wholesale price paid by resellers, distributors and retailers is unknown by consumers.

Terminal gate price

2.6 Terminal gate prices (TGP) are the daily 'spot' prices at which fuel can be purchased from a refinery or wholesale terminal (storage facility). The average TGP for each terminal is published daily on the Australian Institute of Petroleum (AIP) website. Individual wholesalers also publish their daily TGP on their

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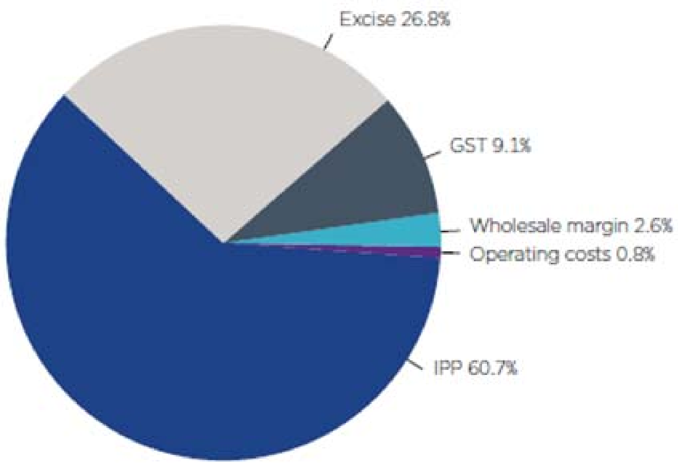
6 ACCC, 2014, *Monitoring of the Australian petroleum industry,* p. 42.
7 Department of the Environment, *Fuel Quality Standards,* viewed 25 February 2015, <http://www.environment.gov.au/topics/environment-protection/fuel-quality/standards>.
8 ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 39.

websites. The TGP is the theoretical cash price that a wholesaler will charge for a buyer to purchase a 30,000 litre tanker of fuel on any given day. This price is only inclusive of the fuel and does not include extras such as charges for line of credit, transport or branding. In reality, the majority of fuel is not sold at the published TGP due to the contractual arrangements in place for the sale of fuel. The contractual wholesale price for each buyer may be higher or lower than TGP, as it may include the extras previously mentioned or discounted prices for high volume purchases. Whilst TGP is not identical to the negotiated wholesale prices, movements in TGP closely mirror movements in the IPP, and therefore are used as an indicative wholesale price. In 2013-14, the annual average difference between wholesale prices and TGP in the major capital cities was less than 2cpl.[9] Whilst there are variations between companies, the most common formula for calculating TGP is outlined below, with the proportions of each component shown in Figure 2:

TGP = IPP + Excise + GST + Wholesale operating costs + Wholesale margin[10]

Figure 2: Average breakdown of terminal gate prices components



Source: ACCC[11]

Retail fuel price

2.7 The four broad components of retail fuel prices are the IPP, Commonwealth taxes (excise and GST), wholesale margin and the retail margin. The retail margin is the difference between the wholesale price and the retail price and includes retail operating costs and profits. The expenses accounted for within the retail margin may include: rent, utilities, transport, labour and wages, franchisee expenses, insurance, marketing and advertising, maintenance,

[9] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 47.
[10] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 44.
[11] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 45.

depreciation and GST on the retail sale. Many of these costs are fixed operating costs and do not vary much, if at all, with the volume of fuel sold. Retailers must apportion the fixed operating costs against the amount of fuel sold, therefore the operating cost per litre of fuel decreases as the volume of fuel sold increases. The exact breakdown of the costs and profits within the retail margin is dependent on the type of business model or operating structure, as well as any ancillary businesses that are associated with the retail outlet, such as a convenience store, car wash or mechanic workshop.

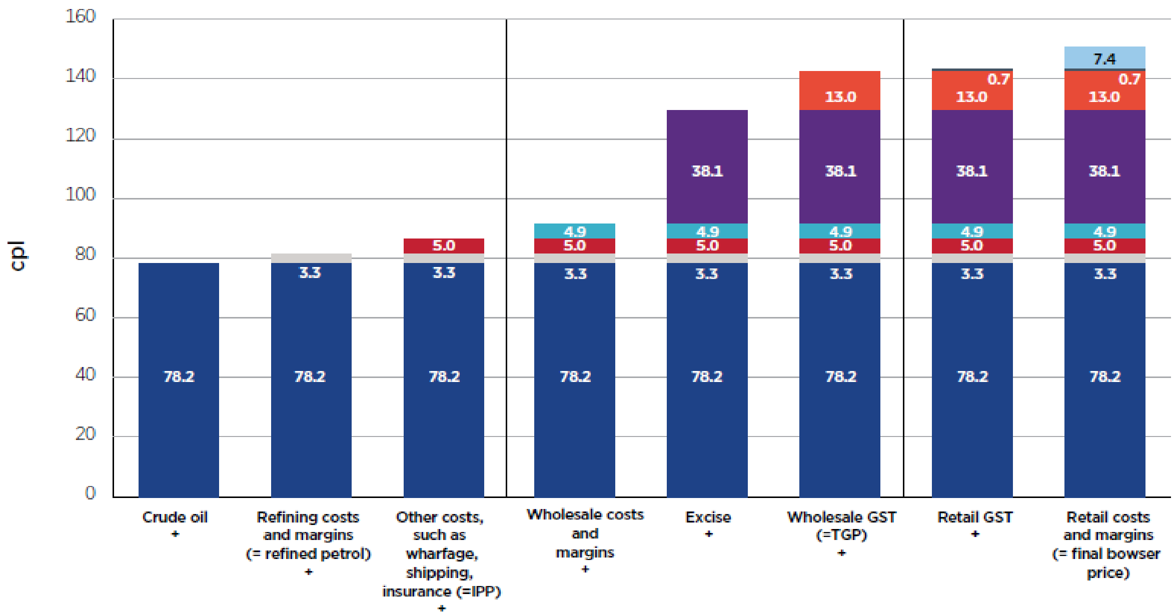
2.8 In 2013-14, the IPP and taxes accounted for 88% of the retail fuel price in the five largest capital cities and this percentage is comparable with previous years.[12] Retailers have no control over the cost of the IPP and taxes. It is likely that in regional areas the IPP and taxes account for a lower proportion of the retail price in comparison with the five largest capital cities. In these regional areas, the retail margin is generally larger, which results in higher retail fuel prices. The factors relating to the increased retail margin and fuel prices in regional areas will be discussed in more detail in Chapter 4.

2.9 According to the Australian Competition and Consumer Commission (ACCC):

> Movements in retail petrol prices are primarily due to changes in the international price of refined petrol and the AUD-USD exchange rate.[13]

2.10 Figure 3 below illustrates the breakdown of retail fuel prices for the five largest capital cities in 2014.

Figure 3: Average component costs of retail fuel prices



Source: ACCC[14]
Note: The retail margin is based on the five largest capital cities and therefore is not representative of the typically higher retail margin in the Northern Territory.

[12] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 58.
[13] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. xxiv.
[14] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 61.

Monitoring retail fuel prices

ACCC and its role in monitoring retail prices

2.11 The ACCC has monitored and reported annually on the prices, costs and profits of the Australian petroleum industry for the past seven years. The primary role of the ACCC in the petroleum industry is to enforce the *Competition and Consumer Act 2010* (Cwth). The ACCC annual reports aim to enhance transparency and 'increase public awareness of the factors that determine retail petrol prices in Australia'.[15]

2.12 Whilst the ACCC is responsible for reporting on fuel pricing and investigating possible anti-competitive behaviour within the industry, it is important to note that:

> The ACCC does not set wholesale or retail petrol prices in Australia. They are determined by the market. Put another way, it is not against the law simply to price well above cost.[16]

2.13 In developing the annual reports, the ACCC collected data from approximately 180 locations within Australia. Four of these locations are in the Northern Territory: Darwin, Alice Springs, Katherine and Tennant Creek. The ACCC collected data from the major retailers within the industry, which included: the four refiner-wholesalers, BP, Shell/Viva Energy, ExxonMobil and Caltex; supermarket chains, Woolworths and Coles; and the large independent retailers, Puma Energy, United Petroleum, 7-Eleven and On The Run.[17] The ACCC did not collect information from smaller independent retailers as part of the annual reporting process. Due to the ACCC data collection limitations in terms of location and size of retailer, the annual reports have not provided an analysis of the retail petroleum industry in regional and remote areas of the Northern Territory.

2.14 In December 2014, the Federal Minister for Small Business issued a new Ministerial direction to the ACCC in respect of its role in monitoring fuel prices. Under the new direction, the ACCC will produce quarterly macro reports instead of annual reports, with the first report released in February 2015. In addition to the quarterly macro reports, the ACCC will also investigate and report on specific issues and locations in the fuel industry, known as micro market investigations.

2.15 In January 2015, the ACCC announced that it would commence undertaking micro market investigations into fuel prices in regional markets. The ACCC will analyse three regional locations in 2015 and will utilise its compulsory information gathering powers under Section 95ZK of the *Competition and Consumer Act 2010* (Cwth) which were activated with the Ministerial direction.[18]

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[15] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. xviii.
[16] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. xii.
[17] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 24.
[18] ACCC, *ACCC's new petrol price reports,* media release, 15 January 2015.

The locations are only publically announced once the compulsory information notices have been issued to ensure there are no changes in market behaviour prior to the investigation. The micro market investigations will examine:

> the cost of fuel in the nearest port, transport and storage costs, as well as wholesale, distribution, and retail costs to fully explain prices and where money is being made in the petrol price value chain.[19]

2.16 The ACCC has identified three potential benefits of the micro market investigations in regional locations:

- Providing greater transparency to empower consumers;
- Possible recommendations for change to some tier of government; and
- Identifying potential breaches of the Competition and Consumer Act that may have not been otherwise apparent.[20]

2.17 On 10 March 2015, the ACCC announced that Darwin would be the first location to be the subject of a micro market investigation. The ACCC has issued compulsory information notices to 'fuel companies at every level of the supply chain leading into Darwin'.[21] Through its investigation, the ACCC intends to obtain 'deep and detailed information about every step of the supply chain' to understand the differential between Darwin retail prices and those of other capital cities and other comparable regional locations.[22]

2.18 In addition to issuing compulsory information notices, the ACCC is also seeking information and comments from 'consumers, industry participants, stakeholders and any other interested parties regarding the petroleum industry in Darwin', which are due by 31 May 2015.[23] The ACCC has highlighted that 'gathering and analysing this complex data will take considerable time'.[24] The report into the Darwin petroleum industry is expected to be released in the second half of 2015.

2.19 At the public hearing, the Committee heard that both the Northern Territory Government and the Automobile Association of the Northern Territory (AANT) had made several approaches to the ACCC to undertake an investigation into the Territory fuel market. Furthermore, the Committee received suggestions from fuel companies during the hearing that the Government should solicit a one off report from the ACCC into the fuel market.[25]

2.20 At the time of the hearing it was unknown which regional locations would be selected for micro market investigations. The Committee welcomes the announcement by the ACCC and believes that the ACCC regional report will

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[19] ACCC, *ACCC's new petrol price reports,* media release, 15 January 2015.
[20] ACCC, *ACCC Announces first regional petrol market study in Darwin,* media release, 10 March 2015.
[21] ACCC, *ACCC Announces first regional petrol market study in Darwin,* media release, 10 March 2015.
[22] ACCC, *ACCC Announces first regional petrol market study in Darwin,* media release, 10 March 2015.
[23] ACCC, *ACCC Announces first regional petrol market study in Darwin,* media release, 10 March 2015.
[24] ACCC, *ACCC Announces first regional petrol market study in Darwin,* media release, 10 March 2015.
[25] Caltex in Committee Transcript, 13 February 2015, p. 24 & BP in Committee Transcript, 13 February 2015, p. 29.

provide a comprehensive understanding of what is occurring within the Darwin fuel market.

Availability of fuel price data

2.21 During the course of the Inquiry, the Committee heard that consumers already have access to a wide range of information relating to fuel pricing components and this information is freely published by a number of sources.

2.22 The Department of Treasury and Finance publish economic briefs on Territory fuel prices, usually on a monthly basis, which can be found on their website. The Department has been monitoring fuel prices since 2007.[26]

2.23 In addition to the reports published by the ACCC, there are a number of other companies that regularly publish information regarding fuel prices. Websites such as the AANT and MotorMouth publish the daily retail prices at different petrol stations in the Greater Darwin area. The AANT also lists the average retail prices in Alice Springs, Katherine and Tennant Creek, however, this does not identify specific prices at individual outlets.[27] There are also a range of smartphone applications available, such as Woolworths and MotorMouth, that inform consumers of current retail fuel prices.[28] The AANT suggests that a higher level of information needs to be available to consumers outside of the Greater Darwin area.[29]

2.24 The AIP has a broad range of publically available information on its website that consumers can access to improve their understanding of the petroleum industry, pricing structure and obtain current and historical pricing details. In addition to publishing the daily average TGP for each capital city, the AIP also produces weekly reports containing information regarding:

- Retail price in Darwin, Alice Springs, Katherine and Tennant Creek;
- Retail price for the Northern Territory;
- Retail price for regional areas;
- TGP in Darwin;
- Tapis crude oil price; and
- Mogas 95 price.[30]

2.25 The Committee received evidence that consumers can readily calculate the price difference between the TGP and retail price, known as the retail margin, through the considerable information already publically available to

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[26] Department of Treasury and Finance in Committee Transcript, 13 February 2015, p. 3.
[27] Automobile Association of the Northern Territory (AANT), *Fuel prices,* viewed on 18 February 2015, <http://www.aant.com.au/Motoring/Fuel/FuelPrices/?fuelType=2> & MotorMouth, *My price search,* viewed on 18 February 2015, <https://motormouth.com.au/pricesearch.aspx>.
[28] Woolworths Limited, Submission No. 3, 2014, p. 2.
[29] AANT, Submission No. 4, 2014, p. 3.
[30] AIP, *Weekly Petrol Prices Report,* viewed on 2 March 2015, <http://www.aip.com.au/pricing/weeklyreport.htm>.

consumers.[31] In the supplementary submission provided by Caltex following the public hearing, the example shown in Table 1 illustrates how this information can be compiled by consumers.

