

Mobil Oil New Zealand Limited's (**Mobil**) application for clearance to acquire up to 100% of Z Energy Limited's (**Z**) interest in the Joint User Hydrant Installation (**JUHI**) and Wiri to Auckland pipeline (**WAP, proposed acquisitions**)

Z's response to statement of preliminary issues

PUBLIC VERSION

8 June 2022

Key: Confidential material in this application has been removed. Its location in the document is denoted by [].

Z ENERGY LIMITED (Z) SUBMISSION ON THE STATEMENT OF PRELIMINARY ISSUES FOR MOBIL'S APPLICATIONS FOR CLEARANCE TO INCREASE ITS INTERESTS IN TWO JET FUEL JOINT VENTURES

Date: 8 June 2022

Introduction

- 1 Z wishes to make clear that, while it is the vendor in the context of Mobil's proposed acquisitions,¹ it is not a willing seller.² []

- 2 Mobil is able to contemplate the proposed acquisitions because Ampol's recent acquisition of Z automatically triggered change of control provisions in the joint venture agreements relating to ownership of the WAP and JUHI.³ Mobil wishes to exercise its pre-emptive rights to buy Z out of the joint ventures.

Background

- 3 Z is a long-term, committed supplier of Jet A-1 fuel to customers at Auckland Airport, having operated there for more than 10 years since the purchase of Shell's downstream assets.
- 4 Z's commitment continues following the transition of the refinery to an import-only terminal in April 2022. Its focus continues to be on maintaining safe and reliable operations through investment in Jet A-1 infrastructure assets to support Z's customers at various New Zealand airports. Z has also invested significantly in the decarbonisation process, having conducted extensive work on the provision of sustainable aviation fuels (**SAF**) at Auckland Airport (**AIAL**) [].

Summary of reasons why the proposed acquisitions would substantially lessen competition

- 5 Z considers the proposed acquisitions would be likely to result in a substantial lessening of competition and the Commerce Commission (**Commission**) should decline to give clearance for them.
- 6 In Z's view, the proposed acquisitions would be likely to give rise to a substantial lessening of competition on the basis that:
- 6.1 Mobil and bp Oil New Zealand Limited (**bp**) would have the ability and commercial incentive to engage in foreclosure i.e.:

¹ Mobil's proposal to acquire up to 100% of Z's ownership interest in the Auckland Airport Joint User Hydrant Installation (**JUHI**) and up to 100% of Z's ownership interest in the Wiri to Auckland Pipeline (**WAP**).

² []

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³ Wiri Pipeline Ownership Agreement at clause 16; Agreement for Ownership and Operation of the Depot, Storage and Administration Facilities at Auckland Airport as Joint User Facilities at clause 13.

- (a) exclude Z from using the WAP and JUHI to supply Jet A-1 at AIAL. Each of Mobil and bp would have the individual ability to do this, or
 - (b) if they together decided to allow Z contractual access to supply through the WAP and JUHI, impose material fees on Z which would significantly raise Z's costs to supply Jet A-1 at AIAL (see from paragraph 9),
- 6.2 access to both the WAP and JUHI on competitive terms is essential to the ability to supply Jet A-1 at AIAL. Foreclosure in relation to either joint venture would prevent Z from being able to competitively supply Jet A-1 at AIAL. This would result in an effective reduction from three to two independent suppliers of Jet A-1 at AIAL (see from paragraph 20), and
- 6.3 an effective reduction from three to two independent suppliers of Jet A-1 at AIAL would result in a substantial lessening of competition, which could not be prevented or avoided by new third party entry or the countervailing power of AIAL or airlines (see from paragraph 26). This reduction in competition underscores bp and Mobil's incentive to engage in foreclosure at the WAP and/or JUHI, given such foreclosure would be likely to give rise to increased profits for them in supplying Jet A-1 at AIAL.
- 7 As a result of the evidence Z presents in relation to the points above, in Z's view the Commission should decline to give clearance. But it is also worth noting that, even if Mobil were to propose a "modernisation" of the joint venture agreements, it should not be assumed that a new structure would be more competitive, or even as competitive as, the status quo or any counterfactual to which the three existing participants might agree. "Modernisation" could in fact give rise to a substantial lessening of competition compared with any likely counterfactual (see from paragraph 48).
- 8 Z expands on these key points below.

