[PUBLIC VERSION]

AMPOL LIMITED / Z ENERGY LIMITED

PARTIES' RESPONSE TO COMMERCE COMMISSION'S STATEMENT OF ISSUES

1 February 2022

PARTIES' RESPONSE TO COMMERCE COMMISSION'S STATEMENT OF ISSUES

1. Introduction / executive summary

1.1 This submission sets out Ampol's response to the Commerce Commission's (**Commission's**) Statement of Issues dated 23 December 2021 (**SoI**) published in relation to the proposed transaction between Ampol and Z Energy (**Proposed Transaction**).

1.2 The Commission is focused on the efficacy of the Proposed Divestment Undertaking submitted by Ampol to divest Gull as a going concern to remedy any substantial lessening of competition that may arise as a result of the Proposed Transaction. Ampol appreciates the Commission's careful consideration of this matter to date but it maintains its view that the terms of its proposed divestment adequately address all of the Commission's concerns. In summary and in response to the key issues raised by the Commission:[1]

(a) Ampol does not agree that it would have ongoing influence over Gull as result of its proposed ongoing shareholding in Gull resulting from an IPO nor through the two potential Divestment Related Agreements:

(i) The Retained Shareholding (as defined in the clearance application) by Ampol would be at a level below 10%. This level of shareholding, with no other rights to appoint or remove a director, will not in any realistic or foreseeable scenarios enable Ampol to influence Gull. If a further additional shareholding (up to [redacted]% in aggregate) is also retained by Ampol then Ampol will give a binding undertaking not to exercise any voting rights associated with those further shares for the period during which they are held. Ampol submits that it would not be in any position to exert a substantial degree of influence over Gull, or otherwise bring real pressure to bear on the decision-making process of Gull, if its voting rights were less than 10% and without any rights to appoint or remove directors.

(ii) Even if the purchaser or, in the case of an IPO, the directors of Gull choose to enter into the Divestment Related Agreements with Ampol (both of which are offered only as an option as part of the Proposed Divestment), that will not provide Ampol with any further influence over the Gull business. The agreements are standard, arms-length, are not intended to be long term and do not contain terms allowing Ampol to influence the strategy or business decisions of Gull. The directors (or indeed any trade buyer of Gull) will be well placed to ensure that they are not "beholden" to Ampol by virtue of any terms of these two agreements. Further, both agreements will be subject to Commission review in advance of being finalised.

(b) Ampol does not agree that an IPO has the potential to take materially longer to complete than a trade sale in the context of the divestment of a business the size of Gull. Both "tracks" for the divestment have some risk of taking longer than the other but, most importantly in this regard, any potential concerns as to the time it may take to effect the divestment are fully addressed through the robust hold separate and ring-fencing undertakings that Ampol has provided in the Proposed Divestment Undertaking. The robustness of, and confidence in, these arrangements are further bolstered in this particular context by the way in which Gull has been operated to date, i.e., as a largely independent business.

(c) The Commission has questioned the degree of certainty it can have regarding forward looking strategy for Gull in the case of an IPO and whether the product disclosure statement (**PDS**) provides sufficient clarity and surety of Gull's likely strategy post-IPO. Ampol submits that whether Gull's strategy is clear from the PDS, and whether or not the Commission can have surety that will not then change over time, is not the question that needs to be considered by the Commission. Whether Gull is owned privately or listed, the new owners of that business will be free to determine its ongoing strategy, including

[1] As per paragraph 8 of the SoI.

responding to changes in market dynamics. The key question for the Commission is whether Gull will be structurally, or systematically, less able to be competitive as a listed company as compared to it being a private company (as it currently is). Ampol submits there is no reason (or evidence) that a listed company would operate less competitively than a privately owned entity (see further (d) below).

As Ampol had noted in its clearance application, one of the "benefits" of divestment via an IPO over a trade sale is that there is greater visibility as to the intended strategy for the business moving forward by virtue of the requirement to issue the PDS to prospective investors at the time the IPO is launched. Ampol has noted to the Commission that if additional comfort is sought, then the PDS provides a greater insight into forward strategy than the Commission may otherwise obtain via a trade sale (i.e., once the Commission has approved the purchaser under a trade sale, it has no forward-looking assurance around strategy).