Table 1: Fuel pricing structure derived from publically available data

Price component	Price (Acpl)	Note
Singapore price	56	From AIP website chart
Int'l freight and charges, terminal cost and wholesale margin	12	By difference from TGP and cost/tax components
Excise	39	From ATO schedule
10% GST (included in TGP)	11	
Terminal gate price	118	AIP average of supplier TGPs
Retail margin, inland freight and GST on margin	11	By difference
Retail price	127	Typical price per AANT
NOTE: This analysis is indicative and does not take into account lags between pricing components		For example, TGP is based on a 7 day rolling average of Singapore prices and retail prices lag TGP changes

Source: Caltex[32]

Note: This data relates to prices for 12 February 2015.

2.26 As noted in the table, there may be inaccuracies when comparing the Mogas 95 (Singapore price) and TGP with the retail price. This is due to the lag times between purchases by wholesalers and retailers. Lag times in fuel pricing occur as wholesalers and retailers purchase a quantity of fuel on a particular day at a particular price. The IPP and TGP vary daily, however, the length of time that a wholesaler or retailer is selling the fuel purchased at a specific price will vary depending on their throughput. High throughput wholesalers and retailers will respond more quickly to changes in wholesale prices and adjust their retail prices accordingly, as they have purchased subsequent fuel at the new price. Low volume sellers will generally take longer to adjust their retail prices due to the slower turnover of fuel supplies. As such, consumers cannot use the differential between a current TGP and retail price to calculate the exact retail margin on each litre of fuel, as this will not allow for an unknown lag time which can affect the size of the margin. However, as TGP closely follow movements in the IPP, the calculations will provide an indicative estimation, particularly if the fluctuations in TGP have only been minor.

2.27 As discussed in this chapter, there is a large amount of publically available information that consumers can access if they wish to gain a better understanding of fuel pricing structures. As, on average, 97% of the wholesale

[31] Caltex, Submission No. 1, 2014, p. 7 & Woolworth Limited, Submission No. 3, 2014, pp. 2-3.
[32] Caltex, Supplementary submission provided following the public hearing, 2015 p. 6.

price is comprised of the IPP and Commonwealth taxes (excise and GST), consumers are unlikely to undertake a detailed analysis of the wholesale price, as the cost of its major components cannot be influenced by wholesalers and retailers. Given that wholesale prices across the major fuel terminals do not vary to anywhere near the same extent as retail prices across the country, consumers are likely to have little interest in access to additional information relating to wholesale prices.

2.28 The price that is ultimately of most concern to consumers is the price they pay on a daily basis at the fuel bowser. The retail price is what varies most across the country, particularly in regional and remote areas. The Committee notes that whilst consumers are able to calculate the retail margin, using a method such as the one provided by Caltex, this will only inform them of the retail margin without any context of the operating costs contained within that margin and the amount of profit that a retailer is making on each litre of fuel sold. Consequently, the information already available to consumers is of limited value in better understanding the changes in the retail margin in the Northern Territory in recent years.

3 Northern Territory Fuel Market Structure

3.1 The fuel market in the Northern Territory has been described as an oligopoly.[33] A number of large companies are vertically integrated, that is they operate at many levels within the fuel supply chain, whilst fewer smaller players are only involved in one specific sector. Whilst it is difficult to ascertain from publically available information the exact proportions of control and ownership within the downstream petroleum industry, this section of the report will provide an outline of the Northern Territory fuel market using available data.

Fuel Terminal

3.2 The Vopak fuel terminal located at East Arm in Darwin is an independently owned and operated import terminal and is not aligned with any fuel companies. Fuel products are supplied by ship and held in storage tanks at Vopak prior to being sold through wholesale arrangements.[34] Any company that will have a large enough turnover may lease Vopak storage space and sell wholesale fuel from the terminal.

3.3 Mr Szymczak from United Petroleum explained:

> Vopak is really only a tank renter. That is the best way to think about them. They do not get involved in anything. Really all they do is rent you tanks, make sure the gantry works and so forth. About two times a year, each half, there are buy-sell negotiations between all the players and terminal. Anyone in that terminal has the right to basically supply anyone. There is a process whereby – it could be, for example, that ExxonMobil will put in a price too. You have to understand usually there are only two people who can supply Darwin to make the ship economics work, and clearly it works better with only one supplier in Darwin. You buy parts of ships.
>
> For example, ExxonMobil might decide they will supply to Darwin and will contact us, they will contact Puma, they will contact Caltex and BP and say, 'This is the price we are prepared to supply you at. Are you interested?' BP might decide to try supplying Darwin and will have their price. Basically everyone talks to everyone and in the end someone gets the supply into Darwin by agreeing with the others.[35]

Wholesale

3.4 The three broad categories of companies operating within the Australian wholesale sector are:

- Refiner-wholesalers (BP, Caltex, ExxonMobil and Shell/Viva Energy): produce fuel in domestic refineries, purchase and on sell from other refiner-wholesalers and import fuel from overseas;

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[33] Acil Allen Consulting, 2014, *Fuel Prices in the Northern Territory – Observations after the Fuel Summit,* p. 1.

[34] Acil Tasman, 2009, *Petroleum Import Infrastructure in Australia: Executive Summary,* p. 11, viewed on 4 March 2015, <http://www.aip.com.au/pdf/Petroleum_Import_Infrastructure_in_Australia_Executive_Summary.pdf>.

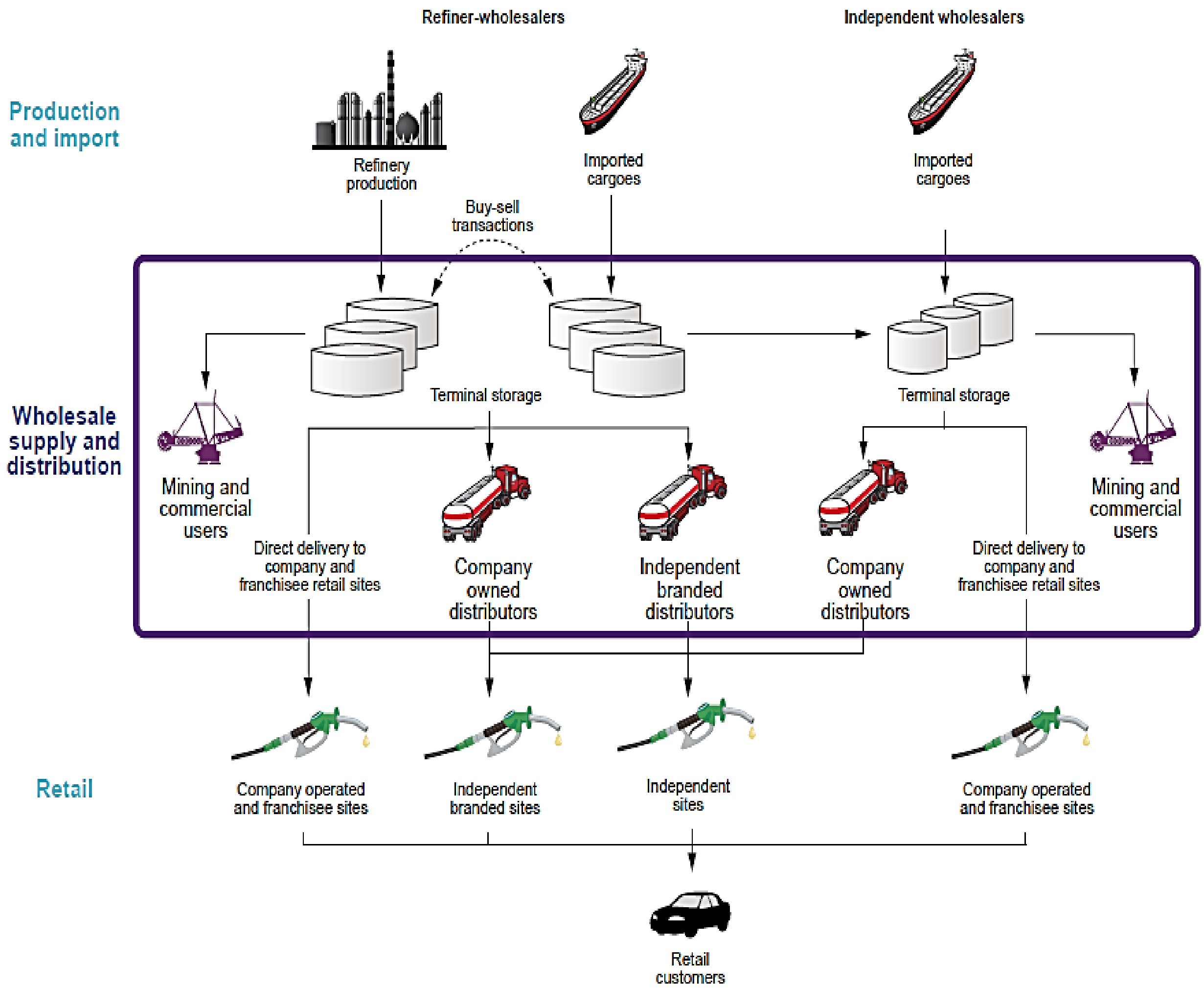
[35] United Petroleum in Committee Transcript, 13 February 2015, pp. 44-45.

- Independent importers: import low volumes of fuel to sell to independent wholesalers; and
- Independent wholesalers (Puma Energy, United Petroleum and Liberty): source fuel from both refiner-wholesalers and independent importers.[36]

3.5 As discussed in Chapter 2, wholesale transactions with retailers may occur through negotiated contractual arrangements or spot purchases using the TGP. The companies currently wholesaling from the Vopak terminal include: Caltex, Puma Energy, United Petroleum, BP, Liberty, Viva Energy and ExxonMobil.[37]

3.6 Figure 4 provides an overview of the fuel supply chain in the Australian petroleum industry.

Figure 4: Fuel supply chain



Source: ACCC[38]

[36] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 39.
[37] These companies all advertise TGP on their websites for the Darwin Vopak terminal.
[38] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 40.

3.7 The Committee heard that Puma Energy and Viva Energy bring in and sell the largest amount of fuel within the Territory market.[39] As specific wholesale market information is not available in the public domain, it is not possible to determine the market share of each participant in the wholesale fuel sector.

Retail

3.8 The majority of retail outlets within the Northern Territory major centres are owned and operated by a small number of companies. There is a limited number of retail outlets that are not part of a company which owns multiple retail sites that are each traded under a different business name.[40]

3.9 The branding on a retail fuel outlet is not an indication of the owner/operator, nor is it an indication of the type of business structure that the outlet operates under. A company that owns multiple retail outlets may have different brands attached to each outlet.[41] Furthermore, the branding displayed at a retail site does not necessarily indicate which wholesalers the retailer has a contractual arrangement with. A retailer may purchase fuel from one company brand, retail it under another brand and be owned by a company that is not affiliated with either brand.

3.10 Puma Energy is the largest independently owned fuel company (not affiliated with the refiner-wholesaler oil companies) in the Australian petroleum industry and is involved in the wholesale, retail, storage and transport sectors of the industry.[42] Within the Northern Territory, Puma Energy owns and operates approximately 24% of the retail outlets.[43] The branding attached to these outlets includes Puma Energy, BP, Caltex and Gull.[44] Puma Energy also operates retail outlets under franchise arrangements. At the time of this report being tabled, Puma Energy was advertising 'multi-site cluster' franchise opportunities within metropolitan and regional areas in the Northern Territory.[45] As part of the franchise operating model, Puma Energy is responsible for payment of all of the fixed operational costs and the maintenance of fuel pumps and associated equipment. Puma Energy determines the retail fuel prices for every site and receives the income from all fuel sales. The franchisee is paid a management fee from Puma Energy and receives the proceeds from applicable shop sales.[46]

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39 Puma Energy in Committee Transcript, 13 February 2015, pp. 51-52.
40 Based on publically available information on the Australian Business Register and the ASIC websites.
41 Based on publically available information on the Australian Business Register and the ASIC websites.
42 Puma Energy, viewed on 3 March 2015, <http://www.pumaenergy.com/en/regions/asia-pacific/australia>.
43 Puma Energy in Committee Transcript, 13 February 2015, p. 49.
44 Puma Energy, *Sites that accept Pumacard,* viewed on 3 March 2015, <http://www.pumacard.com.au/pdfs/PUM2772%20-%20Pumacard%20Merchant%20List%20v1.3%20-%20P.pdf>.
45 Puma Energy, *Service Station Franchise Opportunities,* viewed on 3 March 2015, <http://www.pumaenergy.com.au/business-opportunities/franchise-opportunities/>.
46 Puma Energy, *Retail Partnership Overview,* viewed on 3 March 2015, <http://www.pumaenergy.com.au/assets/Franchise/Puma-Franchise-Summary.pdf>.

