

## **Statement of Issues**

### **Ampol Limited / Z Energy Limited**

**23 December 2021**

#### **Introduction**

1. On 2 November 2021, the Commerce Commission registered a clearance application from Ampol Limited (Ampol) seeking clearance to acquire 100% of the shares or assets of Z Energy Limited (Z) (the Proposed Acquisition).<sup>1</sup>
2. Ampol is the owner of Gull New Zealand Limited, Terminals New Zealand Limited and ALD Group Holdings NZ Limited (together, Gull).
3. As part of the Application, Ampol has submitted a divestment undertaking (the Proposed Divestment Undertaking) to divest Gull as a going concern (the Proposed Divestment), by a trade sale or an initial public offering (IPO).
4. To clear an application, the Commission must be satisfied that an acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
5. This Statement of Issues (Sol) sets out our concerns about the potential competition issues we have identified following our initial investigation so that Ampol and Z (the Parties) and other interested parties can provide us with submissions relating to those concerns.
6. In reaching the preliminary views set out in this Sol, we have considered information provided to date by the Parties and other industry participants. We have not yet made any final decisions on the issues outlined below (or any other issues) and our views may change, and new competition issues may arise, as the investigation continues.

#### **Summary of the concerns we are testing**

7. At this stage of our investigation, our focus is on the efficacy of the Proposed Divestment, as effected by the Proposed Divestment Undertaking, in remedying any substantial lessening of competition that may arise from the Proposed Acquisition due to:

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<sup>1</sup> A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>.

- 7.1 horizontal unilateral effects;
  - 7.2 horizontal coordinated effects; and/or
  - 7.3 vertical or conglomerate effects.
8. We have preliminary concerns that the Proposed Divestment Undertaking is not sufficient to address the competition concerns that could arise from the Proposed Acquisition. Our concerns largely centre on:
- 8.1 the degree of ongoing influence that Ampol will have over Gull ListCo if it is divested by IPO. This arises principally from its ongoing shareholding and any transitional services agreement (TSA) and/or product import and export agreement (PIE Agreement) that may be put in place with Gull ListCo;
  - 8.2 the potential for the IPO process to take materially longer than a trade sale, and the implications of that timeframe for our analysis, as well as for competition in the relevant markets;
  - 8.3 whether the public statements in the product disclosure statement (PDS) will provide sufficient clarity and surety of Gull's likely strategy that we can rule out the real chance that Gull ListCo will operate in a substantially less competitive manner in the factual; and
  - 8.4 whether the transition to an entity directly listed in New Zealand could affect Gull ListCo's ability or incentives to operate as a low-cost, 'no frills' supplier, compared with any other strategies that might be available and incentives that might operate under any other likely alternative ownership model.
9. In addition to the issues we set out below, we may also identify further issues as we progress further in our investigation and undertake more interviews with third parties. We invite submissions on whether there are any additional issues relating to the proposal to divest Gull through an IPO that the Commission should consider.

### **Process and timeline**

10. We have agreed with Ampol an extension of time until 16 March 2022 in which to make a decision.
11. The Commission would like to receive submissions and supporting evidence from the Parties and other interested parties on the issues raised in this Sol. We request responses by close of business on 1 February 2022, including a public version of any submission.

12. All submissions received will be published on our website with appropriate redactions.<sup>2</sup> Parties will have the opportunity to cross-submit on the public versions of submissions from other parties by close of business on 11 February 2022.
13. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.

## The Parties

14. Ampol is an Australian-based fuel company. In New Zealand, Ampol operates through Gull. Gull sources most of its refined fuel requirements from Ampol in Australia and imports it into New Zealand via its storage facility at Mount Maunganui. It supplies commercial and retail customers in New Zealand, primarily through its network of Gull-branded service stations.
15. Z is a New Zealand-based fuel company. It has operations across the fuel supply chain in New Zealand, including refining, importing, storage, distribution, wholesale supply and retail supply to commercial and retail customers. At the retail level, Z supplies fuel through a network of Z and Caltex-branded service stations.

## The relevant markets

16. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act 1986 (Act), as a matter of fact and commercial common sense.<sup>3</sup>
17. Ampol submitted that because it is seeking clearance to acquire Z subject to the Proposed Divestment, it is not necessary to conclusively define the relevant markets.<sup>4</sup> Drawing on the markets defined by the Commission in Z/Chevron,<sup>5</sup> Ampol submitted that the markets relevant to the overlap arising from the Proposed Acquisition are:<sup>6</sup>
  - 17.1 retail fuel markets – separate, service station specific, local markets for the supply of fuel products (ie, diesel, regular petrol and premium petrol, collectively) to retail customers, using a 2km radius as a starting point to identify problem areas (among other considerations);

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<sup>2</sup> Confidential information must be clearly marked (by highlighting the information and enclosing it in square brackets). Submitters must also provide a public version of their submission with confidential material redacted. At the same time, a schedule must be provided which sets out each of the pieces of information over which confidentiality is claimed and the reasons why the information is confidential (preferably with reference to the Official Information Act 1982).