Mobil and bp would have the ability and incentive to prevent Z from using the WAP and JUHI to supply Jet A-1 at Auckland Airport or substantially raise its costs to do so
- 9 In this section, Z sets out the reasons that:
 - 9.1 following the proposed acquisitions, Mobil and bp would be likely to continue to act in accordance with their commercial incentives (rather than necessarily in accordance with the intentions Mobil sets out in its clearance applications), and
 - 9.2 Mobil and bp's commercial incentive following the proposed acquisition would be to foreclose Z's access to the WAP and JUHI, and Mobil and bp would individually have the ability to give effect to this incentive.
- Mobil and bp are likely to act according to their commercial incentives***
- 10 Mobil's conduct following the proposed acquisitions should be considered likely to accord with its commercial incentives, rather than necessarily any intentions it has stated, because:⁴

⁴ Mobil indicates that it intends to modernise the joint venture agreements for each of the WAP and JUHI, to facilitate new entry, encourage and remove barriers to investment in the joint ventures and

10.1 *there are no restrictions on Mobil's conduct that would bind it to carry out its intentions:*

- (a) the Commission is not able to accept behavioural undertakings, which means that Mobil's statement of its intentions in its clearance applications has no binding force (see s 69A of the Commerce Act 1986), and
- (b) there are currently no "modernised" joint venture agreements signed, or capable of being signed, which would give effect to the stated intentions in a form that the Commission could be satisfied would bind the parties to a lasting arrangement capable of avoiding any lessening of competition. (Please note that, without having seen any proposal from Mobil, Z does not concede that such an arrangement would be achievable.) In fact, at this stage Z has not even received any indication of transitional arrangements that would allow it to continue to use the assets for throughput immediately following the proposed acquisitions,

10.2 *there is no evidence that Mobil intends to carry out the intentions it has stated:*

- (a) as noted above, Z has received no indication that Mobil is preparing to try to "modernise" the joint ventures in the context of the proposed acquisitions in the manner suggested in the clearance applications, and
- (b) [],⁵ []. For completeness, all parties have previously discussed "commercialisation", and various other investment and future-state proposals, and Z continues to be willing to discuss any proposal with its joint venture partners,

10.3 *evidence of Mobil's conduct suggests that it typically acts in accordance with its commercial incentives (rather than in a way that suggests it would carry out its intentions):* evidence of Mobil's conduct is consistent with Mobil acting in accordance with its own commercial incentives, including in the context of jointly owned assets. Examples are set out in Appendix 1. This evidence suggests there is at least a real chance – and in Z's view, a very strong likelihood – that Mobil's future actions in relation to the WAP and the JUHI will be entirely based on Mobil's own commercial incentives.

11 There is no reason to assume bp will act other than in accordance with its own commercial incentives:

11.1 Z does not have direct evidence as to bp's likely response to Mobil's proposal to modernise the joint ventures, if the proposed acquisitions go ahead, and

address the recommendations in the Government Inquiry into the Auckland Fuel Supply Disruption (**RAP Inquiry**) (clearance applications at paragraphs 1.6 and 5.4).

⁵ [

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11.2 Z does not have evidence that bp would do anything other than act in accordance with its commercial incentives.

12 Note further that, in Z's view, there is no clear connection between Mobil's stated rationale for the proposed acquisitions and the actual likely effects of the proposed acquisitions. This further calls into question whether Mobil's stated intentions would be sustained such that, post-acquisition, it could and would carry them out. That is:

12.1 Mobil could equally propose to "modernise" the ownership arrangements in the factual or counterfactual.⁶ Further, at least with respect to investment, Mobil could "go it alone". [

] On one occasion Z alone has invested in facilities to support biofuels in the absence of agreement by the other participants,