3.11 United Petroleum is an independent Australian owned petrol and convenience store company.[47] United Petroleum participates in both the wholesale and retail sectors of the Northern Territory fuel market, with 11 outlets retailing under its branding in the Territory. United Petroleum retail outlets may be either company owned and managed or operated through franchise arrangements. As part of the franchise agreement, fuel is provided to the franchisee by United Petroleum at no cost and the franchisee receives a cents per litre commission on all fuel sales. The franchisee is required to pay a fixed percentage of gross shop turnover, excluding fuel sales, to United Petroleum which covers operating expenses such as site rental, access to systems and support services.[48]

3.12 There are two supermarket fuel retailers in the Northern Territory. Coles Express is affiliated with Shell, whilst Woolworths is affiliated and co-branded with Caltex. These supermarket fuel retailers are believed to account for around 25% of the retail outlets in Darwin.[49]

3.13 Despite the large number of Caltex branded retail fuel outlets in Darwin, only two of these sites in Darwin are owned and operated by Caltex.[50] As previously outlined, the other sites displaying Caltex branding are either affiliated with Woolworths or owned and operated by other companies in the fuel market, such as Puma Energy. Caltex is only responsible for the retail pricing at the two sites in Darwin and one site in Katherine that it owns and operates.[51]

3.14 Despite the sizeable number of BP branded retail outlets, these are neither owned nor operated by BP, as BP is a wholesaler, not a retailer, in the Northern Territory.[52]

3.15 It is evident that franchise arrangements and the operating structure of a retail outlet have a direct impact on how retail prices are determined and who is in charge of setting these prices.

3.16 The Committee notes that it is not possible to determine the exact ownership of individual fuel retail outlets, their operating and business structure, and the commercial relationships they may have with other companies in the fuel market solely based on publically available information. The assessment provided of the Northern Territory fuel market has been based upon information readily available within the public domain.

3.17 It is evident that there are a number of major players in the Territory fuel market and a range of different models under which they operate. In order to understand the full nature of the ownership, business structures and commercial relationships, companies would be required to disclose high levels

[47] United Petroleum, *About Us,* viewed on 3 March 2015, <http://www.unitedpetroleum.com.au/united/about-us>.
[48] United Petroleum, *Franchising FAQ,* viewed on 3 March 2015 <http://www.unitedpetroleum.com.au/franchise/faq>.
[49] It was estimated at the Fuel Summit that there are 43 retail fuel outlets in Darwin. Coles and Woolworths combined own 11 outlets within the greater Darwin area.
[50] Caltex in Committee Transcript, 13 February 2015, p. 20.
[51] Caltex, Submission No. 1 (supplementary submission), 2014, p. 16.
[52] BP, Submission No. 2, 2014, p. 1.

of information, some of which may be considered commercially sensitive. The role of the Draft Bill in providing a comprehensive understanding of the arrangements in place within the Northern Territory fuel market will be discussed in more detail in subsequent chapters of this report.

4 The Problem

Northern Territory fuel prices

4.1 The cost of fuel in the Northern Territory and the price differential between retail prices in Darwin and other capital cities has been an ongoing concern to consumers and the Government. This chapter will examine the specifics of the Darwin fuel market and how particular conditions within regional areas may contribute to higher retail prices. It will explore changes within the fuel market that occurred in 2012 and consider the competitiveness of the current market.

4.2 Fuel prices within the Northern Territory have always been higher than the national average. The Darwin TGP is consistently around 3cpl higher than other capital cities, therefore it would follow suit that retail prices would also be higher than other capital cities.[53] The question in the mind of consumers and the Government is how much higher should Darwin and Northern Territory retail fuel prices be in comparison to other capital cities and regional locations.

4.3 The cost of fuel freight from the Asia-Pacific region, predominantly Singapore, to Darwin is lower than the cost of freight to southern capital cities, due to the shorter distance. The port and terminal operating costs and charges vary between each capital city, and the low volume through Darwin reduces the economies of scale. It is likely that these associated costs are attributable to the 3cpl higher TGP in Darwin.

4.4 Fuel prices in regional locations are typically higher than in large metropolitan areas. Whilst the primary determinants of fuel prices are the IPP and the AUD – USD exchange rate, there are a number of factors that can result in higher prices in regional areas including:

- Lower levels of competition, in some instances reflected through a lower number of retail sites;
- Lower throughput (volume of fuel sold per retail outlet);
- Distance and locational factors, such as higher freight charges to transport fuel to retail outlets;
- Lower convenience store sales; and
- Increased lag time for changes in wholesale prices to be reflected in retail prices due to slower turnover of fuel in comparison to high turnover metropolitan outlets.[54]

4.5 It is likely that all of the factors identified above by the ACCC are influential on the high retail prices in regional and remote areas of the Northern Territory; however, the same cannot be said about the Darwin retail market. There is no

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53 Historical data on TGP available from the AIP, viewed on 16 February 2015, <http://www.aip.com.au/pricing/tgp/index.htm#ulp>.

54 ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 73.

shortage of retail outlets within Darwin and the distance between the Vopak terminal and retail sites is relatively short, particularly given the small geographical size of Darwin in comparison to Melbourne and Sydney. However, data from the ACCC shows that retail prices in Darwin are consistently higher than all other capital cities in Australia, which indicates the price differential is potentially related to some of the factors outlined above and possibly some other unidentified causes.[55]

4.6 One of the most commonly cited reasons for higher fuel prices in the Northern Territory is the lower throughput in comparison to more highly populated regions. As mentioned in Chapter 2, the variation in fixed operational costs based on the amount of fuel sold by an outlet is minimal. Consequently, when apportioning the fixed operational costs, the lower the throughput, the higher the operational cost per litre of fuel sold.

4.7 Interestingly, it was noted by Caltex that volume is not a prominent factor in determining retail pricing:

> Throughput is one of the factors, but what I find in examining prices in non-major metro markets around Australia is that there is actually no correlation between the throughput or the average throughput and the level of price.[56]

In their opinion, more influential elements relate to operating sites that are larger, more attractive to consumers, more efficient and subsequently have lower fixed operational costs.

4.8 Mr White from Puma Energy provided an explanation of factors leading to increased retail costs:

> Territory sites, as every other building, have a higher construction and operating cost. The sites here have lower volume of fuel sales and certainly lower convenience sales than sites in other capital cities. This means individual sites generally require higher average fuel margins in order to generate an acceptable return on investment.[57]

4.9 The ACCC supports the correlation between the level of convenience store sales and retail fuel prices:

> The margin on convenience store sales is usually significantly higher than on fuel sales. In the five largest cities convenience store sales generally make a greater contribution to the overall returns of a retail site than they do in regional locations. These retail sites can remain profitable on much lower margins on fuel sales. As a result, upward pressure is put on retail petrol prices in retail sites with lower convenience store sales, such as in regional locations.[58]

4.10 One of the distinctive differences between the Darwin fuel market and the markets of the major capital cities is the absence of a fuel price cycle, which is described as a 'movement in price from a trough to a peak to a subsequent trough'.[59] Price cycles are the result of deliberate competitive pricing policies of

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[55] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 52.
[56] Caltex in Committee Transcript, 13 February 2015, p. 21.
[57] Puma in Committee Transcript, 13 February 2015, p. 47.
[58] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 74.
[59] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. xxviii

retailers. They are not driven by changes in wholesale prices but purely as a competitive marketing strategy. Price cycles operate on the premise that reducing the cpl retail price will significantly increase throughput and the additional volume sold will cover or exceed the cpl loss from the price reduction.

4.11 Mr Szymczak from United Petroleum explained to the Committee that:

> price cycles are an outcome of a very competitive market. The more competitive the market generally the more the market will cycle. The market will cycle with the competitiveness or the reactiveness of people buying. For example, in Melbourne generally if you drop your price by 0.2c per litre compared to a service station across the road you could probably expect a 5% increase in volume…
>
> In Darwin for example we are 0.2c below – at Ludmilla – than BP that is just before us. I do not expect that we would get a 5% increase, so it is really the competiveness of the market; it is where the service stations are located so that the more competitive markets will tend to have price cycling.[60]

4.12 It is evident that the Darwin and Northern Territory fuel markets are not directly comparable to the fuel markets of larger metropolitan areas for a number of reasons. It is expected that retail fuel prices will be higher than in other capital cities. The matter of concern is the degree to which the prices are higher and the changes that occurred in the market that led to this, which will be discussed in the next section of this report.

The retail margin and the 2012 jump

4.13 During the course of the Inquiry, the Committee heard that although fuel prices in the Northern Territory have:

> always been consistently higher, in mid-2012 the gap between Darwin and the other capitals widened markedly and stayed at that level without a clear cost driver as to why that increase happened.[61]

4.14 The retail price of RULP in the Northern Territory between 2002 and 2012 was, on average, 10.1cpl higher than the national average, with the price differential ranging between 5cpl and 15cpl.[62] Since 2012, the Northern Territory and national retail price differential has increased to an average of 19.2cpl, indicating that there has been some change within the market for the average differential to almost double and remain so high for a sustained period of time.[63]

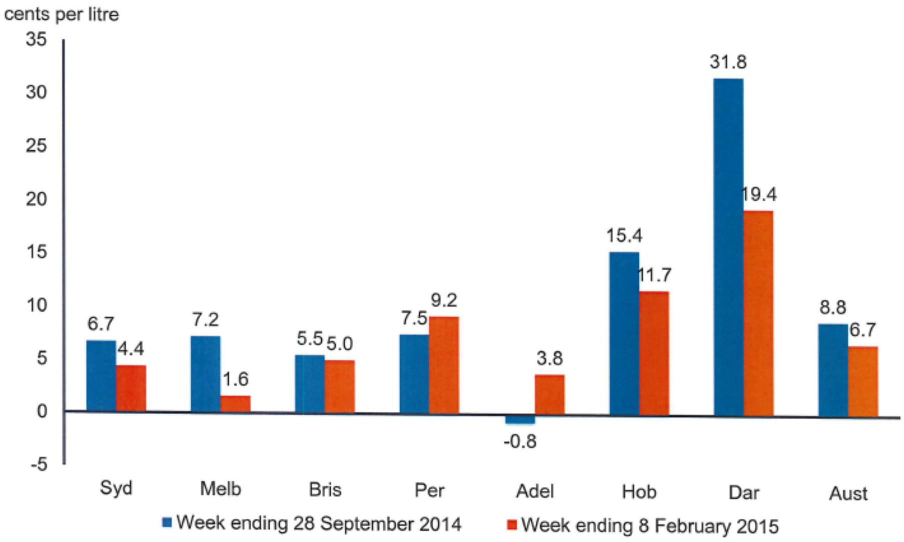
4.15 Prior to 2012, the retail margin (difference between the wholesale and retail price) in Darwin averaged around 10cpl. The margin began to significantly

[60] United Petroleum in Committee Transcript, 13 February 2015, p. 43.
[61] Department of Treasury and Finance in Committee Transcript, 13 February 2015, p. 3.
[62] Acil Allen Consulting, 2014, *Fuel Prices in the Northern Territory,* p.1 & AANT, Submission No. 4, 2014, p.2.
[63] Acil Allen Consulting, 2014, *Fuel Prices in the Northern Territory,* p. 1.

increase from 2012, with an average margin of 24cpl and peaks of up to 35cpl in Darwin and 50 cpl in Alice Springs in 2014.[64]

4.16 It is clear that the retail margin is the cause of high fuel prices in the Territory. Figure 5 illustrates the average retail margin for each capital city in September 2014 (prior to the Fuel Summit) and in February 2015.

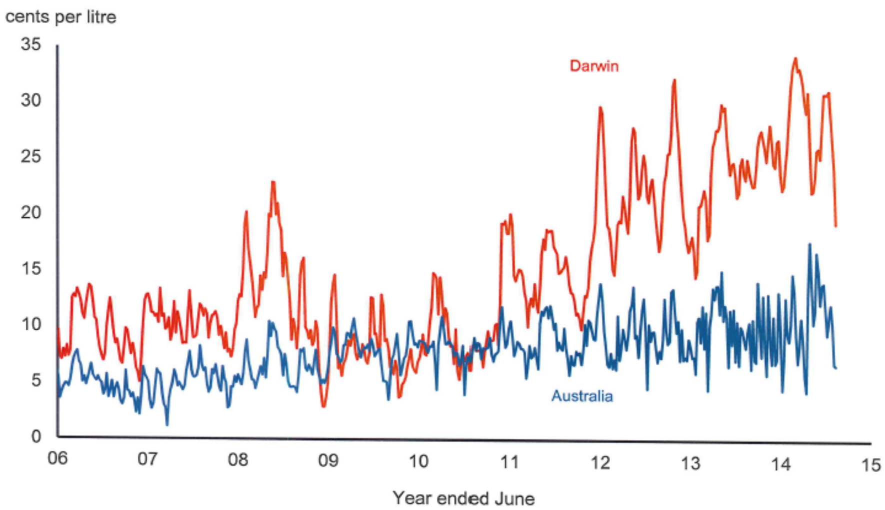
Figure 5: Capital cities average retail margin



Source: Department of Treasury and Finance[65]

4.17 Figure 6 plots the Darwin and national average retail margins from 2006 to 2015, which illustrates the increase in the margin from 2012.