<sup>3</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>4</sup> The Application at [17.1(a)].

<sup>5</sup> Z Energy Limited and Chevron New Zealand Limited [2016] NZCC 10.

<sup>6</sup> The Application at [17.2].

- 17.2 terminal storage markets – separate regional markets for the storage of each refined fuel product (petrol, diesel, aviation fuel, marine fuel and bitumen), by terminal location;
  - 17.3 a market for commercial supply to distributors – the supply of fuel products to distributors at Mt Maunganui; and
  - 17.4 commercial petroleum product markets – separate markets for the large bulk commercial customers that purchase diesel directly from the major fuel firms and the smaller bulk customers that purchase diesel through resellers.
18. At this stage of the investigation, we do not consider it necessary to reach a firm view on the appropriate markets for considering the competition effects of the Proposed Acquisition. We have adopted the market definitions proposed by Ampol for the purposes of this Sol, although, as outlined above, this view may evolve as the investigation progresses.

### **Without the acquisition**

- 19. Assessing whether a substantial lessening of competition is likely requires us to compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the acquisition, often referred to as the factual) with the likely state of competition if it does not (the scenario without the acquisition, often referred to as the counterfactual) and to determine whether competition is likely to be substantially lessened by comparing those scenarios.
- 20. Where there are multiple counterfactual scenarios, we usually focus our analysis on the scenario that we consider to be the most competitive. This is because if the Proposed Acquisition is unlikely to result in a substantial lessening of competition in this scenario, then it is unlikely to do so in any other likely counterfactual scenarios.
- 21. Ampol has submitted that the most appropriate counterfactual is the status quo.<sup>7</sup>
- 22. At this stage we consider that the most competitive likely scenario without the Proposed Acquisition is that Gull would continue to provide the level of competitive constraint in the relevant markets as it does currently. However, we are continuing to consider this issue and welcome any further submissions on this point.

### **Unilateral effects**

- 23. Where two suppliers compete in the same market, a merger could remove a competitor that would otherwise provide a competitive constraint, allowing the merged entity to raise prices.<sup>8</sup>
- 24. Ampol and Z overlap in New Zealand in relation to retail service stations, terminal storage, commercial supply to distributors and the commercial supply of fuel.

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<sup>7</sup> The Application at [8.1] and [8.2].

<sup>8</sup> New Zealand Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019) at [3.62].

25. In the Application, Ampol acknowledges that, given the Commission's previous assessments of the competitive position of Gull in the New Zealand market and the overlap between Gull and Z in certain local markets, absent the Proposed Divestment the Commission would wish to work through the competition effects in relation the relevant markets.<sup>9</sup> This includes the potential for both unilateral and coordinated effects. Ampol has not sought to satisfy the Commission that the Proposed Acquisition will not substantially lessen competition in those markets.
26. The Commission considers this concession is appropriate. The Commission is not satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any relevant market in New Zealand.
27. Ampol has instead submitted that as a result of the Proposed Divestment, the Proposed Acquisition does not have any potential to result in a substantial lessening of competition in any market in New Zealand.<sup>10</sup> Ampol further submitted that the Proposed Divestment remedies all potential competition issues in local retail markets, as it means that there would not be any aggregation with the Proposed Acquisition.<sup>11</sup>
28. We are considering whether, taking into account the effect of the Proposed Divestment Undertaking, we can be satisfied that the Proposed Acquisition is not likely to give rise to unilateral effects concerns in any relevant market.

### **Coordinated effects**

29. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition, which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.<sup>12</sup>
30. Again, Ampol has submitted that the Proposed Divestment remedies any coordinated effects issues in retail markets that the Commission may otherwise have wished to examine.<sup>13</sup>
31. We are considering whether any of the relevant markets are vulnerable to coordination, and whether we can be satisfied that the Proposed Acquisition, taking into account the effect of the Proposed Divestment Undertaking, would not be likely to change the conditions in the relevant market so that coordination is more likely, more complete, or more sustainable.

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<sup>9</sup> The Application at [19.1].

<sup>10</sup> The Application at [1.4].

<sup>11</sup> The Application at [19.6].

<sup>12</sup> *Mergers and Acquisitions Guidelines*, above n8 at [3.84].