12.2 of course, following the proposed acquisitions, Mobil would need to persuade one fewer joint venture partners as to the merits of any proposal (i.e. bp only) compared with the counterfactual (i.e. Z and bp). However, that difference would not fundamentally alter Mobil's ability or incentive to modernise the arrangements. There is no evidence that the presence of Z is hindering investment or alteration of the joint ventures:

(a) Mobil argues that [

] That is not factually accurate. For

example, [

] ⁷ and is owned by an Australian fuel company which participates in aviation joint ventures⁸ and has staff with other relevant international experience. Furthermore Z is and has been an effective participant in supply chain joint ventures in New Zealand.⁹ But even if Mobil's argument were factually accurate, it would not constitute evidence as to the likelihood Z staff could understand and would agree to changes to joint venture arrangements (noting that, as above, Mobil has not made any proposals to this effect to Z), and

(b) [

], and Mobil does not appear to

present any evidence to support its view. In fact, Z's conduct in joint ventures is very different to the view Mobil has presented. There are many previous examples of Z's willingness to make investments:

⁶ Mobil has identified the counterfactual as being the status quo. Z agrees to the extent there is no current proposal or intention to alter the ownership arrangements (except for the acquisitions that Mobil is seeking clearance for).

⁷ [

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⁸ For example, Ampol owns 50% of a pipeline to Brisbane airport and participates in a range of fuel storage and hydrant joint ventures at airports (Cairns, Brisbane, Gold Coast and Melbourne), as well as into-plane facility joint ventures.

⁹ Such as COLL, the shared storage arrangements and at Wiri.

(i) during the RAP Inquiry, Z submitted that the industry “needs to be aligned to improve resilience in the jet fuel supply chain”,¹⁰

(ii) []¹¹ []¹²,
and

(iii) Z was vocal during the Commission’s retail fuel market study in pointing out aspects of the shared storage arrangements that hindered competition, and being open in negotiations with bp and Mobil to altering these (see Appendix 1),

(c) []
[]. Mobil and bp are global companies, compared with Ampol/Z which is wholly committed to Australia and New Zealand. In both Ampol and Z’s experience, Mobil’s (and bp’s) international commitments and offshore approval requirements means that they are constrained in the types of models that they would consider, and in their likelihood of investing (although they may not be aligned on the types of models they would consider). Mobil and bp must have investments approved offshore in the US and UK, and they compete for capital with opportunities within a much larger and more diversified company. For this and possibly other reasons over which Z does not have visibility, [](see further the examples in Appendix 1),

(d) []

] ¹³, and

(e) Mobil argues that []

¹⁰ Z Energy Limited (ZEL) Full Year Results Announcement for the Year Ended 31 March 2019, 2 May 2018, at page 18.

¹¹ []

¹² [], see confidential
Appendix 3.

¹³ See footnote 11.

] Regardless, any lack of involvement in a particular set of arrangements or developments says nothing about Z's willingness or ability to support and implement any new arrangements for joint venture assets,

12.3 the joint venture participants have previously considered and agreed significant issues, and there is no reason they would not be open to doing so again. For example, the joint venture participants have agreed to major capital expenditure on the JUHI in the last 10 years on items such as two new tanks to add storage capacity, a new bund wall and liner improvements, road bridge discharge bay improvements, and replacement of the PLC/SCADA System – all of which Z has supported, and

12.4 there is no evidence that bp and Mobil are systematically aligned, which might lead Mobil to the view that it would be more likely to persuade bp than Z of its ideas. In Z's experience, bp is generally no more likely to align with Mobil than Z. For example, [

].¹⁴

13 As above, in both the factual and any likely counterfactual Mobil would need to persuade other/s of the merits of any changes to joint venture arrangements. This may well entail some difficulty and complexity but such features would be present in factual and counterfactual scenarios.