Figure 6: Darwin and national average retail margin 2006-15

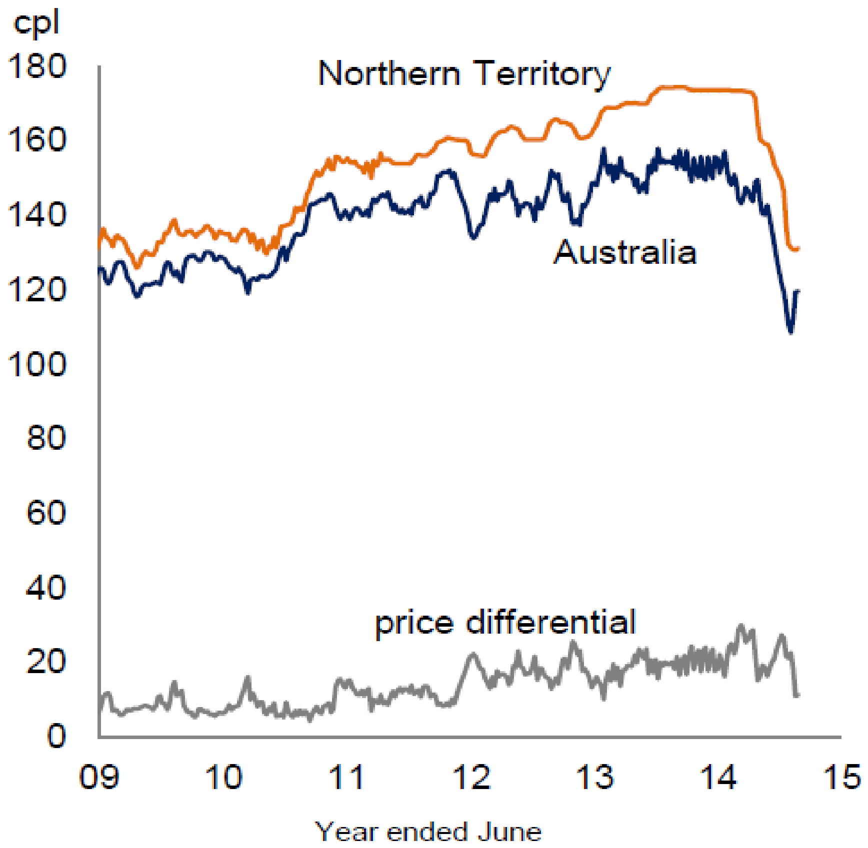


Source: Department of Treasury and Finance[66]

[64] Acil Allen Consulting, 2014, *Fuel Prices in the Northern Territory,* p. 1 & AANT, Submission No 4, 2014, p. 2, AANT in Committee Transcript, 13 February 2015, p. 34.
[65] Department of Treasury and Finance, presentation at Committee Hearing, 13 February 2015.
[66] Department of Treasury and Finance, presentation at Committee Hearing, 13 February 2015.

4.18 Figure 7 illustrates the price differential between the Northern Territory and national average retail fuel prices between 2009 and 2015.

Figure 7: Differential between Northern Territory and national average retail fuel prices 2009-15



Source: Department of Treasury and Finance[67]

4.19 In October 2014, the Northern Territory Government invited stakeholders in the downstream petroleum industry to attend a *Fuel Summit* to discuss the Territory's high retail fuel prices and explore potential changes in market forces that had led to the significant increase in the retail price differential between the Northern Territory and national average. The primary factors attributable to the high retail prices that were outlined by participants at the *Fuel Summit* include:

- High fixed operational costs, such as labour, electricity and rent;
- Transportation costs to regional and remote areas; and
- Low throughput resulting in higher fixed overheads per litre of fuel sold.

4.20 During the *Fuel Summit,* the Government sought to understand what changes had occurred in the Northern Territory fuel market in 2012 that had led to such dramatic increases in the retail margin. Despite the Government's endeavours,

[67] Department of Treasury and Finance, Economic Brief, *Fuel Prices February 2015*, <http://www.treasury.nt.gov.au/PMS/Publications/Economics/EconomicBriefs/FuelPrices/EB-FP-1502.pdf>.

a clear picture has not been formed of what specific changes occurred within the marketplace or the driver behind the retail margin increase.

4.21 There has been speculation on the reasons why retail fuel prices in the Territory increased dramatically from 2012. Much of this speculation has centred on Archer Capital's acquisition of Ausfuel in May 2010 and Gull in November 2010, which Archer Capital subsequently sold to Puma Energy in February 2013.[68] It is unclear whether Archer Capital's acquisition of these fuel companies played a role in the increased retail prices in the Northern Territory. As Puma Energy did not increase their market share in the Territory until after the retail margin had started to increase, it is not possible to draw any definitive link between the acquisitions in 2010 and 2013, and the increases in retail fuel prices.

4.22 The Committee sought explanations from witnesses during the Inquiry about the changes in the fuel market that occurred from 2012. One witness suggested that there had been some sort of 'structural shift' within the marketplace, however could not identify the driver behind the shift.[69] The other witnesses from petroleum companies were not able to provide insight into the 2012 retail margin increases.

4.23 Mr Bell from the AANT told the Committee:

> nothing that I can see or view, and Treasury could probably verify this. Nothing occurred in 2012 that would indicate day-to-day operating costs – rents or otherwise – shifted so significantly that it required margins that ranged between 5c and 15c long term, which seemed to be an acceptable margin range – to operate a business should then need to shift to then peak out – we have heard figures of 20c to 25c. We saw 35c per litre peaking just prior to the fuel summit, and considering the likes of Alice Springs – they did not see the effects of post-summit where the price fell. They held onto prices significantly longer and margins peaked out at 50c plus there, which is absurd.
>
> I do not see there has been a significant shift. I do not see any justification for the margins that were allowed to peak at the levels they have done in recent times.[70]

4.24 The Committee is unable to make an informed conclusion as to what factors changed within the Darwin fuel market in 2012 that led to a substantial and continued increase in the differential between wholesale and retail fuel prices. What is clear is that this increased retail margin remained for several years. Whilst retail prices, particularly in Darwin, did start to fall following the *Fuel Summit* in October 2014, due to the rate at which wholesale prices had been decreasing and continued to decrease, it was only in February 2015 that the retail margin fell and stayed below 20cpl. It is unclear at what point the retail margin will plateau, bearing in mind that before 2012 the margin averaged at 10cpl and after 2012 increased to 24cpl.

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[68] Archer Capital, viewed on 25 February 2015, <http://www.archercapital.com.au/allmodals/realisedinvestments/ausfuel>.
[69] Caltex in Committee Transcript, 13 February 2015, p. 19.
[70] AANT in Committee Transcript, 13 February 2015, p. 34.

Market failure?

Competition

4.25 Competition is driven, in part, by consumer behaviour. The Committee heard evidence that consumers in the Territory are less price sensitive than those in major capital cities and that if 'people are more price sensitive and buy from the cheapest it does drive the price down'.[71] The argument put forward is that if consumers do not respond to competitive pricing and reward retailers through their purchasing decisions, the market will be less competitive. When asked about competitive pricing, Mr Szymczak from United Petroleum explained:

> The cost of doing business is higher in the Northern Territory, but one of the underlying factors is that the price competition is not as strong in the Northern Territory, in Darwin and other places, because the consumer is less price-sensitive. It is as simple as that.[72]

4.26 In their submission to the 2005 *Inquiry into Fuel Prices in the Northern Territory*, the AANT discussed consumer price sensitivity in the Northern Territory and its impact on retail pricing. It is unclear whether Territory consumers are unwilling to shop around for the lowest price or whether a lack of competitive pricing prevents them from seeking out the lowest price.[73] It is evident from the daily retail prices published on the AANT and MotorMouth websites that the price difference within the Darwin retail market does not usually vary by more than 0.2cpl between retail outlets.

4.27 In any competitive market there are price leaders and price followers. In a competitive fuel market, prices will both rise and fall, with one or a number of players being the first to take that step. Following the *Fuel Summit*, United Petroleum made a number of competitive pricing moves by reducing the retail price of E10 and RULP and accepting Woolworths and Coles shopper dockets from consumers to further reduce the retail price by 4cpl.[74] United Petroleum told the Committee that:

> in Darwin we have been very competitive because being competitive, to United as an independent petrol retailer, is what we do. We always want to be at market or below market in any case.[75]

4.28 In considering price leaders and followers in the Territory fuel market, Mr Topham from Caltex noted:

> In Darwin you would have to ask who is really the competitive chain tending to set the level of prices. For example, if you had one competitor with a very high cost structure and therefore needed quite high retail prices to stay in business, the others might say, 'I have lower costs, but when I look at my business I would rather follow them and make a higher margin than discount in the hope of getting a higher volume'. Ultimately everyone will have to make a decision as to the trade-off between margin and volume.

[71] United Petroleum in Committee Transcript, 13 February 2015, p. 41.
[72] United Petroleum in Committee Transcript, 13 February 2015, p. 41.
[73] AANT, 2005, *Submission to Inquiry into Fuel Prices in the Northern Territory*, p. 8.
[74] United Petroleum in Committee Transcript, 13 February 2015, p. 42.
[75] United Petroleum in Committee Transcript, 13 February 2015, p. 42.

> To me, everyone will have a business strategy which has to look at that question. Therefore, if you have relatively inefficient or high cost operators, it is quite likely the market will drift up to that level rather than other competitors seeking to push those people out of the marketplace through more aggressive pricing strategies.[76]

4.29 The Committee was unable to ascertain through the evidence provided whether there are retailers within the Territory that are consistent price leaders. However, what is clear is, given the similarity of retail prices across the market despite the different business structures and operating costs, retailers are predominantly willing to follow the local market trend in retail pricing, rather than undertake competitive discounted pricing or maintain higher prices than the market trend to ensure fixed operating costs are covered.

4.30 Another factor that may impact on competitive pricing is the number of retailers operating within an area. According to the ACCC 'in general, the degree of competition in a market will be greater the larger the number of sellers'.[77] However, the throughput per site is clearly a factor on whether an increased number of retailers will result in competition to drive prices down. The volume of fuel sold by individual retailers in the Territory has been repeatedly raised as a primary reason behind high retail prices. The overall volume of fuel that consumers will purchase in the Northern Territory is a relatively fixed amount.[78] Therefore, this fixed amount must be shared amongst competing sites so there is 'a big incentive for petrol retailers to grow their volume because you grow your profitability by doing it'.[79] However, as the ACCC has noted:

> there may be little incentive to reduce prices. This is because competitors will also quickly reduce their prices and the net result is the same volume of petrol sold at each retail site but with a lower margin.[80]

4.31 It is unclear whether the Territory's major centres are 'over pumped', that is the number of retail sites per capita is too high, leading to a reduction in the throughput for each site and therefore a higher retail price. However, two new sites have recently opened which may indicate that there is sufficient volume of fuel being sold in outlets to justify opening new sites.[81]

4.32 In remote areas within the Territory, the degree of competition is significantly reduced due to the absence of competitors.[82] The lack of competition, combined with increased transportation costs and potentially higher operational costs, has resulted in higher retail prices in remote areas.

4.33 On the surface of the Darwin fuel market, it appears that the elements of a competitive market exist, in that there are a number of different retailers offering fuel and associated ancillary businesses to consumers and providing discount incentives such as shopper dockets. However, the absence of price cycles and

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76 Caltex in Committee Transcript, 13 February 2015, p. 20.
77 ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 474
78 Caltex in Committee Transcript, 13 February 2015, p. 21
79 United Petroleum in Committee Transcript, 13 February 2015, p. 41.
80 ACCC, 2014, *Monitoring the Australian petroleum industry*, p. 74.
81 Department of Treasury and Finance in Committee Transcript, 13 February 2015, p. 7.
82 Parry, T 2005, *Inquiry into Fuel Prices in the Northern Territory,* p. 11.

the rigidity of prices across the different retail outlets indicate that the Darwin market does not perform competitively in the same manner as other capital cities and regional locations.

Upwardly sticky

4.34 The term 'sticky' or 'stickiness' in the downstream petroleum industry refers to the responsiveness of retail prices to changes in international and wholesale prices, also referred to as lag times, as discussed in Chapter 2. The ACCC notes that:

> retail prices in some regional locations are 'sticky', i.e. they are less responsive — both upwards and downwards — to movements in international prices.[83]

4.35 The primary reason that prices in regional areas tend to be stickier than large metropolitan areas is the slower turnover of fuel supplies. High throughput retailers in major cities may receive a new tanker supply of fuel on a daily basis, while regional areas may only require new supplies every fortnight or month.[84] When a retailer purchases an amount of fuel at a particular price and the wholesale price of fuel subsequently decreases, the retailer in a regional area is unlikely to immediately decrease their retail prices. The reason being, they still need to recover the higher wholesale cost while selling that particular supply of fuel. In theory, the same should apply when wholesale prices increase, regional areas should not need to increase their retail prices until their fuel supply is replenished with fuel purchased at a higher wholesale price.

4.36 Another factor that has been identified as contributing towards the stickiness of retail pricing is the absence of price cycles in the Northern Territory, as discussed earlier in this chapter.

4.37 The Committee heard differing opinions on whether the Northern Territory market is 'upwardly sticky', that is that retail prices respond more quickly to wholesale increases and do not tend to react, or react more slowly to decreases in wholesale prices.

4.38 Mr Topham from Caltex drew the Committee's attention to comments made by the ACCC in their 2014 report that 'retail prices in some regional locations are 'sticky' and stated that his interpretation of retail fuel pricing in Darwin is that it is sticky in both directions.[85]

4.39 The Committee heard from AANT that:

> The market behaved in a particular manner up until that point but beyond that we saw the market change significantly. We saw what we describe as ratchet pricing where the market was quick to respond to increases in the terminal gate price. What had not occurred was the falling of prices when

[83] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 75.
[84] AIP, *Facts about prices in regional and country areas,* viewed on 25 February 2015, <http://www.aip.com.au/pricing/pdf/Facts%20about%20Prices%20in%20Regional%20and%20Country%20Areas.pdf>.
[85] Caltex in Committee Transcript, 13 February 2015, pp. 22-23.