<sup>13</sup> The Application at [19.6].

## Vertical or conglomerate effects

32. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively.<sup>14</sup>
33. We are considering whether we can be satisfied that the Proposed Acquisition, taking into account the effect of the Proposed Divestment Undertaking, is not likely to give rise to vertical effects through the restricted supply of key inputs.

## Proposed Divestment Undertaking

34. Where a merger raises competition concerns, an applicant can provide an undertaking to sell assets or shares as a condition of clearance.<sup>15</sup> For a divestment undertaking to remedy competition concerns, we must be satisfied that the divestment will result in sufficient additional competitive constraint on the merged firm that a substantial lessening of competition is no longer likely.<sup>16</sup>
35. To assess whether a divestment undertaking remedies competition concerns, we consider all the relevant risks associated with any proposed divestment. We assess three kinds of risk associated with any divestment:
- 35.1 composition risk – the risk that the scope of any divestment undertaking may be too limited, or not appropriately configured, to attract a suitable purchaser or to allow a successful business to be operated in competition with the merged entity;
  - 35.2 asset risk – the risk that the competitiveness of a divested business will deteriorate prior to the completion of any divestment; and
  - 35.3 purchaser risk – the risk that there may not be a purchaser that is acceptable to us and/or the risk that the applicant has an incentive to sell to a party who would not be a strong competitor.

## The Proposed Divestment Undertaking and Ampol's submissions

36. The Proposed Divestment Undertaking would see Ampol divesting Gull, either by way of trade sale (in which case the divestment would be of the entire Gull business), or by way of an IPO (in which case, as discussed further below, Ampol would retain a meaningful shareholding in Gull post-Divestment). Ampol submits in the Application that its divestment of Gull in this way means the Proposed Acquisition will result in no ongoing aggregation of the Parties' operations, and that this necessarily remedies all potential competition issues in the relevant markets.<sup>17</sup>

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<sup>14</sup> *Mergers and Acquisitions Guidelines*, above n8 at [5.1]-[5.2].

<sup>15</sup> *Mergers and Acquisitions Guidelines*, above n8 at [F.2].

<sup>16</sup> *Mergers and Acquisitions Guidelines*, above n8 at [F.12].

<sup>17</sup> The Application at [19.6].

37. Under the Proposed Divestment Undertaking:
- 37.1 Ampol will divest Gull post-Acquisition within a timeframe agreed with the Commission (the Divestment Period);
  - 37.2 Ampol would have the option of carrying out the Proposed Divestment by way of either a trade sale to a purchaser approved by the Commission or by the sale of shares in Gull ListCo to the market through an IPO;<sup>18</sup>
  - 37.3 at the option of the purchaser of Gull, or the directors of Gull ListCo if the Divestment is via an IPO, arm's length agreements would be put in place for Ampol to continue to supply refined fuel and transitional support services to Gull if needed (Divestment Related Agreements);<sup>19</sup>
  - 37.4 Ampol would commit to hold-separate business preservation and information ring-fencing obligations that will apply during the Divestment Period;<sup>20</sup> and
  - 37.5 if the Proposed Divestment takes place through an IPO, Ampol would retain a meaningful shareholding in Gull ListCo (Retained Shareholding), which Ampol says is necessary in order to support a successful IPO. If Ampol considers it necessary for the success of an IPO, it may also retain a larger number of shares than the Retained Shareholding (the Additional Shares).
38. In addition to the Proposed Divestment Undertaking:
- 38.1 Ampol proposes giving an undertaking to Gull ListCo and its shareholders not to exercise any voting rights that may attach to the Additional Shares;<sup>21</sup> and
  - 38.2 Ampol further proposes that it would enter into a binding agreement with Gull ListCo not to sell the Retained Shareholding and any Additional Shares until at least after the announcement of Gull ListCo's 2023 annual financial results (Lock Up Period).<sup>22</sup> It states in the Application that its intention is to dispose of the Additional Shares over a period following the expiry of the Lock Up Period.<sup>23</sup> This intention would be communicated to Gull ListCo by letter, and would be recorded in the PDS for Gull ListCo's listing, but would not be an obligation enforceable by the Commission.<sup>24</sup>

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<sup>18</sup> The Application at [20.3].

<sup>19</sup> The Application at [20.6].

<sup>20</sup> The Application at [20.9].

<sup>21</sup> The Application at [25.17]-[25-19] and [25.22].

<sup>22</sup> The Application at [25.18] and [25.21].

<sup>23</sup> The Application at [25.18] and [25.20].

<sup>24</sup> The Application at [25.21].