Following the proposed acquisition, Mobil and bp's commercial incentive will be to raise Z's costs and/or exclude it from the joint ventures (i.e. engage in foreclosure), and they will have the ability to do so

Either Mobil or bp would have the ability to engage in foreclosure

14 Immediately following the proposed acquisitions, unless some other arrangements are agreed, a likely outcome is that Z will no longer be an owner of the joint venture

¹⁴ See also, "UPDATE: Industry split on Auckland jet fuel options", BusinessDesk, 6 June 2019, <https://www.scoop.co.nz/stories/BU1906/S00143/update-industry-split-on-auckland-jet-fuel-options.htm>

assets and will thus no longer be a party that is able to use the assets, or participate in decisions as to how they should be structured and run in the future.¹⁵

15 To the extent that is the case, bp and Mobil would not need to take any steps for Z to be excluded from the joint ventures. In other words, not only would bp and Mobil have the ability to exclude Z from the joint ventures, they would not need to take any steps for it to happen.

16 Importantly, Mobil and bp would have the ability individually to exclude Z from the joint ventures. That is because a decision to alter the existing joint venture agreements requires unanimity among the joint venture owners. So, even if Z could persuade one of Mobil or bp to allow it to participate, such a proposal would need to be agreed by the other (and positive steps would need to be taken by both).

Both bp and Mobil will have the incentive to engage in foreclosure

17 Z's exclusion from the joint ventures is also the outcome of the proposed acquisitions that is likely to be most consistent with bp and Mobil's commercial incentives. That is, for the reasons set out in more detail in subsequent sections, excluding Z from the joint ventures will effectively foreclose Z from competing (or at least, competing effectively) in the supply of Jet A-1 at AIAL and potentially in other jet fuel markets and downstream markets for other fuels. Mobil does not appear to contest that proposition in its clearance applications. Foreclosing Z from supplying Jet A-1 at AIAL would be likely to result in a substantial lessening of competition such that bp and Mobil would be likely to increase their profits overall (see paragraph 20).

18 For completeness, Z assumes it is possible that bp and Mobil would be incentivised to allow Z to access the joint venture as a non-owner. Such an incentive could arise if, for example, bp and Mobil were unable to import sufficient volumes of Jet A-1 in a timely manner to meet demand, or ensure full utilisation of the WAP and JUHI,¹⁶ or if bp and Mobil were able to charge Z sufficient throughput fees to offset any loss of increased profits arising from the likely reduction in competition at AIAL. But even if this occurred, Z would have no ability to ensure it could achieve access on competitive terms either in the short term or on an ongoing basis, having no participation in governance and decision-making in the joint ventures. Therefore, at the very least, bp and Mobil would have the ability and incentive to drive up Z's costs.

Foreclosure would not occur in any likely counterfactual

19 Foreclosure should not arise in any counterfactual scenario because Z would retain participation in the governance of the joint ventures.

¹⁵ [

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¹⁶ This is unlikely in practice, as there would be nothing to stop Mobil and bp increasing their imports of Jet A-1 to make up for the removal of Z's volumes.

If Z was foreclosed from the WAP and/or JUHI, there would be a substantial lessening of competition to supply Jet A-1 at AIAL

- 20 In this section, Z sets out the reasons that, if Z were foreclosed from one or other or both of the WAP and JUHI, it would be effectively foreclosed from supplying Jet A-1 at AIAL, and the likely consequence would be a substantial lessening of competition.

Access to both the WAP and JUHI on competitive terms is essential to the ability to competitively supply Jet A-1 at AIAL