(d) Finally, Ampol does not agree that the transition to a listed entity could affect Gull's ability or incentives to operate a low-cost, 'no frills' supplier model. There is no reason to believe Gull would be "less competitive" under one form of ownership than the other. The Gull model is an existing successful model. An IPO would not result in any structural change to the Gull business and with existing management remaining in place there is no basis for a suggestion that there would be a change in strategy just because Gull becomes a listed entity. While Ampol has acknowledged that the move to a listed company will involve some increased costs, these are not material costs in the context of a business the size of Gull and such costs are offset to some extent by the other advantages of being a listed entity, e.g., access to new sources of capital to fund expansion and capital investments.

1.3 In the remainder of this response, Ampol addresses the issues identified by the Commission (following the order of the SoI) and further sets out why Ampol considers the Proposed Divestment Undertaking will be sufficient to remedy any competition concerns.

1.4 Ampol would welcome an opportunity to meet with the Commission to discuss this submission further and any residual questions or concerns the Commission may have regarding Ampol's Proposed Divestment Undertaking. Ampol proposes that such a meeting be held as early as convenient to the Commission in the week of 14 February 2022 (by which time any cross submissions on the SoI would have also been received).

2. Counterfactual[2]

2.1 The Commission has indicated in the SoI that at this stage it considers the most likely counterfactual is that Gull would continue to provide the level of competitive constraint in the relevant markets as it does currently.

2.2 Ampol considers this an appropriate counterfactual. However, Ampol notes that continuing to provide the level of constraint, whether under the continued operation of Gull under Ampol ownership and independent of Z Energy or otherwise, does not necessarily mean that Gull would continue to operate the same strategy as it has always done. Rather, Gull could change its strategy in the face of changing market conditions or commercial priorities for Ampol. The key question for the Commission's focus in regard to the Proposed Transaction and the Proposed Divestment Undertaking is therefore only whether competition would be lessened, and not whether Gull would maintain the same strategy as it does currently, under new private ownership or as a publicly listed entity.

3. IPO

3.1 The Commission has set out a number of specific concerns in the SoI related to the efficacy of an IPO to address any competition concerns. Those specific matters are addressed below.

[2] See paragraphs 19 to 22 of the SoI.

However, there are two preliminary points about Ampol's proposal to include a divestment by way of an IPO as part of its undertaking that are important to emphasise.[3]

(a) First, at a conceptual level, an IPO should be an effective means for a party in Ampol's position to divest itself of a business in order to meet possible competition law concerns, including adequately addressing the asset, composition and purchaser risks identified by the Commission. That is, the features inherent in an IPO process should not be a bar to that being an effective means of achieving a divestment that sufficiently addresses competition concerns given that ultimately, following a successful IPO, there will be a standalone business continuing to compete independently in the market under the management of a separate executive team and strategic direction of a separate board of directors. It is Ampol's submission that not having a single purchaser – but rather Gull being a listed public company and so owned by, and accountable to, a large number of shareholders – would not make Gull a less effective competitor. Ampol's reasons for this are set out in the clearance application – see paras 23.16 – 23.20 and 25.8 – 25.9. Under an IPO, Gull would also have continuity in its experienced and successful management team.[4] It is Ampol's submission that an IPO can "resolve" any competition concerns just as effectively as would a trade sale.

Related to this, and following the Commission's comments from paragraph 58 of the SoI, Ampol considers that a publicly listed company can operate as effectively as a competitor in the relevant market as would a company privately owned. Z Energy operates highly effectively as a listed company, as does ASX listed Ampol itself (as do numerous listed companies across many industries). The benefits of being a listed company, such as better access to capital, highly experienced managers and strong governance processes, create a platform for listed companies to be very competitive operators. For this reason, Ampol does not agree that a publicly listed ownership structure carries a higher risk that it could lead to a less effective competitor in the market. Indeed, as noted, ready access to both equity and debt capital markets is often cited as a clear advantage for a listed company. Such access can in turn mean capital can be deployed to improve competitiveness and pursue growth opportunities, whether that is via capital expenditure, acquisitions or organic expansion, or the ability to hire talent.