39. Ampol submitted that the composition, asset and purchaser risks arising from the Proposed Divestment Undertaking are minimal and would not reduce the effectiveness of the Proposed Divestment.<sup>25</sup>
- 39.1 On composition risk, Ampol submitted that Gull has a long-standing history of market competitiveness and a proven and long-established low-cost market strategy, and that this would likely continue to be the case post-Divestment. Ampol proposes to divest Gull in its entirety and submitted that the separation of Gull from Ampol is easily achievable as it already operates largely independently of Ampol. Ampol also submitted that the Divestment Related Agreements would enable continued supply of refined fuel and transitional support services to Gull ListCo if needed.<sup>26</sup>
- 39.2 On asset risk, Ampol submitted that Gull as a business would not deteriorate over the Divestment Period. In particular, Ampol proposes that Gull would be separately managed by a hold-separate manager and with information ring-fencing in place. In addition, Ampol submitted that Gull's goodwill and competitiveness would be protected by preservation obligations included in the Proposed Divestment Undertaking, and that Gull would continue to receive support services and refined fuel from Ampol during the Divestment Period.<sup>27</sup>
- 39.3 Ampol submitted that purchaser risk is low and that Gull would remain an effective independent competitor as it has always done, regardless of whether Gull is divested via a trade sale to a purchaser approved by the Commission or an IPO.<sup>28</sup>
40. Given the differences in their execution, timing, and ownership structure outcome, the Commission currently considers that the IPO and trade sale processes give rise to different issues for our competition analysis. We set out below the issues that we are currently considering in relation to the IPO process, the trade sale process, and finally, those issues which are relevant to both processes.

#### **Issues in relation to the IPO process**

41. We are continuing to consider all three aspects of potential risks arising with divestment (ie, composition risk, purchaser risk, and asset risk). However, we are particularly focused upon composition risk.

#### *Framework for considering Retained Shareholding/Additional Shares*

42. As outlined in our Mergers and Acquisitions Guidelines, for the Commission to be satisfied that a divestment undertaking will remedy competition concerns arising

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<sup>25</sup> The Application at [22.3].

<sup>26</sup> The Application at [23].

<sup>27</sup> The Application at [24].

<sup>28</sup> The Application at [25].

from a merger, we assess whether there is likely to be a purchaser that is independent of the merged firm.<sup>29</sup>

43. For the purposes of assessing whether a person has carried out an acquisition in contravention of section 47 of the Act, a “person” includes two or more purposes that are associated. A person is associated with another person if that person is able, directly or indirectly, to exert a substantial degree of influence over the activities of the other. Our Mergers and Acquisitions Guidelines set out how we assess whether a person has a substantial degree of influence for the purposes of section 47 of the Act. As outlined in our Guidelines, we consider that a person (A) has a substantial degree of influence over another person (B), if person A has the ability to bring real pressure to bear on the decision-making process of B. Whether a person has a substantial degree of influence over another is a question of fact, that takes into account a number of factors.<sup>30</sup>
44. We consider those principles to be relevant to assessing whether a divested business will operate independently of a merged firm. This is because, as indicated in our Guidelines, if one party can substantially influence the activities of the other, it may not be appropriate to regard each of those parties as separate competitors in the market.
45. If Ampol retained a substantial degree of influence over Gull ListCo following the Proposed Divestment, the Proposed Divestment may not be sufficient to resolve any competition concerns arising from the Proposed Acquisition.

*Composition risk: degree of influence as a result of the Retained Shareholding, Additional Shares, and/or the Divestment Related Agreements*

46. Ampol intends to hold the Retained Shareholding, and may also hold the Additional Shares, for a period of time following an IPO. We understand that:
  - 46.1 Ampol will have voting rights in respect of the Retained Shareholding, and will be able to exercise those rights;<sup>31</sup> and
  - 46.2 Ampol will also have voting rights in the Additional Shares but will undertake to Gull ListCo and its shareholders that it will not exercise them.<sup>32</sup> This undertaking will not be enforceable by the Commission (and could conceivably be waived by Gull Listco at any time).
47. Ampol may also enter into the Divestment Related Agreements with Gull ListCo, at the option of the directors of Gull ListCo.<sup>33</sup>

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<sup>29</sup> *Mergers and Acquisitions Guidelines*, above n8 at [F25].

<sup>30</sup> *Mergers and Acquisitions Guidelines*, above n8 at [2.4] to [2.9].

<sup>31</sup> The Application at [25.19].

<sup>32</sup> The Application at [25.19].

<sup>33</sup> The Application at [20.6] and [20.7].