> we saw deep discount periods, so the prices lifted and remain high – or sticky if you will – but if there was a return response it was very minimal and not in line with what was occurring at the terminal gate price.[86]

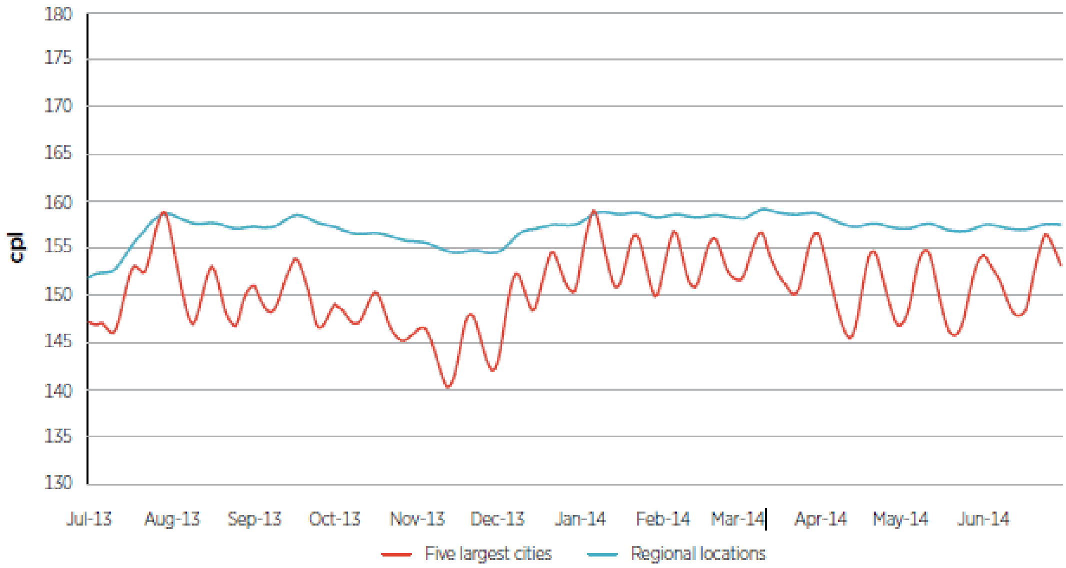
4.40 Prior to the *Fuel Summit*, there were definite signs of the Darwin and Northern Territory fuel market being upwardly sticky, which are clearly illustrated in Figures 8, 9 and 10. These graphs show that retail prices were predominantly static and unresponsive to the fluctuations in the Mogas 95 price, with the majority of movement in retail prices being in the upward direction. Following the *Fuel Summit*, the retail prices have appeared to become more responsive to variations in wholesale prices, which suggests this may have been an instigator for the market to become less upwardly sticky.

Figure 8: Weekly average Mogas 95 price 2013-14

Source: ACCC[87]

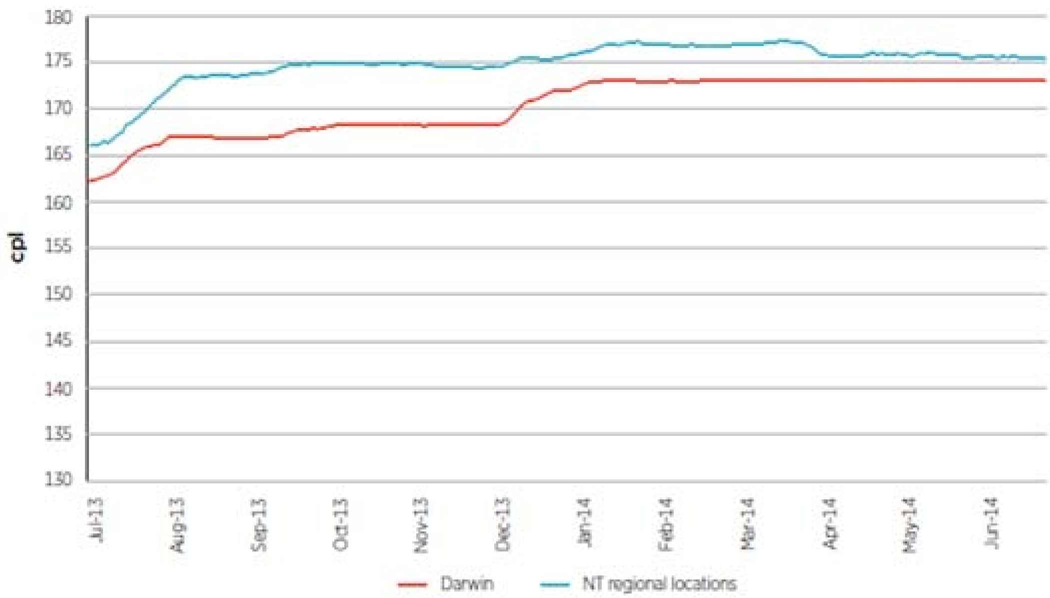
[86] AANT in Committee Transcript, 13 February 2015, p. 32.
[87] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 53.

Figure 9: Seven day rolling aggregated average for the five largest capital cities and regional locations



Source: ACCC[88]

Figure 10: Seven day rolling average retail petrol prices in Darwin and Northern Territory regional locations 2013-14



Source: ACCC[89]

Note: It is important to note that the NT regional locations data is the average retail price for Alice Springs, Katherine and Tenant Creek. The ACCC did not collect data or report on remote regions in the NT in the 2014 *Monitoring the Australian petroleum industry* report.

[88] ACCC, 2014, *Monitoring the Australian petroleum industry,* p.xxxiv.
[89] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 80.

5 The Draft Fuel Price Disclosure Bill's Solution

Price disclosure

5.1 The intention of the Draft Fuel Price Disclosure Bill is to allow the Northern Territory Commissioner of Consumer Affairs to obtain information about retail fuel pricing to increase consumer awareness and promote price competition. Northern Territory Consumer Affairs is an independent office within the Department of the Attorney-General and Justice.

5.2 The Draft Bill proposes to enable the Minister (Attorney-General and Minister for Justice) to issue Gazette notices requiring 'the periodic provision of information to the Commissioner by fuel retailers or any other persons from whom a fuel retailer obtains fuel, directly or indirectly'.[90] The definition of 'information' within the Draft Bill is intentionally broad and may include:

- The cost to a fuel retailer of carrying on the business of retailing fuel;
- The profit derived by a fuel retailer from carrying on the business of retailing fuel; and
- Other information about the way in which the price of the fuel is determined by a fuel retailer.[91]

5.3 The Committee heard evidence that it is 'clear from the way in which the bill is drafted' that the intention of the disclosure is aimed at retailers.[92] Whilst it has not yet been determined what specific information retailers will be required to disclose, it is expected that it will include all cost and profit components from the wholesale purchase price onwards, as these are all relevant in determining the final retail price.[93] The specific information required would be outlined in the Gazette notice.

5.4 The majority of retail fuel outlets do not operate as standalone businesses that only sell fuel. There is a range of different ancillary businesses that may be attached to the outlet such as convenience stores, mechanic workshops, car washes and restaurants. Depending on the business model of the retail outlet, these ancillary business operations may come under the same ownership as the fuel retailing business or they may be a separate entity. Based on the definition of information in the Draft Bill, financial details relating to ancillary businesses may need to be disclosed to the Commissioner if they affect the way that retail prices and profits are determined.

5.5 Whilst the Department of the Attorney-General and Justice has informed the Committee that the intention of the disclosure requirements are directed at retailers, given the different operating models that exist within the industry, this

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[90] *Fuel Price Disclosure Bill* (NT), Section 5.
[91] *Fuel Price Disclosure Bill* (NT), Section 3.
[92] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, p. 11.
[93] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, pp. 11-12.

raises the question of who is the actual fuel retailer. An example would be in the case of a Puma Energy franchisee. The franchisee does not set the retail price of fuel at their individual site, this is determined by Puma Energy; nor does the franchisee receive the income from fuel sales. Puma Energy is responsible for payment of the fixed operational costs and the franchisee makes their profit from applicable convenience store sales and management fees. Consequently, the information that the franchisee operating the retail site could provide to the Commissioner may be of little use in ascertaining how the retail fuel price was determined and whether the retail margin is perceived as being at a reasonable level. This leads to the question of whether, in this type of instance, the Minister would seek information from Puma Energy through a Gazette notice, as they play the primary role in determining the retail fuel price at the franchisee outlet and may be perceived as the actual fuel retailer.

5.6 The specific details of the information to be disclosed, the frequency of disclosure and the compliance timeframes will be set out in the Gazette notice as they are not stipulated within the Draft Bill. Ms Day, Acting Deputy CEO for the Department of the Attorney-General and Justice advised the Committee:

> The intent of that is to build in flexibility, which it is believed is important given the nature of the fuel industry. Retailers in the Territory work under a number of different business models and flexibility was considered necessary to allow for the possibility of targeted disclosure requirements.[94]

5.7 The need for flexibility and targeting of disclosure requirements suggests that different retailers may be compelled to provide different levels or types of information. It is unclear how the Minister would determine what information each retailer would need to provide when the specifics of their operating models and business structures are largely unknown.

5.8 The Commissioner would have broad powers under section 6 of the Draft Bill to publish any of the information provided by fuel retailers. This section does not set any parameters about what information will be published and whether individual retailers will be identifiable or the information will be aggregated, such as across multiple retail outlets owned by a company or across a specific location. The Commissioner will evaluate the information provided and make 'decisions about whether or not to publish information which might be commercial-in-confidence or otherwise commercially sensitive'.[95]

5.9 The Committee heard a number of concerns in relation to the seemingly unrestricted power of the Commissioner to publish any information provided by retailers, with particular reference to publishing information on individual sites and commercial-in-confidence details. These concerns will be discussed in further detail in Chapter 7.

5.10 The Commissioner can determine the most appropriate format for publication, such as a bulletin, website or smart phone application. During the debate on

[94] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, p. 5.
[95] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, p. 5.

referring the Draft Bill to the Committee, the Attorney-General suggested that the information would be published on a website.

5.11 The Draft Bill does not specify whether the disclosure requirements will apply only to retailers in major centres or across the entire retail market, including remote fuel retailers. The Gazette notice will outline which retailers are required to disclose information to the Commissioner, which provides flexibility to determine the locations where retail pricing structures will be evaluated. It was suggested by the Attorney-General that the disclosure requirements would not be applied to remote retailers.[96]

5.12 The Committee questioned the intended exclusion of remote locations from the disclosure requirements, particularly in light of the higher retail prices in these areas compared to larger cities and towns which the Gazette notices are expected to focus upon. The explanation provided by the Department of Treasury and Finance for the potential exclusion included the compliance costs for small remote retailers that may be passed on to consumers and the lack of alternative options for consumers when purchasing fuel in remote locations.[97]

5.13 This section of the chapter has outlined the theoretical aspects associated with the price disclosure component of the Draft Bill. The effectiveness of price disclosure and associated challenges with its practical application will be discussed in detail in Chapter 6.

Price motivator

5.14 The Committee's Terms of Reference include investigation into 'mechanisms for setting a price motivator exemption to be gazetted under the bill'.[98] In its current form, the Draft Bill does not include a reference to this price motivator exemption and there is no clear and specific definition of what this might mean.

5.15 The Committee sought the views of witnesses on how this term may be defined, as well as receiving suggested descriptions in a number of submissions. Ms Day from the Department of the Attorney-General and Justice provided the following description of the concept:

> the idea is that it is perhaps within tram lines if you like, so there is an amount which is set by reference to either an actual figure or perhaps more likely by reference to prices in other places, but allowing for the fact that there has been historically a higher price in Darwin anyway, in the Territory generally, in relation to fuel.[99]

5.16 The general consensus by those asked about the price motivator exemption was that a 'reasonable' retail profit amount or retail margin would be determined and retailers that kept their profit under the specified amount or

[96] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, p. 15 & Honourable John Elferink MLA, *Motion: Establishment of Fuel Price Disclosure Bill Scrutiny Committee*, Hansard, Debates, 22 October 2014.
[97] Department of Treasury and Finance in Committee Transcript, 13 February 2015, p. 15.
[98] Fuel Price Disclosure Bill Scrutiny Committee, *Terms of Reference.*
[99] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, p. 15

within the margin would be exempt from being required to disclose information to the Commissioner. As Gazette notices are issued by the Minister, it would be the Minister that determined the exact form of a price motivator exemption and whether it is applied as ‘a blanket exemption or by reference to regions of individual retailers’.[100]

5.17 There are a number of ways in which a price motivator exemption could be framed including:

- Setting a range or upper limit on the margin between the Darwin TGP and the retail price;
- Setting a range or upper limit on the differential between the national average retail price and the Darwin retail price;
- Setting a range or upper limit on the differential between the Darwin retail price and the price of a region of comparable location/population; and
- Setting a net profit margin limit in terms of cents per litre of fuel sold.

5.18 The apparent risk with setting a range or upper limit on retail pricing is that if retailers wish to be considered for an exemption, they can simply structure their pricing so that it is just below the limit or top of the range to avoid scrutiny; however, there is no incentive for them to reduce it further.

5.19 An important factor in establishing a price motivator exemption is determining what is considered to be a reasonable price differential, profit or retail margin:

> The price difference between the Territory and Australia appears to be largely driven by the retail margin. Retail margins in the Territory are about three times higher than the national average. In the absence of data, particularly on the components of retail margins, it is not possible to determine what might be considered a reasonable price Territorians should pay for fuel.[101]

Ms Ryan, Under Treasurer of the Department of Treasury and Finance, supported these comments:

> The fact that we do not have data on these and other cost factors means that we do not know what a reasonable price differential is; we do not have that kind of information.[102]

5.20 The Committee heard concerns about how the Minister will make determinations about reasonableness in terms of including a price motivator exemption in a Gazette notice:

> The concern that we have with the way the bill is currently constructed is that there is no definition of what constitutes reasonableness in order for a market participant like BP, possibly in the future, to have an understanding of what they should and should not be doing. It is based around an arbitrary

[100] Honourable John Elferink MLA, *Motion: Establishment of Fuel Price Disclosure Bill Scrutiny Committee*, Hansard, Debates, 22 October 2014.
[101] Department of Treasury and Finance in Committee Transcript, 13 February 2015, p. 10.
[102] Department of Treasury and Finance in Committee Transcript, 13 February 2015, p. 4.

decision made by a person of what constitutes reasonableness or unreasonableness.[103]

5.21 In determining a reasonable profit margin on the retail sale of fuel, the Minister would need to consider whether higher profits may be a result of operational efficiencies. For example, a retailer may have lower retail prices than competitors but may be making a higher cents per litre profit on fuel sales due to more efficient business practices. Similarly, retailers with inefficient practices may have a lower profit margin but a higher retail price. These factors would all be relevant in determining what constitutes a reasonable retail price, margin and profit amount.