However, Ampol acknowledges that the mechanics and specific details around how an IPO of Gull is to be executed in this particular context do create some new considerations for the Commission. Ampol had given those matters careful consideration before proposing this form of divestment in its clearance application and the detailed Proposed Divestment Undertaking accompanying that clearance application. It considers its proposal for how it would effect the divestment by way of an IPO (as explained in Part G of the clearance application and reflected in the Proposed Divestment Undertaking) adequately addresses any potential risks or concerns the Commission may have identified. Ampol is, however, open to further discussion about how best to address the Commission's concerns.[5] Ampol believes the IPO divestment route can provide the Commission with at least the same level of assurance around competition issues as a trade sale divestment route.

(b) Second, Ampol's proposal that it be able to divest Gull by way of an IPO or trade sale was to provide Ampol with two viable options to divest Gull (to be exercised at its choice, but within the parameters set by the Proposed Divestment Undertaking), given it is a large

[3] See further Ampol's confidential response dated 30 November 2021 to the Commission's specific questions on the form of the undertaking. Some points made in that document are repeated below as it is not clear if the Commission had had a sufficient opportunity to consider those points prior to issuing the SoI and Ampol also considered it may be helpful to further set out some of its points in this public document.

[4] As set out in the clearance application at paras 23.18 and 23.19, Ampol would propose for [redacted] and for an experienced CFO to be hired in preparation for the IPO to enhance the management capability of Gull for the listed company environment. Ampol will provide the Commission with details of the proposed directors and the CFO (and other senior managers) once such persons have been identified during the Divestment Period.

[5] Ampol notes that it had identified a number of possible modifications it could make to its proposed undertaking and associated divestment mechanics in its confidential 30 November 2021 response and is committed to further discussing those matters with the Commission. Some are referred to again below.

business to divest, within the requested Divestment Period ([redacted]). This, in turn, was intended to provide the Commission with even more comfort that there would be a successful divestment of the business within the required period. The terms of the Proposed Divestment Undertaking were intended to address all of the potential asset, composition and purchaser risks and the onus will be on Ampol to ensure all required conditions set out in the agreed undertaking are met before it could proceed with a complying IPO. If those conditions are ultimately not able to be satisfied (for whatever reason), Ampol could instead sell by way of trade sale [redacted]. To this end, Ampol considers that its proposed divestment mechanics for the IPO set out in Schedule 1 of the draft Proposed Divestment Undertaking – to make it a "complying IPO" – already adequately address any concerns the Commission may otherwise have had as to matters such as Board composition, investor make up, level of shareholdings and voting rights that Ampol may retain, as well as providing for Commission oversight of terms and process and insight into Gull's strategy as a listed company. As noted, Ampol is happy to continue to work with the Commission to refine and modify any conditions the Commission considers are required for the IPO option to be acceptable, but Ampol submits that these are matters that should be able to be addressed through discussion on the detail rather than the IPO option as a whole not being acceptable because of any perceived uncertainty with the concept.

No substantial ongoing influence of Ampol over Gull[6]

3.2 The Commission is concerned that a proposed retained shareholding could give Ampol a substantial degree of influence over Gull once listed because Ampol would have the ability to bring real pressure to bear on the decision-making process of Gull, as a result of which competition could be affected, in conjunction with the offer to bidders of a product import and export agreement (**PIE Agreement**) and transitional services agreement (**TSA**) (together, the **Divestment Related Agreements**).[7] The Commission has indicated this concern may arise not only in relation to the proposed Additional Shares (which Ampol has proposed to retain on a non-voting basis if required in order to effect a successful IPO and which could increase Ampol's total shareholding to [redacted]%), but also the proposed initial Retained Shareholding (of [redacted]%) on a standalone basis.

3.3 Ampol is surprised the Commission would have a concern with the Retained Shareholding. Ampol acknowledges the reference given at footnote 35 of the SoI that in a Financial Markets Conduct Act 2013 context a holding at or above 5% is considered a holding at which persons are, or may at any time be, entitled to control or influence the exercise of significant voting rights in a listed issuer. But, that is for different reasons. The purpose of the regime relating to the disclosure to the market of substantial holdings is "*to promote an informed market, and to deter insider conduct, market manipulation, and secret dealings in potential takeover bids*…".[8] We anticipate that 5% threshold has been set accordingly at a lower level to ensure good disclosure to the market regarding trading activities of shareholders. It is not intended to establish a threshold for influence or control over a listed entity.