48. At this stage, we are not satisfied that Ampol will not have the ability to exert a substantial degree of influence<sup>34</sup> over Gull ListCo following an IPO. In particular, we currently have concerns that:
- 48.1 the existence of voting rights, even if they are only able to be exercised in respect of a portion of Ampol's total shareholding, could give Ampol the ability to directly and materially influence the strategic decisions of Gull ListCo;<sup>35</sup> and
- 48.2 in addition to having the practical ability to exert this influence, Ampol could have the incentive to do so, given it would own one of Gull ListCo's key competitors (Z).
49. In addition, we are also still considering the extent to which Ampol might still be able to exert passive influence on Gull ListCo, even if:
- 49.1 Ampol did not have voting rights in respect of either the Retained Shareholding or the Additional Shares, or
- 49.2 the Commission were able to enforce Ampol's commitment not to exercise those rights.
50. We have identified the below matters which we currently consider have a real chance of eventuating following an IPO, and a combination of which could lead to Ampol continuing to have a substantial degree of influence over Gull ListCo.<sup>36</sup>
- 50.1 Ampol's shareholding may be the largest single shareholding in Gull ListCo following an IPO. It will not be known until after an IPO is launched if any

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<sup>34</sup> *Mergers and Acquisitions Guidelines*, above n8 from [2.6]. While that guidance is provided in the context of assessing when two entities may be treated as the same person for the purposes of section 47 of the Act, we consider that if Ampol retained a substantial degree of influence over Gull following an IPO, the Proposed Divestment may not be sufficient to resolve any competition concerns arising from the Proposed Acquisition. For the purposes of section 47 of the Act, a "person" includes two or more purposes that are associated. A person is associated with another person if that person is able, directly or indirectly, to exert a substantial degree of influence over the activities of the other.

<sup>35</sup> We have referred to the substantial product holder disclosure regime set out in the Financial Markets Conduct Act 2013 (FMCA), which obliges directors, senior managers, and people who have a "substantial holding" in a listed company, to disclose certain changes to their ownership in a company. S 274(2) of the FMCA defines a substantial holding as a relevant interest in 5% or more of a class of quoted voting products in a listed company.

<sup>36</sup> We have undertaken this assessment with reference to previous NZCC decisions, for example Decision No. 459, National Foods Limited and New Zealand Dairy Foods Limited (22 March 2002), and Visy and HPNZ [2012] NZCC 9 (30 March 2012). We have also referred to: the findings of the UK Competition Commission in its report sent to the Secretary of State (BERR) – Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc (14 December 2007) and the subsequent consideration of an appeal relating to that report by the England and Wales Court of Appeal in *British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907; and the UK Competition Commission's report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc (28 August 2013). While these decisions relate to a "material degree of influence" test that does not appear in the New Zealand merger regime, we consider them informative.

cornerstone shareholders will have larger shareholdings in Gull ListCo than Ampol, or how long they may retain those shareholdings for.

- 50.2 Even if a cornerstone shareholder with a shareholding larger than Ampol's emerges, the degree to which Ampol and the cornerstone shareholder may cooperate or coordinate with one another is unknown.
- 50.3 As an existing industry player with expertise in the market, other shareholders may be influenced by Ampol's views on matters relating to the strategic direction of Gull ListCo.<sup>37</sup>
- 50.4 With respect to the exercise of any voting rights associated with Ampol's shareholding:
- 50.4.1 it is not clear whether Gull ListCo and its shareholders would have the incentive to enforce an undertaking given to them by Ampol not to exercise the voting rights attaching to the Additional Shares, and the Commission will have no ability to enforce this undertaking;
- 50.4.2 we are currently unable to exclude the real chance Ampol will be able to block a special resolution<sup>38</sup> through the exercise of the voting rights attaching to its Retained Shareholding and/or Additional Shareholding,<sup>39</sup> either independently of other shareholders or taking into account the potential influence it may have over other shareholders' voting decisions. In particular, as Gull is not currently listed, there is no history of voter turnout at meetings of Gull shareholders to inform this assessment<sup>40</sup> and the identities of any future shareholders and the distributions of their shareholdings will not be known until after the IPO is complete; and
- 50.4.3 under section 110 of the Companies Act 1993, if Ampol votes<sup>41</sup> against certain special resolutions<sup>42</sup> which are ultimately passed and Ampol has exercised all of the votes attached to its shares and of which it is the beneficial owner, Ampol would be entitled to require Gull to

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<sup>37</sup> This could occur, for example, in the context of a vote on a special resolution, or a management review by shareholders under section 190 of the Companies Act 1993.

<sup>38</sup> Special resolutions could be relevant to Gull ListCo's competitive activity if, for example, they relate to major transactions that affect the level of investment that Gull ListCo could undertake.