5.22 The Committee also notes that not all 'inefficiencies' are due to the practices of the retailer. A retailer serving a less densely populated area may have higher costs due to lower volumes, and it would be perverse to penalise such a retailer with additional administrative costs that could be more easily avoided by retailers in locations more easily serviced.

5.23 Puma Energy, BP and the AANT have expressed concerns about whether a price motivator exemption, in whatever form it may take, would constitute a form of price regulation and whether such a move 'breeds inefficiency in the market'.[104]

5.24 The Committee notes that as a price motivator exemption is not included within the Draft Bill, there is no obligation for an exemption to be established. Furthermore, the definition of or criteria for a price motivator exemption may potentially be changed over time without any consultation or scrutiny.

5.25 This chapter has outlined the conceptual idea of how a price motivator exemption may be considered by the Minister through Gazette notices. The effectiveness of an exemption will be examined further in Chapter 6.

[103] BP in Committee Transcript, 13 February 2015, p. 26.
[104] Puma Energy in Committee Transcript, 13 February 2015, p. 50, BP in Committee Transcript, 13 February 2015, p. 27 & AANT, Submission No. 4, 2014, p. 3.

6 Would Price Disclosure Have the Desired Effect?

Will price disclosure reduce prices?

6.1 Whilst the Draft Fuel Price Disclosure Bill does not seek to directly reduce prices, it does aim to promote price competition, which should theoretically lead to lower prices in the Territory. The Committee has not been provided with any quantifiable evidence as to whether price disclosure will in fact reduce prices. However, a range of arguments have been presented on the effect of the publication of fuel pricing information in reducing retail prices.

6.2 The Committee heard strong opinions from witnesses in the petroleum industry that the Draft Bill would not be an effective mechanism to increase competition and consequently reduce retail fuel prices. It was suggested by one witness that the Draft Bill may be a 'lever that the Northern Territory Government would like to use in order to drive those margins and bring cheaper fuel to the Northern Territory'; however, they believe the Draft Bill would be unlikely to lead to price reductions.[105]

6.3 In their submission to the Committee, Caltex states:

> The implications of the regulatory intervention provided for in the bill is that exposure of the workings of the market would in some way modify its operation, for example, by reducing excessive profit margins applied to wholesale prices.[106]

However, Caltex does not believe that the assessment of the nature of the market is correct and the Draft Bill would have no impact on reducing retail prices.

6.4 Mr Szymczak from United Petroleum stated:

> I do not think it will produce price competition because what I envisage out of this bill is – you will find United's margin is 20c, Puma's margin 22c, Caltex's margin is 21c or whatever, and in some way you would seek to name and shame in the NT News. I do not think that will necessarily create competition in the marketplace because I think the Northern Territory Fuel Summit showed that information is already known and available and the ACCC could provide that information. I am not sure how it promotes competition. I do not think it will.[107]

Mr Szymczak also noted:

> How the costs are derived is good public information for interest but does not necessarily drive competition. It comes down to consumers voting with their feet and buying where it is cheapest.[108]

6.5 Similar views were expressed by Mr Topham from Caltex:

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105 United Petroleum in Committee Transcript, 13 February 2015, pp. 39-40.
106 Caltex, Submission No. 1, 2014, p. 2.
107 United Petroleum in Committee Transcript, 13 February 2015, p. 40.
108 United Petroleum in Committee Transcript, 13 February 2015, p. 42.

> the legislation will not make any difference to the competition in the market, the level of prices or the amount of price information. We would see it as being ineffective.[109]

6.6 Both BP and Caltex expressed the view that a price motivator exemption, which would allow retailers to not disclose information to the Commissioner, would not have the effect of reducing retail prices, therefore it could be inferred that disclosing cost and profit information would not reduce prices either.[110]

6.7 The Committee heard from Ms Ryan, Under Treasurer:

> The bill itself will not force lower prices but we expect it will make everything more transparent. The retailers themselves will be looking at their cost structures, consumers would be able to have a look, depending on what the information is that comes to the public, and therefore inform their choices. It is really about transparency and making it available to people so they can inform the choices they make.[111]

6.8 It is possible that the increased focus on the cost and profits associated with retailing fuel and the requirement for retailers to disclose this information to the Commissioner, who may then publish the information, will have an effect on the manner in which retailing pricing determinations are made and therefore have the end result of reducing the price consumers pay at the bowser.

6.9 The AANT explained that for the past few years there has been a trend to:

> keep prices high but all of a sudden post the summit – the summit was clearly a trigger point for something to occur. There have been other factors post that. There has been significant pressure from government. AANT has certainly ramped up its advocacy position in respect of that.[112]

6.10 It would appear that the spotlight that has been shone upon retail fuel prices as a result of the *Fuel Summit* and consultation on the Draft Bill has placed downward pressure on retail prices.

6.11 Figure 11 highlights that while retail fuel prices remained relatively static from June 2014 to the beginning of October 2014 despite downward movements in wholesale prices, there was a distinctive change that occurred in October when retail prices started responding to downward changes in wholesale prices. This decrease in retail prices followed almost immediately after the *Fuel Summit*, with another marked decrease in the middle of January which coincided with the announcement by the ACCC that they would commence micro market investigations into regional areas in Australia.

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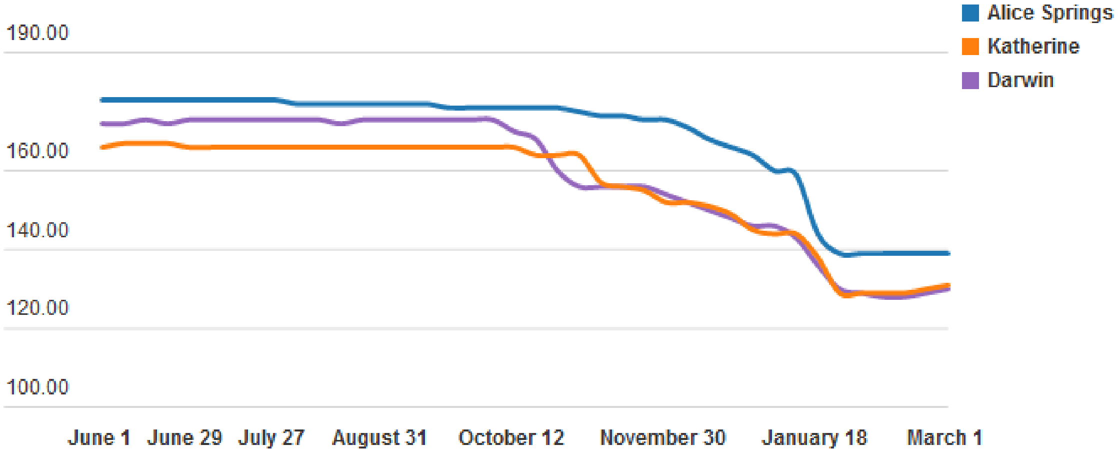
109 Caltex in Committee Transcript, 13 February 2015, p. 21.
110 Caltex, Submission No. 1, 2014, p. 10 & BP in Committee Transcript, 13 February 2015, p. 28.
111 Department of Treasury and Finance in Committee Transcript, 13 February 2015, p. 12.
112 AANT in Committee Transcript, 13 February 2015, p. 34

Figure 11: Retail fuel prices in Darwin, Alice Springs and Katherine June 2012 - March 2015



Source: ABC[113]

6.12 It is important to note that despite the overall reductions in retail fuel prices that have been observed, for the most part, the retail margin has remained on average above 20cpl. In February 2015 the margin began to decrease below 20cpl and remained below this level in March 2015; however, whether these reductions are related to lag times or a change in retail pricing decisions remains to be seen.

6.13 In addition to the decreasing retail margin, the differential between the Northern Territory and national average fuel prices also decreased to 11.5cpl in February 2015, in comparison with a price differential of 21.4cpl in January 2015 and 20.3cpl in February 2014.[114] Retail fuel prices in the Territory increased by 3.5cpl in March 2015; however, the differential to the national average decreased to 2cpl in the last week of March.[115] Prior to 2012 the average price differential was 10.1cpl.

6.14 It is not possible to definitively draw the conclusion that retail fuel prices have decreased as a direct result of the negative public opinion which was heightened through the *Fuel Summit*, the ACCC announcement and the introduction of the Draft Bill and subsequent Committee Inquiry. However, what is clear is that wholesale prices had been decreasing for months and Territory retail fuel prices had not been responsive to these changes, which begs the question as to whether retail prices would have made these movements had it not been for increased scrutiny.

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113 ABC News, *How they tumbled: Cost of unleaded fuel across the Territory*, 10 March 2015, viewed on 11 March 2015, <http://cf.datawrapper.de/JCFtv/2/?abcnewsembedheight=400>.

114 Department of Treasury and Finance, *Fuel Prices February 2015,* viewed on 16 March 2015, <http://www.treasury.nt.gov.au/PMS/Publications/Economics/EconomicBriefs/FuelPrices/EB-FP-1502.pdf>.

115 Department of Treasury and Finance, *Fuel Prices March 2015,* viewed on 22 April 2015, <http://www.treasury.nt.gov.au/PMS/Publications/Economics/EconomicBriefs/FuelPrices/EB-FP-1503.pdf>.

Will price disclosure improve transparency and better inform consumers?

6.15 The primary objective of the Draft Bill is to 'better inform motorists of the price structure of fuel'.[116]

6.16 As discussed in Chapter 2, information on the components of retail fuel prices and the factors that influence these are currently available to consumers through the ACCC reports, AIP factsheets and weekly pricing reports and websites such as MotorMouth and the AANT. The Department of Treasury and Finance also produces economic briefs on fuel prices which analyse data obtained by the AIP on a monthly basis. There is no publically available data on how frequently consumers in the Northern Territory access these websites and publications.

6.17 The NT Fuel Watch was a scheme previously established to monitor the weekly high, low and median prices of regular unleaded petrol, premium unleaded petrol, diesel and LPG in the Territory's major centres. The scheme was operated by the Northern Territory Commissioner of Consumer Affairs under the *Consumer Affairs and Fair Trading Act* (NT). One of the functions of the Commissioner under section 7 of the Act is to 'collect, collate and disseminate information affecting the interests of consumers'.[117] The information on retail fuel prices was published by the Commissioner on a regular basis on the NT Fuel Watch website. During the debate on the establishment of this Committee, the Leader of Government Business advised that the 'scheme was discontinued in 2012 due to high costs, the low uptake of the service and a lack of consumer benefit in a small market such as the Northern Territory'.[118]

6.18 The degree to which price disclosure by the Commissioner will improve transparency in fuel pricing structure is dependent on the level of information requested from retailers and the manner in which the Commissioner publishes the information. If the Commissioner publishes aggregated data that does not reveal the cost structure and net retail profit for individual retailers, then the transparency of how each retailer is operating is unlikely to be increased, as the evaluation will be of the Northern Territory or a specific region as a whole. However, if the Commissioner determines that fuel pricing information is to be published at an individual retail site level, the transparency will be improved greatly. This does, however, raise serious concerns about the disclosure of commercially sensitive information, which is discussed in Chapter 7 of this report.

6.19 When the information is made available to the public through the Commissioner's publications, the data will in essence be historical. The duration between when a Gazette notice requests information to be provided to

[116] Fuel Price Disclosure Bill Scrutiny Committee, *Terms of Reference.*
[117] *Consumer Affairs and Fair Trading Act* (NT).
[118] Honourable John Elferink MLA, *Motion: Establishment of Fuel Price Disclosure Bill Scrutiny Committee*, Hansard, Debates, 22 October 2014.

the Commissioner and when the data will be publically available has not been determined. Retailers will need to be provided with sufficient time to supply the information and then the Commissioner will need to undertake an in-depth analysis prior to publishing the data. As a result, the information available to consumers may well relate to periods several months prior. Consequently, while consumers will be able to understand cost structures and profits relating to fuel retailers for a past period, they will still be reliant on websites such as MotorMouth and the AANT to obtain information on current retail prices.

6.20 The Committee has not been provided with any evidence to ascertain whether consumers would access information published by the Commissioner. The reasons for the low uptake of the previous NT Fuel Watch scheme are unclear and therefore it is not possible to assess whether the factors contributing to the low uptake could be addressed by the Commissioner or the Government.

6.21 The Committee has considered a range of issues regarding the effectiveness of the Draft Bill in improving transparency and better informing the public; however, it is unable to determine to what extent the Draft Bill may be able to achieve its primary objective.

Will a price motivator motivate?

6.22 The Committee sought the views of witnesses as to whether a price motivator exemption would be effective in motivating retailers to reduce their retail prices to receive an exemption from disclosing information to the Commissioner.

6.23 The view expressed by Caltex is that there is ‘no merit in an exemption mechanism’ as it would not have a ‘price (discount) motivator effect’.[119] The price motivator:

> would be completely ineffective, the reason being that the cost of reporting, whilst it is onerous, is relatively low in cents per litre. So for example, if the level is set at 15c per litre, notional margin in the market was currently at 20c a litre, you would not give up a 5c a litre retail market just to save the red tape costs. What would happen is those red tape costs would be passed on to consumers in a competitive market to no one’s benefit.[120]

6.24 Although BP are not a retailer in the Northern Territory, they also agreed that:

> the potential cost of complying by foregone revenue, or foregone margin, is not worth it. I think that markets are what drives prices at the end of the day, not regulation in a deregulated market.[121]

6.25 Both United Petroleum and Caltex noted that the disclosure components of the Draft Bill may be perceived as a mechanism to ‘name and shame’ retailers that are seen as making excessive profits.[122] This, however, would require the publication of cost and profit information on an individual site basis, which

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[119] Caltex, Submission No. 1, 2014, p. 10.
[120] Caltex in Committee Transcript, 13 February 2015, p. 24.
[121] BP in Committee Transcript, 13 February 2015, p. 28.
[122] Caltex, Submission No. 1, 2014, p. 10 & United Petroleum in Committee Transcript, 13 February 2015, p. 40.

raises the issues of commercially sensitive information that are discussed later in this report.