Short term

- 21 *No access to the WAP or the JUHI:* for Z to bypass both the WAP and the JUHI, it would need to truck Jet A-1 from the terminal at Wiri and deliver it directly to planes. It would not be practically possible to do so because:
- 21.1 without access to a storage or hydrant facility (the JUHI) deliveries would need to precisely correspond with demand. As a matter of logistics, it would not be possible for Z to match the storage and output at Wiri with the timing of demand of its airline customers (note that previous examples of trucking fuel to AIAL utilised the JUHI – see paragraph 23 below).¹⁷ More specifically, the timing challenges include the risk of delays in truck delivery, that Wiri is approximately 8km from the delivery point (compared with approximately 100m for the JUHI), and there is highly variable and sometimes congested traffic conditions around AIAL. As a result, the operation would require a large amount of contingency to be able to consistently deliver fuel on time, which would materially increase costs. Z anticipates that airlines would be very unlikely to contract with a provider that only delivers by truck due to high risk of delays, and high costs that airlines may incur related to aircraft refuelling delays. Z notes that these implications would be even more dramatic for trucking Jet A-1 from Mount Maunganui, rendering the possibility infeasible,
- 21.2 there are likely to be material practical and compliance hurdles to having deliveries to the planes rather than via the JUHI. For example, each truck requires three drivers and a relief driver, and in order to transport Jet A-1 airside each would need to complete induction and training on hazardous substances and health and safety compliance. Further, multiple trucks would need to be lined up one after another in order to be able to fully refuel large aircraft with destinations beyond Australia, and
- 21.3 AIAL's cooperation would be required for trucking Jet A-1 from Wiri (or Mount Maunganui), and Z anticipates that cooperation might not be forthcoming. While Z has not sought an updated view from AIAL, AIAL told the RAP Inquiry:¹⁸

Auckland Airport's core aeronautical precinct is not designed to support regular large format trucks or high volumes of trucking. Within the last 12 months Auckland Airport has invested specifically to remove truck movements from the core precinct by developing a peripheral road link specifically for this purpose and implemented heavy vehicle restrictions and penalties pursuant to the Auckland International Airport bylaws for unauthorised access. Every tanker truck delivery would involve traffic management, in particular the complete closure of the core precinct's domestic terminal access roads twice for each truck delivery (i.e., 20 road closures

¹⁷ See clearance applications at paragraph 10.4(b).

¹⁸ RAP Inquiry report at paragraph 17.19.

per day to facilitate 10 tanker truck deliveries). The impact of this would be significant given 50% of all passengers use the domestic terminal.

22 Further information on the cost differential of trucking and ability to move sufficient product to meet demand, compared with using the WAP, is in the following paragraphs.

23 *No access to the WAP:* there are infrastructure constraints to loading Jet A-1 at Wiri (or Mount Maunganui) and receiving truck loads at the JUHI as both are not designed for large-scale trucking, meaning it would not be practically feasible nor cost competitive:

23.1 [

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23.2 [

],¹⁹

23.3 [

(a)

(b)

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23.4 [

²⁰

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¹⁹ This is an approximation only, based on industry costs of the WOSL joint venture (i.e. Wiri) of approximately [].

²⁰ [

- 23.5 previous trucking to the JUHI has taken place only in emergency conditions for a limited duration and at a cost well above normal levels. The arrangements put in place by the industry after the RAP crisis were not considered as being sustainable alternatives for maintaining normal supply, other than for modest quantities during peak months or in exceptional circumstances,²¹ and
- 23.6 the current configuration of cost sharing at Wiri would exacerbate the cost disadvantage Z would experience from trucking.²² [

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²¹ RAP Inquiry report at paragraph 14.47: "Applying the input capacity measure, the pipeline from Wiri to the airport does not provide sufficient capacity on its own. In addition, it has nearly reached the limit of its capacity and soon will not be able to meet forecast demand. Making up the input capacity shortfall by trucking additional fuel from Wiri to the JUHI is possible and would bring the input capacity above the range for a few years. However, the current traffic constraints at the airport mean this is unlikely to be a satisfactory options, other than for modest quantities or in exceptional circumstances."

²² [

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²³ [

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- [

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- [

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- [

- 24 *No access to the JUHI:* for completeness, using the WAP but not the JUHI would not be feasible because the WAP discharges into the JUHI.

Long term

- 25 The implications over the longer term of being unable to access the WAP and/or JUHI are addressed below from paragraph 31.

Foreclosure of Z would give rise to a substantial lessening of competition

- 26 In this section, Z sets out why, if it were foreclosed from supplying Jet A-1 at AIAL, there would be a substantial lessening of competition in the supply of Jet A-1 at AIAL, taking account of existing and potential competition, as well as the countervailing power of AIAL and airlines. Z's foreclosure would also raise Z's costs and adversely affect competition for the supply of Jet A-1 elsewhere in New Zealand, and the downstream supply of other fuel products in New Zealand. This likely outcome of the proposed acquisitions underscores why bp and Mobil would have the commercial incentive to exclude Z from the WAP and/or JUHI.