<sup>39</sup> We note that while Ampol will undertake to Gull ListCo not to exercise any voting rights in relation to the Additional Shares, the Commission will have no ability to enforce that undertaking, and it would be open to Gull ListCo to waive that commitment.

<sup>40</sup> We acknowledge the figures provided at [25.25] of the Application regarding typical voter turnout at the annual general meetings of Z and other NZX listed companies. However, we are not yet satisfied that we can assume that Gull ListCo would have a similar level of voter turnout.

<sup>41</sup> We note that while Ampol will undertake to Gull ListCo not to exercise any voting rights in relation to the Additional Shares, the Commission will have no ability to enforce that undertaking, and it would be open to Gull ListCo to waive that commitment.

<sup>42</sup> Namely, a special resolution to alter the constitution, or to approve a major transaction or an amalgamation in respect of which a buy back right can be exercised.

purchase its shareholding. We are currently unable to exclude the real chance that the prospect of being required to purchase Ampol's shareholding would prevent Gull's board from putting forward proposals for special resolutions that it perceives Ampol may vote against.<sup>43</sup>

- 50.5 Ampol may also be a key supplier to Gull ListCo for at least part of the time that it holds shares. We are considering whether its overall relationship with Ampol could cause Gull ListCo to compete less vigorously with Z, to avoid conflict with a key supplier and shareholder. By way of example only, if Gull ListCo is considering opening new retail petrol stations, such influence may cause it to be less inclined to open those petrol stations in areas in which Z petrol stations already compete.
51. Ampol submits that the size of its shareholding in Gull following an IPO would not be sufficient to give it a right to appoint a member of the Gull board.<sup>44</sup> However, we are not yet satisfied that Ampol would not be able to influence the composition of Gull's board. This is for similar reasons to those outlined above regarding the extent to which Ampol may cooperate or coordinate with other shareholders, the extent to which other shareholders may be influenced by Ampol's views on the composition of Gull's board, difficulties relying on an undertaking from Ampol to Gull's board and other shareholders not to exercise the voting rights attaching to the Additional Shares, and uncertainties about turnout in shareholder votes (although we acknowledge that directors are appointed and removed by ordinary resolution, rather than special resolution).
52. Finally, we have concerns about how long any such influence can reasonably be expected to persist (taking into account Ampol's stated intention<sup>45</sup> to sell down any Additional Shares). While Ampol has said it will sell down the Additional Shares, it cannot provide this to the Commission as a commitment, and circumstances could change such that it holds them longer than expected; for example, if the share price is depressed.
53. We welcome submissions on:
- 53.1 whether a shareholder with no voting rights can nevertheless still exercise a substantial degree of influence on a listed entity, and:
- 53.1.1 if so, the level of non-voting shareholding at which a shareholder could exercise a substantial degree of influence; or

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<sup>43</sup> It is not clear to the Commission whether, in the event that Ampol exercised its voting rights attaching to the Additional Shares, breach of its undertaking not to exercise those voting rights would prevent Ampol from exercising its rights under section 110 of the Companies Act 1993 to require Gull ListCo to purchase its shares.

<sup>44</sup> The Application at [25.21] and [25.24].

<sup>45</sup> The Application at [25.20].

- 53.1.2 if not, what is the level of voting rights required before a shareholder can be considered to exercise a substantial degree of influence;
- 53.2 the combined effect of Ampol's shareholding in Gull ListCo and its potential status as a key supplier to Gull ListCo on any influence that Ampol may be able to exert over Gull ListCo; and
- 53.3 the extent to which Ampol's shareholding in Gull ListCo could affect or impact the dynamics between the parties in negotiating the terms of the Divestment Related Agreements.

*Asset risk: the timeframe for an IPO*

54. In the Application Ampol has set out several timing considerations that must be taken into account in an IPO process.<sup>46</sup>
- 54.1 An IPO would be subject to market conditions at the time the IPO is launched.
- 54.2 An IPO also needs to be timed for the offer to fall within an "IPO window", which is based on several factors including availability of audited financial information of the issuer, reporting seasons for existing listed issuers and general market conditions.
- 54.3 The preparatory work for an IPO will take several months as due diligence is undertaken, market soundings are completed and offer documentation is prepared and reviewed by the Financial Markets Authority (FMA) and NZX.
55. Ampol also notes that an IPO can only be launched post-completion of the Proposed Acquisition (an IPO cannot practically be launched on a conditional basis).<sup>47</sup>
56. As a consequence, we are continuing to consider the implications of an extended divestment timeframe for:
- 56.1 the prospect of the Gull business degrading or becoming less competitive during the Divestment Period. For example, we understand that it is common for key investment decisions or other decisions that may involve significant expenditure to be deferred or not taken as firms prepare to be sold or listed; and
- 56.2 the confidence with which we can predict the efficacy of the Proposed Divestment and the likely state of competition in the factual (because the longer into the future we are required to look, the more variables become relevant, and therefore the less confidence we can have in the likelihood of any specific outcome).
57. We invite submissions on these issues.