6.26 The Committee finds compelling the argument that avoiding the red tape costs of disclosure is not a sufficient incentive for a retailer to significantly reduce prices, so to that extent a price motivator exemption would be ineffective.

6.27 As the disclosure requirements and details of what information is to published are not included in the Draft Bill, it is not clear what other incentives a retailer might have to avoid the disclosure regime. However, if the disclosure regime has the potential to enable the Minister or Commissioner to compel the production of commercially sensitive information and that the threat of the publication of this information is to form an incentive for changing price behaviour, this would change the purpose and effect of the rules made under the Draft Bill from price disclosure to price regulation. As discussed in Chapter 8, the Committee considers that only the Assembly should have the power to create a price regulation regime.

6.28 From the information available, it appears that the creation of a price motivator under the Draft Bill is likely to be ineffective, add to red tape costs and have some perverse outcomes.

Recommendation 1

The Committee recommends a price motivator not be included within any disclosure requirements made under the Draft Bill.

What will be the regulatory burden?

6.29 There will undoubtedly be a cost to retailers as a result of additional regulation within the Northern Territory petroleum industry. It is not possible to estimate the regulatory compliance cost for retailers due to the number of unknowns regarding the level and frequency of information to be disclosed and the compliance timeframes.

6.30 The cost is likely to depend on the operating structure of the business and whether the individual retail outlet has ready access to the required information or if they will need to seek information from a head office.

6.31 It has been suggested on a number of occasions that the red tape or regulatory burden may have:

> the unintended and perverse consequence of increasing the costs involved in operating a fuel retailing business which will inhibit the ability of businesses to provide lower priced fuel to customers.[123]

6.32 In short, many witnesses have noted that the Draft Bill will drive up costs in the industry. It is highly likely the regulatory compliance costs will be passed on to

[123] Woolworths Limited, Submission No. 3, 2014, p.4.

consumers, thereby pushing the retail price upwards, albeit by a relatively small amount.[124]

6.33 In addition to a regulatory cost to be incurred by retailers, there will be a cost incurred by the Government in the administration of this Draft Bill through the Commissioner of Consumer Affairs.

6.34 Woolworths Limited has suggested that as the Draft Bill will result in significant regulatory impacts on businesses, it should be subject to a Regulatory Impact Statement (RIS) to evaluate the potential costs and benefits (direct and indirect) to business, community and Government.

6.35 The Committee questioned the Department of the Attorney-General and Justice on the matter of an RIS:

> **Ms FYLES:** Has the draft bill been subjected to an RIS and if so what was the outcome? If not, was there a reason why it was not subjected?
>
> **Ms DAY:** Due to the short time in which it was developed, the bill has not been subject to a regulatory impact analysis at this time.
>
> **Ms FYLES:** Is that something that, considering this is quite interesting legislation – the choice of word I use – that we should perhaps look at doing?
>
> **Ms DAY:** The intention was to undertake the regulatory impact analysis at the time of the issuing of the Gazette notices because that is believed to be the point at which the detailed provisions are available for scrutiny.[125]

6.36 The Committee notes that there is no requirement for any public consultation or review by the Assembly on the making of the Gazette notices.

6.37 According to the Northern Territory Government's *Regulation-Making Framework: Principles and Guidelines 2007*:

> regulation making process involves all regulatory proposals undergoing a preliminary assessment to establish whether they are likely to impact significantly on the community, and therefore whether a full RIS or exemption is warranted.[126]

6.38 This document further states:

> When a submission seeking approval to draft legislation is submitted to Cabinet, it needs to be accompanied by a certificate from the Regulation Impact Unit, indicating either an exemption or that a full RIS needs to be undertaken before the legislation is approved for introduction in the Legislative Assembly.[127]

6.39 The Committee notes that the Draft Bill has not yet been introduced into the Assembly so has not yet required assessment by the Regulation Impact Unit.

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[124] Puma Energy in Committee Transcript, 13 February 2015, p. 47, & Caltex hearing in Committee Transcript, 13 February 2015, p. 24.
[125] Committee Transcript, 13 February 2015, pp. 13-14.
[126] Northern Territory Government, *Regulation-Making Framework: Principles and Guidelines 2007*, p. 8.
[127] Northern Territory Government, *Regulation-Making Framework: Principles and Guidelines 2007*, p. 8.

Recommendation 2

The Committee recommends that the Government follow its usual procedures prior to introducing any fuel price disclosure bill into the Assembly and submit it to the Regulation Impact Unit for a comprehensive analysis of the costs and benefits to businesses, community and the Government.

What is a reasonable timeframe?

6.40 To determine a reasonable timeframe for retailers to comply with the requirements of a Gazette notice, further details would need to be furnished in relation to what level of information retailers will be required to disclose to the Commissioner. The timeframe required to gather the appropriate information may also depend on the retail business model and whether they have ready access to all of the required information.

6.41 The Committee heard from both BP and United Petroleum that significant resources are required when complying with the reporting requirements of the ACCC in their annual report.[128] Collating data and presenting it to the ACCC is a complex and timely task and may require collaboration from a range of different sections within a business to compile all of the data.

6.42 In regards to the process that would need to be undertaken by a retailer to comply with a Gazette notice, Mr Stuart from BP noted:

> We have alluded in the submission that in order to do that, much of that information would not be kept in the service station site, be it in the Northern Territory if we participated there or in service stations in other states where we do participate in the market, but are held centrally in a head office type of organisation, and involve gaining that information from several parts of the business – be it the retail fuel business, the supply business, the transport and logistics component of the business – and bringing all of that together over a particular period, deducing it and allocating it to a store, and then independent fuel product lines, be it diesel, regular unleaded, premium fuel – you can start to see how complex and perhaps even how opaque these sorts of numbers become.[129]

6.43 Sections 8 and 9 of the Draft Bill outline the penalties for non-compliance with Gazette notice requirements, with the maximum penalties set at 400 penalty units or two years imprisonment. Mr Stuart highlighted:

> the concerns we had with the bill that strike fairly hard penalties for people involved in the business, including the directors, where that information either is not provided or is not provided in time. There are fairly strict penalties for not being able to turn that information around quite quickly.[130]

[128] BP, Submission No. 2, 2014, p.3 & United Petroleum in Committee Transcript, 13 February 2015, p. 40.
[129] BP in Committee Transcript, 13 February 2015, p. 28.
[130] BP in Committee Transcript, 13 February 2015, p. 29

6.44 In their submission to the Committee, BP suggested the Government adopt a compliance timeframe, similar to that of the ACCC, of two months to allow retailers adequate time to provide the necessary information.[131]

6.45 The Committee acknowledges that regulatory compliance with the Draft Bill may require a significant resource commitment on behalf of retailers and the Gazette notices should provide retailers with a reasonable timeframe to meet the regulatory commitments.

[131] BP, Submission No. 2, 2014, p. 3.

7 Would the Draft Bill be Effective in Disclosing Prices?

Can you compare across different business models?

7.1 In previous chapters, this report has touched upon the different business models and operating structures that exist within the Northern Territory fuel market. It is evident that the way in which one retailer operates can be distinctively different to another, dependent on whether they are independently owned and operated (no affiliation with one of the refiner-wholesaler oil companies), aligned with a supermarket chain, a franchise or owned and operated by a fuel company itself.

7.2 As discussed in Chapter 3, retailers that fall within the same business model category, such as a franchise, may have different operating structures depending on the company that they are affiliated with. For example, whilst Puma Energy receives all income related to fuel sold by franchisees, United Petroleum pay a cents per litre commission on fuel sold by franchisees.

7.3 There are very few retail fuel outlets that operate as a standalone business and only sell fuel. The overwhelming majority of retail outlets have one or more ancillary businesses located at the retail site, including convenience stores, restaurants, mechanic workshops, car washes and gas bottle exchange facilities. These ancillary businesses may or may not be under the same ownership as the fuel station component of the outlet. The manner in which ancillary businesses contribute towards fixed operational costs, such as rent and utilities, may vary depending on the business model and operating structure. Furthermore, the amount that an ancillary business is required to contribute towards the fixed operational costs may be based on a specific formula that may not directly correlate with the actual expenses incurred, for example, the percentage of electricity used by the ancillary business.

7.4 In addition to the ancillary businesses located at a retail site, some companies in the Northern Territory fuel market are vertically integrated and involved in many facets of the supply chain and market. Mr White from Puma Energy told the Committee:

> We have depot storage, we have warehousing, a transport business, a network loyalty card, a lubricant business and we also maintain a lot of vehicles. The apportionment and allocation of costs across operational areas like this again we see is complex, arbitrary, and in our view the data produced will not be meaningful but will be a cost to the industry.[132]

7.5 The Committee heard that due to the nature of the retail fuel industry and the fact that many outlets operate more than just fuel bowsers, the Draft Bill is seeking to analyse cost and profit information in a manner which is not normally undertaken at an individual retailer level:

[132] Puma Energy in Committee Transcript, 13 February 2015, p. 47.

> The draft bill requires the disclosure of cost, profit and other information related to operating a business or the way in which pricing is determined by a retailer. These provisions require dissection and cost apportionment of our operations in ways not required for the everyday operating of a business. Quite simply, the industry does not look at business in the way the bill is requesting data to be presented and certainly in its format at the moment. It is our view the proposed provisions add a layer of costs and complexity that do not exist today.
>
> To give you an example, under the draft bill fuel retailers would be responsible for disclosing the apportionment of costs such as health and safety, sales and marketing, rents and leases, advertising, customer support, insurance, electricity, labour, maintenance depreciation and human resources. The apportionment of these costs to individual sites could possibly be arbitrary and highly theoretical. The costs also need to be allocated across various operational areas of a business.[133]

7.6 Mr Stuart from BP expressed similar views to the Committee:

> In terms of what is seemingly a simple question to ask, by virtue of the different aspects of the service station, be it convenience store sales, be it the different allocation of costs which might not just relate to the one side but may be covered across several sites in a network in order to deliver scale, to deliver efficiencies, to keep prices low for consumers actually deducing those costs and allocating them to an individual store, to an individual fuel product line, over a particular time period, does become a complex thing to do.[134]

7.7 The Committee sought to further clarify the relationship between determining the retail price of fuel and the costs and profits of other ancillary businesses:

> **Mr CHAIR:** You said it will be very difficult to take the fuel side of the price out of a service station that does other things, but when you set the price in the first place you have obviously worked out a margin that will cover something. What do you set that price on? What is it the margin you have on your fuel meant to cover? Will it cover transport, will it cover wages? You will have to have worked out some sort of calculation to separate it from the section that sells ice cream and the labour required for the shop.
>
> **Mr WHITE:** We do not split it out that way. Transport, without question, because transport is directly related to fuel. You will look at it as a delivered cost. But the other site operating cost – you might have one person at the site. They might have a convenience store, they may have hire equipment and they will have fuel retailing. There could a number of different elements in that business. We do not then allocate out that person against just fuel retailing.
>
> You look at the site as an economic unit and then you look at adding on businesses if that unit is not achieving a sustainable return on investment.[135]

7.8 The ACCC substantiates the information provided by witnesses in regard to cost allocation:

> One of the issues in monitoring an industry producing, importing and selling a range of products is that costs cannot necessarily be directly attributed to a particular product or service…many wholesale and retail costs are

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[133] Puma Energy in Committee Transcript, 13 February 2015, p. 46.
[134] BP in Committee Transcript, 13 February 2015, p. 28.
[135] Committee Transcript, 13 February 2015, p. 50.

> common to the supply of both fuel and non-fuel products for retailers, as they are generally sold from the same premises and by the same staff.[136]

7.9 The ACCC also notes in respect to analytical methods used within their fuel monitoring reports:

> While the ACCC has used well accepted cost allocation rules and conventions such as using production volumes, sales volumes and sales values, care should be taken when interpreting data presented in this report as there is no exact way of allocating common costs.[137]

7.10 The evidence presented to the Committee highlights the complexity in analysing the cost and profit structure of an individual retail fuel outlet and associated ancillary businesses to accurately ascertain the cents per litre profit made on fuel sales.

7.11 The different business models that exist within the Northern Territory fuel market would make it seemingly difficult to apply the same analysis and calculation approach to each individual retailer without taking into account their different operating structures. Consequently, it may be difficult for the Commissioner to obtain and evaluate the fuel pricing structure information of different retailers in a manner that can be published with the aim of increasing transparency and providing meaningful information to better inform consumers.

Is there too much scope for creative accounting?

7.12 There is potential that the introduction of disclosure requirements and a price motivator exemption may lead to changes within internal accounting methods to distort costs associated with retailing fuel and ancillary businesses with the intention of reducing the apparent retail profit attributable to fuel sales.

7.13 In discussing the price motivator exemption, Mr Stuart explained:

> the provision would at best simply change things like internal accounting allocations where what was formally recorded in profit margin may be reallocated back to costs such as labour, maybe even to the manager of the owner of the service station in order to decrease the reported profit margin for the site.[138]

7.14 Alternatively, retailers may not change their internal accounting methods, instead they may actually make changes to their business operations, such as the maintenance schedule or investment, which would again have an impact on the cost and profit structure.[139]

7.15 The allocation of costs and profits may be affected if the retailer is part of a multi-site company or is vertically integrated in the fuel supply chain which can allow ‘costs to be allocated upstream of the retail site, in many cases, beyond Australian shores’.[140]

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[136] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 160.
[137] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 161.
[138] BP in Committee Transcript, 13 February 2015, p. 27.
[139] BP, Submission No. 2, 2014, p. 4.
[140] BP, Submission No. 2, 2014, p. 2.