Existing competition would be substantially lessened if Z were foreclosed from the WAP and JUHI

- 27 Mobil argues that bp, as a continued joint owner, would remain a vigorous competitor in the relevant downstream markets.²⁴ Z accepts that bp would remain a competitor to supply Jet A-1 to AIAL. However, the competitive tension provided by two suppliers would be significantly less than three.

- 28 [

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- 29 As noted in *Z/Chevron* local refining operations placed downward pricing pressure on Jet A-1 suppliers at AIAL:²⁵

There is limited storage for Jet A-1 transported to Auckland Airport via the RAP and WAP (approximately three days). Therefore, the major fuel firms are under pressure to sell sufficient volumes of Jet A-1 at Auckland Airport or they face the possibility of having to export any leftover volumes to markets offshore. Doing so would incur additional freight costs and that product would have to be priced so as to be competitive with other international Jet A-1 fuel sources. As such, exported Jet A-1 must be priced at export parity prices (where any additional costs of transportation are incurred by the exporting fuel firm).

- 30 This dynamic will cease with the shutdown of the refinery. Specifically, rather than being effectively compelled to sell a fairly fixed quantity of Jet A-1 (as a result of the "butchery principle"²⁶), suppliers will be able to calibrate their imports to meet

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²⁴ See clearance applications at paragraphs 10.20 to 10.22.

²⁵ [2016] NZCC 10 (Z Energy Limited and Chevron New Zealand) at paragraph 275.

²⁶ In *Z/Chevron*, the Commission said at paragraph 41: "Fuel firms cannot choose to have a barrel of crude processed into only one or two petroleum products. Instead, each barrel of crude refined by

demand, and the pressure to sell product in short order will reduce. As such, the change to an import-only market will exacerbate any lessening of competition arising from a reduction in the number of suppliers, compared to a market in which there is local refining.²⁷

Entry will not be likely, and sufficient in extent and timely enough to prevent a substantial lessening of competition

- 31 Z does not know of any potential new entrant Jet A-1 supplier. Any new entrant would need to establish a Jet A-1 import supply chain (including import facilities, and either access to the RAP and Wiri or an alternative route). It would then, at a minimum, face uncertainty as to access terms at the WAP and JUHI, and alternatively would need to establish distribution capability to bypass those assets. This would be likely to take several years. As a result, there is no basis to expect entry by a new supplier to be likely, and sufficient in extent and timely enough to prevent a substantial lessening of competition.
- 32 For Z, foreclosure would not be transitory given the time and cost it would take to construct and operationalise an alternative to the WAP and JUHI. As Mobil notes, Z has previously investigated the possibility of transporting Jet A-1 from Mount Maunganui to AIAL using rail.²⁸ This proposal was developed by Z prior to the RAP crisis and proposed to industry, not as a cost competitive second supply chain, but as a possible resilience solution after the RAP crisis.
- 33 Z continues to consider this would be a feasible project. However, as Mobil acknowledges, it “would take several years to deliver”.²⁹ In fact, []³⁰
- Furthermore, it would not be a project that Z could undertake on its own, but rather would require investment from others, most likely other Jet A-1 suppliers at AIAL. The investment would be an expensive and time-consuming, thus long-term, decision to improve resilience and overall capacity in the supply chain. It can in no way be argued to be likely, sufficient in extent, and timely to the level that would be required for Z to prevent a price rise above competitive levels to customers at AIAL.
- 34 Z is unable to comment on Gull’s plans to enter the supply of Jet A-1 at AIAL, except to note that its own investigations of alternative supply to AIAL have yielded the conclusions summarised above. Z would be willing to comment on any proposal in discussions with the Commission but, based on the demonstrably significant supply chain analysis it has conducted, would be surprised if there is an option available

NZRC at Marsden Point produces a mix of different refined products, including petrol, diesel, aviation fuel and other products. This is known as the “butchery principle”... Although the ratio of these different products produced from a barrel of crude are fixed for the most part, there is some degree of flex between different fuel types at the margins.”