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<sup>46</sup> The Application at [21.1].

<sup>47</sup> The Application at [21.19].

*Purchaser risk: the strategic behaviour of the listed entity*

58. In considering whether the Proposed Divestment will effectively mitigate any substantial lessening of competition that may arise from the acquisition of Z by Ampol, it is necessary to consider how Gull would compete in the absence of the Proposed Divestment, and compare that to how it is likely to compete after the Proposed Divestment.
59. The Commission has previously observed Gull’s positioning as a “challenger brand” that is “aggressive on price, which sees prices being significantly lower in markets where Gull is present”, which has been referred to as the “Gull effect”.<sup>48</sup> We are continuing to consider the extent to which these observations, which were made in 2016, remain true in 2021, as a reflection of Gull’s competitive behaviour in the absence of the Proposed Divestment.
60. With respect to Gull’s likely competitiveness after the Proposed Divestment, we are considering how we can best test this issue in the context of a divestment through an IPO. Where a business is divested by trade sale, we are able to engage directly with the potential purchaser and examine how they have previously carried out their business in order to ascertain how that purchaser is likely to operate the divested business moving forward.
61. In an IPO context, there is no single purchaser. Ampol has submitted that the PDS, which is a document intended to provide potential investors with the information they need to make an informed decision about whether to invest in Gull ListCo, will publicly disclose Gull ListCo’s forward-looking strategy.<sup>49</sup> While not impossible, Ampol says that “it would be a significant event from an investor’s perspective for a newly listed company to fundamentally change its strategy disclosed in the company’s IPO.”<sup>50</sup>
62. While we have not reached a concluded view on this issue, it may not be necessary for Gull ListCo to “fundamentally change” its business strategy in order for it to substantially lessen the competitive pressure it exerts on Z or its other competitors.
63. At this stage we cannot exclude the real chance that the transition to an entity directly listed in New Zealand affects Gull’s ability to operate in the low-cost way it currently does.
- 63.1 One interviewee noted that there may be a difference in the way that a Gull which is directly listed in New Zealand is managed compared to the status quo.<sup>51</sup>
- 63.2 Another interviewee suggested that a listed entity may have a higher cost base than a “no frills” operator like Gull, including as a result of the need to

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<sup>48</sup> Z / Chevron, above n 4, at fn 146.

<sup>49</sup> The Application at [23.8].

<sup>50</sup> The Application at [23.8].

<sup>51</sup> NZCC interview with [ ].

internalise certain back-office functions that a smaller operator might outsource or forgo entirely. Obligatory reporting functions for listed entities also add another layer of cost that is not borne by private companies.<sup>52</sup>

64. We are continuing to consider:
- 64.1 whether the public statements in the PDS would provide sufficient clarity and surety of Gull ListCo's likely strategy that we can rule out the real chance that Gull ListCo will operate in a substantially less competitive manner in the factual; and
  - 64.2 whether the transition to an entity directly listed in New Zealand could affect Gull ListCo's ability or incentives to operate as a low-cost, 'no frills' supplier, compared with any other strategies that might be available and incentives that might operate under any other likely alternative ownership model.
65. We welcome submissions on these issues.

*Purchaser risk: threshold for purchaser approval*

66. In an IPO process, Ampol would notify the Commission in writing of the identity of any person who proposes to acquire shares in the Gull ListCo business over a certain threshold as soon as reasonably practicable.<sup>53</sup> This means that, in effect, any purchaser that proposes to acquire shares in Gull ListCo below that threshold would not need to be notified to the Commission under the Proposed Divestment Undertaking.
67. We are not yet satisfied that this proposal adequately addresses purchaser risk, because we cannot yet rule out the real chance that acquisitions below the specified threshold could not give rise to competition issues.<sup>54</sup>

**Issues in relation to the trade sale**

68. At this stage in our process, the key issue that we are considering in relation to the trade sale process specifically is purchaser risk.
69. In particular, we are considering whether Ampol may have the incentive to sell Gull to a purchaser that may not be an effective competitor.<sup>55</sup> Specifically, as we have noted above, Gull has a reputation as a no-frills supplier that competes aggressively on price. We are considering whether, as a result of its proposed ownership of the competing Z network, Ampol would have an incentive to sell Gull to a purchaser that is not likely to continue to operate Gull in a similarly aggressive manner.
70. One aspect of this consideration will be the extent to which the proposed purchaser is involved at other levels of the fuel supply chain in New Zealand or overseas (ie, the

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<sup>52</sup> NZCC interview with [ ].