3.4 Ampol notes that under the Takeovers Code, a person who holds or controls more than 20% voting rights (not just a shareholding test) must make a takeover offer to all shareholders or obtain shareholder approval for actions. (That threshold is designed to ensure that effective control of a code company does not pass to a party or associated parties without an offer being made to all shareholders on the same terms or a change in voting control being approved by shareholders.) Ampol considers that this threshold of voting rights above 20% more accurately reflects the level of interest required to control a company via being able to bring real pressure to bear on its decision making in practical terms (and therefore allows shareholders a chance to approve such a change in control, or to sell their shares before such a change occurs). If voting rights below 10%

[6] See paragraphs 46 to 53 of the SoI.

[7] As set out in the Ampol / Z Energy clearance application, these agreements will be at the election of the purchaser or directors of Gull in the case of an IPO.

[8] Section 273, Financial Markets Conduct Act 2013

would cause the same concern for investors, one would expect the threshold under the Takeovers Code to be significantly lower.

3.5 Ampol had understood the Commission also held the view that a holding of less than 10% would not generally raise a Commerce Act concern.[9] There is precedent for this view in the context of the shareholdings acquired in The Warehouse by each of Foodstuffs and Woolworths in 2007 which were just below this threshold (and remaining shares the subject of clearance applications that were ultimately declined). Ampol's understanding is that the acquisition of each of those shareholdings in and of themselves were not the subject of a Commission investigation or concern. In Decision 606 and 607, the Commission indicated that it did not undertake a full investigation of these acquisitions, partly because no control was attached to the shareholdings in the form of the ability to appoint directors to the board of The Warehouse.[10]

3.6 Ampol understands that board representation was also a key factor in the Commission Decision 459A, National Foods Limited and New Zealand Dairy Foods Limited, 26 September 2002 (being a reconsideration of its earlier decision as to whether Fonterra and National Foods were associated[11]). In Decision 459A, the Commission cited expert evidence and opinion from Basil Logan, Chairman of Opus International Consultants Limited, who considered board representation to be the most important factor in assessing Fonterra's ability to influence National Food's behaviour.[12] Mr Logan also doubted that the ability to block special resolutions by itself would enable Fonterra to influence National Food's strategic objectives.[13]

3.7 Therefore, while Ampol notes and understands that other factors can impact the question of influence (some of which are discussed further below), as a starting point, a Retained Shareholding at less than 10%, with no rights to appoint or remove a director, should not reach a threshold of influence for Commerce Act purposes.[14] Ampol also maintains its view that such a shareholding would not, on typical voter turn-outs, be sufficient to block a special resolution (which needs to be passed by 75% of votes) and it is also unlikely that a 10% voting block would determine the outcome of a significant shareholder matter.[15]

3.8 Ampol notes the Commission also raises the question as to whether Ampol could influence the composition of Gull's board.[16] However, as directors are appointed by ordinary resolution (requiring 50% of the votes) it is unlikely that with voting rights below 10% Ampol could impact this choice as voter turnout would need to be incredibly low or there would need to be a large number of other shareholders who, in any event, agreed with Ampol for its shareholding to be determinative.

3.9 Ampol considers that the circumstances in which it could exercise its buy-out rights under section 110 of the Companies Act 1993 would be extremely remote, and would not create any negative

---

[9] This assumption arises from the phrasing of the example given at paragraph 2.9 of the Commission's merger guidelines that suggests – albeit in a negative phrasing – that a shareholding above 10% may raise a concern.

[10] Decisions 606 and 607, Foodstuffs (Auckland) Limited, Foodstuffs (Wellington) Co-operative Society Limited, and Foodstuffs South Island Limited; and (separately) Woolworths Limited and The Warehouse Group Limited, at paragraph 52.

[11] i.e. Decision 459, National Foods Limited and New Zealand Dairy Foods Limited (22 March 2002).

[12] See paragraph 38.

[13] See paragraph 32.