²⁷ Compare Mobil’s statements at paragraph 10.22 of its clearance applications.

²⁸ See clearance applications at paragraph 10.4(c).

²⁹ See clearance applications at paragraph 10.4(c).

³⁰ []

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that would meet the Commission's criteria for entry that would prevent a substantial lessening of competition.

Any countervailing power held by AIAL would not be effective to prevent a substantial lessening of competition

AIAL does not have the ability to exercise any countervailing power in a way that would thwart a price rise above competitive levels

- 35 Mobil states that AIAL could impose conditions on any JUHI lease to preserve competition (which Melbourne airport did with its JUHI joint venture lessees).³¹ However, Z considers it highly unlikely such a condition could be imposed in a sufficiently timely way and to a sufficient extent to avoid a substantial lessening of competition: it appears the first opportunity for this to occur would be [

].³² Z would not expect the possibility of the JUHI having more restrictive lease arrangements in [] time would be likely to prevent anti-competitive price rises in the interim.³³

- 36 The same difficulty would apply to any attempt by AIAL to purchase the JUHI assets. []

- 37 Z notes that, in Ampol's experience, the Melbourne example cited by Mobil was a long, drawn-out process over a number of years, which (consistent with the preceding paragraph) centred on the expiry of the existing lease. Such a change is not such an imminent and credible threat that it could deter Jet A-1 price rises:

37.1 Melbourne airport is supplied by a JUHI joint venture (in which Mobil is a participant) and by trucking from terminals in the Port of Melbourne (the terminals being owned by individual oil companies),

37.2 key infrastructure was governed by a regime that [], and

37.3 [

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- 38 [

³¹ See clearance applications at paragraphs 10.7 to 10.8.

³² []

³³ []

]. Furthermore, to Ampol/Z's knowledge no new suppliers have entered since the changes.

AIAL's incentive is insufficient to prevent a substantial lessening of competition

39 AIAL has only a limited incentive to avoid a substantial lessening of competition. That is because a substantial lessening of competition would only have an adverse impact on AIAL if it rose to a level that risked fewer airlines flying to AIAL, or AIAL had wider concerns about suppliers' conduct. A mere price rise above competitive levels would be unlikely to deter airlines from flying to AIAL and therefore this incentive is not of significance.

40 In short, there is "headroom" for material anti-competitive price increases before AIAL's incentive operationalises, meaning that AIAL's incentive would not prevent a substantial lessening of competition.

Airlines do not have sufficient countervailing power to prevent price rises above competitive levels

41 Airlines' ability to constrain any attempt by Mobil or bp to increase jet fuel prices by shifting volumes to rival suppliers at other airports is limited by several factors including scheduling constraints (access to airport facilities and crew). It is not costless to adjust fuelling schedules and thus there is room for material price rises before this conduct would be worthwhile.

42 While airlines reduced their dependence on AIAL during the physical supply disruption in 2018, this came at a high cost to airlines and was only done given the emergency circumstances. So, it is not a competitive alternative. Domestically, preferentially fuelling at Wellington or Christchurch airports would not be effective given Jet A-1 is
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43 While Air New Zealand is a large volume customer, which both bp and Mobil will wish to serve, in practice its ability to thwart price increases is likely to be limited. Air New Zealand, like many other major carriers, spreads its volume among two (or more) suppliers, in part for resiliency or security of supply purposes. If there were only two Jet A-1 suppliers at AIAL, Air New Zealand and other large airlines would have no choice but to purchase from both suppliers regardless of price, thus reducing competitive tension and increasing suppliers' pricing power.

Competition would be adversely affected in other markets

44 As the Commission is aware, New Zealand is now an import-only fuel market. Import cargoes are typically made up of multiple products. and can be destined for various downstream product and geographic markets.