7.16 The Committee questioned witnesses from the Department of the Attorney-General and Justice regarding confirming the veracity of information supplied to the Commissioner and were advised the Draft Bill:

> presupposes either people on staff, or consultants, or whatever, with the necessary expertise to be able to analyse that. It also presupposes sufficient detail of information to make it a meaningful exercise.[141]

7.17 The work required to make meaning of the figures supplied, and the potential for the disclosure regime to distort the way they operate, are factors to be considered when evaluating any potential disclosure regime.

[141] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, p. 12.

8 Are the Draft Bill's Procedures Appropriate?

Delegated legislative power

8.1 The Draft Bill proposes to give the Minister broad powers to legislate disclosure requirements of fuel retailers by Gazette notice. The Draft Bill would also enable the Minister to give the Commissioner any other related additional functions and empowers the Minister to give directions to the Commissioner in relation to those functions.

8.2 The Draft Bill also makes it a criminal offence to fail to meet the requirements created by the Minister's Gazette notice, with penalties up to 400 penalty units or imprisonment for two years.

8.3 When asked about the possible parliamentary oversight of this significant legislative power to be given to the Minister, the Attorney-General's Department explained:

> There is no real parliamentary oversight in relation to Gazette notices. They are issued by the minister; it is an administrative document. So during the drafting of the legislation we consider whether we should do it in the form of regulations or Gazette notices because, as you are aware, as regulations are subject to parliamentary oversight they are put before the House. So one of the reasons we ended up making that decision in relation to Gazette notices was to allow us greater flexibility and the ability to respond to changes in the market as quickly as possible so that if there were some concerns about the market the Gazette notices are obviously something that can be issued more quickly than regulations which must go through a regulation making process.
>
> So in the end that was the way we came down but the other option certainly is that it could be in regulations, bearing in mind that that would have that effect of limiting the ability to respond so quickly to changes.[142]

8.4 It is an important principle in our system of democracy that the Parliament keeps adequate control of its law-making power. It is frequently convenient for it to delegate a power to make rules and regulations under an Act, but for significant delegated legislation it is usual to require it to be subject to review by tabling in the Assembly and being subject to disallowance.

8.5 Rules of a minor administrative nature can conveniently be made by gazettal, while rules that significantly affect people's rights should be subject at least to parliamentary review. The extent of review required for a rule making power is dependent on the breadth of the power and the impact the rules may have.

8.6 Having established the requirement to disclose fuel price information in the Draft Bill, the Committee considers that the types of details that must be disclosed can suitably be dealt with by gazettal. However, the Draft Bill delegates the power to make rules on a much broader range of issues than that.

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[142] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, pp. 16-17.

8.7 It is also relevant to note that the Draft Bill provides for imprisonment for up to two years for failure to comply with rules gazetted under it and does not provide those subject to its rules with any consultation or appeal rights.

8.8 The Draft Bill also allows the Minister to Gazette what information 'in relation to one or more fuel retailers' business' the Commissioner is to publish and to direct the Commissioner in the performance of this and other functions.

8.9 Consequently, the rules Gazetted by the Minister can have a significant impact on people's rights by creating onerous requirements for which a person may be imprisoned if they fail to comply. They also allow the publication of confidential information that may have a significant impact on a person's business, as discussed further below.

8.10 The Committee does not consider that it is appropriate to have such a broad rule making power that is not disallowable by the Assembly that can have such a significant impact on individuals without them having any right to consultation or review.

Recommendation 3

The Committee recommends that before the Draft Bill is introduced into the Assembly it is amended to make any rule making powers that may significantly impact on a person's rights be subject to disallowance by the Assembly.

8.11 The breadth of the Minister's power to make new laws under the Draft Bill is illustrated by the proposed 'price motivator' that was referred to the Committee for its consideration. On its face the Draft Bill provides a law regarding mandating the disclosure of fuel price information. However, it seems that the breadth of powers to gazette the rules for disclosure means that the Minister, without reference to Parliament, could create laws to 'motivate prices'. This raises the question of whether it is appropriate for a Minister to be able to use his or her ability to make disclosure rules for a purpose other than that specified in the Draft Bill. It also raises the question of what other policy purposes the Minister could use this power for.

8.12 The Committee considers that it is inappropriate for an Act to delegate a power to make laws for purposes other than those set out in the Act. Consequently, if the Draft Bill is intended to give the Minister the power to make rules to motivate pricing behaviour, rather than simply rules regarding the information to be disclosed, this should be explicitly provided in the Bill.

Recommendation 4

The Committee recommends that any bill introduced into the Assembly should only delegate legislative power for purposes specified in the bill.

Commercial confidentiality

> Cost information is a very competitive piece of information that all companies would prefer to keep commercially confident.[143]

8.13 The Committee notes a number of concerns raised regarding the range of information that may be requested through Gazette notices and the extent to which this information will be published and disclose commercially sensitive information that can be linked to individual retailers.

8.14 None of the fuel companies that have provided evidence to the Committee support the idea of publishing individual retailer data that will place commercial-in-confidence information into the public arena and, in turn, their competitors' hands. The Committee was informed that 'the intention would not be to divulge commercial-in-confidence information'[144].

8.15 The Committee sought clarification on how information would be classified as commercially sensitive:

> **Mr CHAIR:** Who will decide what is commercial-in-confidence?
>
> **Ms DAY:** The way things are structured at the moment the Commissioner for Consumer Affairs will decide what to publish.[145]

8.16 As discussed in Chapter 2, many wholesalers and retailers have contractual arrangements that determine the wholesale price at which retailers purchase fuel. In addition to these contracts, retailers also enter into other contracts for additional services required in fuel retail operations such as fuel transportation, utilities and site rental. These contractual agreements may contain confidentiality clauses and concerns have been expressed about the potential for the requirements of the Draft Bill and Gazette notices to result in contractual breaches:

> **Mr BARRETT:** I know these companies often enter into agreements with each other, with transport companies, with different arms of different energy companies, and they are very in-confidence kind of bits of information. They are actually contracted to not tell under their agreements with those other companies. I wonder how we would get around if we are asking them to divulge some kind of information. How do we get around the fact that contracts they actually have in place from overseas or some Singapore terminals and things like that might actually undo because of our requiring them by law now to divulge that? Has that been considered?
>
> **Ms DAY:** Yes, the complexity around that has been considered. As I think I said earlier, these are the sorts of matters that would have to be given very careful consideration in the drafting of the Gazette notices.[146]

8.17 The Committee notes that a number of companies have expressed grave concerns about the public disclosure of cost information within a competitive market:

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[143] Puma Energy in Committee Transcript, 13 February 2015, p. 53.
[144] Department of Attorney-General and Justice in Committee Transcript, 13 February 2015, p. 12.
[145] Committee Transcript, 13 February 2015, p. 12.
[146] Committee Transcript, 13 February 2015, pp. 17-18.

> The information we would be very upset about is any information that, from a competitive point of view, puts you in a situation where a competitor gets information about your business you would rather have them not have. The most sensitive information is our buy price. When you boil it down it does not matter how you talk about TGP, wholesale, whatever you want, at the end of the day it is the buy price. If I had Puma's buy price they would be horrified; if they had my buy price I would be horrified. It is a competitive business and information like that is very important.[147]

Similar views were voiced by Mr White from Puma Energy:

> We think if that information was shared or passed around competitors, 1) it gives away our competitive edge and, 2) it may actually be anti-competitive because then people start keeping their prices at the same amount and you remove competition. Fundamentally we are a market-based company and we probably think that things like pricing or cost information is best kept within each company and let them fight on the street.[148]

Mr Topham from Caltex also expressed similar concerns:

> Clearly costs are highly confidential commercially because they give competitors insights into operation which can be used against you competitively, so we would certainly support the idea that some information should not be provided and certain information should not be published, except perhaps in a very aggregated form. So yes, we see confidentiality being a real concern in the provision of data.[149]

8.18 The majority of the information that is collected by the ACCC to monitor and report on fuel prices is commercially sensitive and is provided on a confidential basis. To ensure that confidentiality is maintained, the information presented is an 'aggregated analysis of costs, revenues and profits', therefore the individual wholesalers and retailers cannot be identified.[150]

8.19 The evidence presented to the Committee demonstrates that one of the primary concerns of fuel retailers in regards to the Draft Bill is the potential for commercially sensitive information provided to the Commissioner to be publically disclosed. Whilst this may not be the intention of the Draft Bill, the Committee acknowledges these concerns as there is currently no framework to determine what information will need to be disclosed and how the information will be published by the Commissioner.

Consultation and appeal rights

8.20 The issues relating to the potential publication of commercial-in-confidence information lead directly to the question of whether retailers or other companies within the fuel supply chain will be consulted regarding the specific information to be published.

8.21 The Committee questioned witnesses from the Department of the Attorney-General and Justice in relation to consultation and avenues of appeal if retailers

[147] United Petroleum in Committee Transcript, 13 February 2015, p. 44.
[148] Puma Energy in Committee Transcript, 13 February 2015, p. 53.
[149] Caltex in Committee Transcript, 13 February 2015, p. 24.
[150] ACCC, 2014, *Monitoring the Australian petroleum industry,* p. 160.

challenged the publication of commercially sensitive information. The Committee was advised:

> there are no provisions in the bill at the moment allowing for specific appeal rights or anything along those lines.[151]

8.22 The Committee sought further clarification on how a company may challenge publication of commercial-in-confidence information:

> **Ms DAY:** As far as I am aware the mechanism would be only available through judicial review of an administrative decision of the Commissioner.
>
> **Mr WOOD:** The question I would be ask, from the point of view of natural justice, is should they not have some right to appeal?
>
> **Ms DAY:** Judicial review includes that and that is always available. Are you asking could there be provisions incorporated into this legislation, is that it?
>
> **Mr WOOD:** Yes, I think so because you are asking companies to provide – we do not do it for people that provide rental accommodation. We do not ask this of anyone else. We are asking it of fuel companies so it is new legislation that requires the company to invite commercial in-confidence information, but there is no guarantee that commercial in-confidence information will not be given to the public under this act. It is all up to the Commissioner to decide what he will publish and what he will not. You would think, just from the point of view of fairness a company could, if it found out that is what the Commissioner was going to decide to do, have some way they can appeal or at least argue the case for that not to occur.
>
> **Ms DAY:** Yes, of course it would be possible to redraft the legislation to include provisions limiting the Commissioner's power to publish or to require notification and then to allow companies to appeal possibly to the NT Civil Administrative Tribunal or something along those lines. It would be possible to do it; it would be a different approach to what has been taken to date, but obviously that is a matter for the committee's recommendations.
>
> In relation to that it will also have to consider the effect of delay and the additional processes and costs associated with those procedures, so those are matters for the committee.[152]

8.23 The Committee discussed the absence of any provisions within the Draft Bill for administrative appeals with the witnesses that expressed concerns regarding the potential publication by the Commissioner of commercial-in-confidence information. Witnesses expressed the view that 'a form of appeal would be most important' if they wished to challenge the publication of specific information without having to go through judicial review processes.[153]

8.24 The Committee notes that for an administrative appeal process to function effectively, companies would need to be consulted prior to publication by the Commissioner to enable them to object to commercially sensitive information being publically disclosed. Without this prior consultation, companies would only be able to appeal after the information had been released, at which point competitive damage may have already occurred.

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[151] Department of Attorney General and Justice in Committee Transcript, 13 February 2015, p. 13.
[152] Committee Transcript, 13 February 2015, p. 17.
[153] BP in Committee Transcript, 13 February 2015, p. 27.

Recommendation 5

The Committee recommends that further consideration be given to the appropriate level of consultation and appeal rights prior to introducing any fuel price disclosure bill into the Assembly.

9 Conclusion

9.1 There has clearly been a failure of the fuel market in the Northern Territory.

9.2 While there is a range of factors resulting in fuel being more expensive in Darwin than the five largest capitals in Australia, the pre-2012 prices established a benchmark and there has been nothing to justify the increases in the retail margin since that time. This means that competition has failed to deliver fair pricing.

9.3 What is not clear is the cause of that failure. However, prices have moved down closer to their historical levels following the *Fuel Summit* and further following increased scrutiny from the ACCC.

9.4 The Territory Government had sought an ACCC investigation into the Northern Territory fuel market and in the absence of such an investigation developed the Draft Bill to require the disclosure of fuel pricing information. Now that the ACCC has commenced an investigation into the Darwin fuel market, the need for the Draft Bill is somewhat mitigated.

9.5 The reasons for the post 2012 failure of the Darwin fuel market are not yet known, and while retail fuel margins have come back from their 2014 levels, it is unclear whether these reductions will be sustained.

9.6 The Committee consider that the Draft Bill should not be introduced prior to the outcome from the ACCC's investigation of the Darwin market. After the ACCC has reported, the Assembly should have an improved understanding of Territory fuel pricing and will be better able to evaluate whether price disclosure laws would be effective.

9.7 The Committee has identified a number of issues with the Draft Bill and made a number of recommendations for consideration if in the future the Government considers that fuel price disclosure laws are required.

Recommendation 6

The Committee recommends that:

a) The Government does not introduce a fuel price disclosure bill prior to the outcome of the ACCC's investigation into the Darwin fuel market; and

b) If after the ACCC's investigation into the Darwin fuel market the Government considers fuel price disclosure laws are warranted, the Draft Bill be reviewed in light of the Committee's recommendations and the ACCC investigation.

Appendix 1: Submissions and Public Hearing

Submissions

1. Caltex Australia
2. BP
3. Woolworths Limited
4. Automobile Associate of the Northern Territory
5. Viva Energy (Confidential)

Note: Copies of submissions are available at:

http://www.nt.gov.au/lant/parliamentary-business/committees/fpd/Submissions.shtml

Public Hearing

Darwin – 13 February 2015

Note: Copies of the transcript are available at:

http://www.nt.gov.au/lant/parliamentary-business/committees/fpd/FPD_Transcript_13_February_2015.pdf

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