<sup>53</sup> The Application at [25.30].

<sup>54</sup> [ ].

<sup>55</sup> *Mergers and Acquisitions Guidelines*, above n8, Attachment F at [F25.2].

proposed purchaser's level of vertical integration). This is because the purchaser may have different pricing incentives at the retail level depending on the extent of their vertical integration. If a purchaser owns significant upstream assets (such as refinery assets), its profit maximising incentive may be to sell high volumes at the retail level. Conversely, if a purchaser does not own upstream assets, it may have a comparatively greater incentive to sell a lower volume of retail fuel at a higher price.

71. Gull's current owner, Ampol, owns refinery assets in Australia. We are considering whether a proposed purchaser that does not similarly own upstream assets may have different strategic incentives in terms of retail pricing at its newly-acquired Gull outlets, with the consequence that retail prices at Gull outlets rise relative to the status quo.
72. For the same reasons, we will also consider whether Z's acquisition by Ampol could also lead to lower retail prices at Z outlets given that Z does not currently own refining assets.

#### **Issues in relation to both IPO and trade sale processes**

73. As part of the Proposed Divestment, Ampol will, either at the option of the purchasers of Gull or the directors of Gull ListCo in an IPO context, enter into a PIE Agreement and/or TSA, with each of these agreements continuing with Gull post-Divestment.<sup>56</sup> This raises composition risk issues.
74. In an IPO context, templates of these Divestment Related Agreements will be provided to the Commission prior to its decision.
75. We are not yet satisfied that these Divestment Related Agreements, together or separately, could not give Ampol any influence over the strategic decisions or behaviour of Gull, in a way that diminishes the competitive tension between Gull and Z.
76. We are therefore considering:
  - 76.1 whether it is necessary to restrict the period of any PIE Agreement to a short term (ie, [ ] at most), in order to:<sup>57</sup>
    - 76.1.1 reduce the time period over which any strategic influence might persist; and
    - 76.1.2 allow Gull the freedom to periodically test the market in competitive tenders; and
  - 76.2 whether the template agreements that Ampol intends to provide are capable of providing us with the necessary level of comfort that the Divestment Related Agreements are not capable of giving rise to the issues of influence

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<sup>56</sup> The Application at [20.6] and [20.7].

<sup>57</sup> A similar position was expressed by Mobil Oil New Zealand Limited in its 2 December 2021 submission on our Statement of Preliminary Issues.

discussed above, including given current uncertainties regarding the identity of any trade sale purchaser and the composition of Gull ListCo's board if it is listed.

77. Finally, we are continuing to consider whether any acquirer of Gull would require additional assets, or ongoing supply or support services, beyond the Divestment Related Agreements, in order to operate Gull in a way that replicates the competitive constraint that Gull would impose on the relevant market(s) without the Proposed Acquisition.
78. We invite submissions on the issues that we have raised above.

### **Other issues**

79. In its submission on our Statement of Preliminary Issues, Waka Resources submitted that the divestment of Gull via an IPO "ignores the opportunity for local Iwi adjacent to the Gull terminal...to buy an asset that's on their underlying land", and that purchasing Gull (including both its terminal and retail outlets) is the "only way NZ based entities can quickly and effectively enter and influence the fuel industry in NZ or for Iwi a chance to invest in another industry other than the typical fisheries, forestry, aquaculture and horticulture."<sup>58</sup>
80. We are continuing to reflect on the impact of these considerations on our analytical framework.

### **Next steps in our investigation**

81. We have agreed with Ampol an extension of time until 16 March 2022 in which to make a decision. However, this date may change as our investigation progresses.<sup>59</sup> In particular, if we need to test and consider the issues identified above further, the decision date may extend.
82. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the issues identified above.

### **Making a submission**

83. We are continuing to undertake inquiries and seek information from industry participants about the impact of the Proposed Acquisition. We welcome any further evidence and other relevant information and documents that the Parties or any interested parties are able to provide regarding the issues identified in this Sol.

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<sup>58</sup> Waka Resources Submission on Statement of Preliminary Issues, 24 November 2021.

<sup>59</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

84. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference "Ampol/Z" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on 1 February 2022.
85. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would be likely to unreasonably prejudice the commercial position of the supplier or subject of the information.