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45 First, the Jet A-1 in any given cargo may be delivered to AIAL as well as other airports. Demand for Jet A-1 at AIAL is vastly greater than demand at any other airport. To illustrate,

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45.1

45.2 [

] and

45.3 [

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46 [

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47 Secondly, the economics of combi-cargoes vary depending on the product mix they include. [

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A substantial lessening of competition may be likely even with Mobil's suggested "modernisation"

48 Z considers that the proposed acquisitions would be likely to result in a substantial lessening of competition, and thus that clearance should be declined. But in any event, even if Mobil were to propose a "modernisation" of the joint venture agreements, it should not be assumed that this would be pro-competitive, as compared with either the status quo or any revised arrangements to which the three existing participants might agree in the counterfactual.

49 First, the detail of any modernisation would be important to whether it should be regarded as pro-competitive. Mobil suggests that removing the requirement to acquire an ownership interest for entrants to use the assets, and ensuring the owners are able to "generate a return", would be pro-competitive compared with a counterfactual of the status quo. However, that is not necessarily the case and there is scope for pro and anti-competitive effects in a wide range of possible structures. For example, if some users were not owners, and the owners charged exorbitant fees (to "generate a return"), then new users would face high costs while owner-users could subsidise their downstream operations using their returns on the assets. Conversely, if all users were owners then all might participate in the assets on equal terms and, at minimum, have a say in how the assets are operated. Mobil itself publicly made this argument in the context of an application for regulation of services at the Sydney JUHI.³⁴ Mobil, together with the other JUHI participants, stated that the appropriate mechanism for third parties to supply fuel through the JUHI involved equity participation because that ensures appropriate incentives for

³⁴ See the [submission by Sydney Airport JUHI Joint Venture](https://ncc.gov.au/images/uploads/DEJFBASu-002.pdf) regarding the BARA application for "Service No 1: provided by the Sydney JUHI Facility", 21 November 2011, available at <https://ncc.gov.au/images/uploads/DEJFBASu-002.pdf>. See also Mobil's separate submission in support of the joint venture's submission at <https://ncc.gov.au/images/uploads/DEJFBASu-014.pdf>.

efficient operation and investment.³⁵ They also submitted that the provision of access to third parties on a throughput basis (i.e. without an equity interest) was "...likely to have a number of outcomes which may limit competition in the medium to long term".³⁶

- 50 Secondly, even if in the factual Mobil proposed pro-competitive arrangements, these would be subject to bp's input and agreement. As set out above, it is far from clear that a pro-competitive restructuring would be more likely in the factual than any counterfactual (and Z considers on the basis of the evidence it has presented that, in fact, Z's participation would be more likely to lead to pro-competitive restructuring than its exclusion).
- 51 Accordingly, even if the Commission considered Mobil would be likely to propose a restructuring along the lines presented in the clearance applications, the factual cannot be considered likely to entail a pro-competitive joint venture structure compared with any likely counterfactual. In fact, Mobil's proposal may well give rise to a substantial lessening of competition.

³⁵ See submission by Sydney Airport JUHI Joint Venture, above, at paragraph 9.

³⁶ See submission by Sydney Airport JUHI Joint Venture, above, at paragraph 192.

APPENDIX 1

- 52 Following are examples of Mobil's conduct (beyond those set out in the submission above) that are consistent with Mobil acting in accordance with its own commercial incentives, including in the context of supply chain and/or jointly owned assets, and not actively progressing investment and improvements:

52.1 *National Inventory Arrangements (NIA), also known as borrow and loan:*

(a) [

]³⁷

(b) In its final report on the market study, the Commission acknowledged the unfairness in the system [and suggested it be changed.³⁸]

(c) [

]³⁹ [

]⁴⁰ [

]

(d) As the Commission is aware, the NIA is now being unwound. []

52.2 *WAP Operating Committee:* [

³⁷ []

³⁸ []

³⁹ Commerce Commission, "Market study into the retail fuel sector – Final report", 5 December 2019, at paragraphs 5.93 to 5.95.

⁴⁰ []

]⁴¹ [
]

52.3 *General delays to WAP Operating Committee decisions:* [

]

⁴¹ [
]

CONFIDENTIAL APPENDIX 2 – []