[14] In terms of the enforceability of the intended documentation as to the non-voting commitment, as set out in the clearance application / Proposed Divestment Undertaking, an enforceable deed poll would be entered into by Ampol in favour of Gull ListCo to ensure it cannot vote any of the Additional Shares, meaning that its voting rights would be capped at [redacted]%. The deed poll would be enforceable by Gull ListCo and its shareholders. A deed poll is commonly used in IPOs and takeovers where a shareholder is to give a binding undertaking which the listed entity is able to enforce. Ampol can provide a draft of the form of document if that would be helpful to the Commission. Further, and as discussed further below, as was raised in Ampol's confidential 30 November 2021 response Ampol would also be happy to provide the commitment to the Commission directly.

[15] See paragraphs 25.23 to 25.25 of Ampol's clearance application.

[16] As set out in paragraph 51 of the SoI.

impact on Gull or disincentive for the Gull board to put forward proposals for the relevant types of special resolutions. Such rights would only arise in very narrow circumstances, being an amendment to the Gull constitution which imposed or removed a restriction on the activities of Gull, a major transaction or an amalgamation. In addition it could only occur following the expiry of the lock-up period in February 2024 (otherwise the disposal would breach the lock-up agreement) and if there were no Additional Shares (i.e., no shares subject to a non-voting commitment, such that section 110(c) is satisfied). Ampol would be required to vote all of its shares against the resolution and the resolution would need to pass. While this is a theoretical risk, it would seem a very unlikely scenario as it could involve Ampol in a long drawn out sale process which could become subject to arbitration or objection by Gull if it does not wish to repurchase the shares or it is unable to find a buyer.

3.10 Ampol acknowledged in its clearance application that a shareholding above 10% may give the Commission concerns as to possible influence. It was for this reason that Ampol had proposed that it provide a commitment not to exercise any voting rights associated with any Additional Shares.[17] In Ampol's view this commitment provides a complete answer to the Commission's concern. In simple terms Ampol submits that it cannot reasonably be said to bring real pressure to bear on the decision-making process of Gull if it cannot vote more than [redacted]% of shares in the company and without any right to appoint or remove directors.

3.11 Ampol does not agree with the suggestion that an up to [redacted]% equity stake, with only [redacted]% voting rights attached (and no director appointment or removal rights) would cause Gull to act differently and/or less competitively. It is true that at this time it is not known what the make-up of shareholders will be at the time of listing (or at any time following listing once trading has commenced) and whether Ampol would be the largest shareholder in Gull (with either just the Retained Shareholding or with the Additional Shares added). However, Ampol considers the Commission's concern that a large shareholder may nonetheless hold sway with other shareholders or the directors, or may coordinate with a larger cornerstone shareholder in breach of competition laws, is misplaced. Even if Ampol could coordinate with another large shareholder in a way that could affect Gull's operations and ultimately substantially lessen competition in the market,[18] such coordination would be actionable by the Commission under section 27 of the Commerce Act.

3.12 In any case, each shareholder will need to act in its own best interests. That is true for any corporate action affecting the listed company, whether it be voting on a resolution, participating in a capital raising, buy-back or other corporate transaction. Ampol therefore considers that any retained holding would not limit Gull's ability to execute corporate transactions involving shareholder approval or participation. In the specific context of a capital raising, not only would a subsequent capital raising be very rare shortly following the capital raising conducted as part of the IPO, but there is also nothing to suggest that a capital raising could not be completed without Ampol's participation (which would have the effect of diluting its holding). There are a number of examples of successful capital raisings being conducted without the participation of shareholders with larger holdings.[19] In fact, it is often seen as a benefit for listed company boards if new investors can be brought on to the share register as a result of existing shareholders non-participation.

3.13 Further Gull will be run independently given its board will be required to act in the best interests of Gull as a company, rather than any particular shareholder. Gull would risk claims of prejudice to minority shareholders or criticism from institutional shareholders and fund managers if it did otherwise. As a listed company Gull will be required to have at least two independent directors, and a majority of independent directors if it is to be in compliance with the NZX Corporate Governance Code. Any shareholder resolution (including relating to the appointment of a new

[17] For clarity, it is noted that the reason for providing a commitment about not exercising voting rights over such shares, as opposed to issuing shares without voting rights, was to avoid having two classes of shares in the company. Ampol continues to consider it would be undesirable to have different classes of shares. Ampol has committed to sell such shares, and non-voting shares may not be desirable for the subsequent owner(s).

[18] An issue the Commission has raised at 50.2 of the SoI.

[19] For example, Kathmandu successfully conducted a $204 million capital raising in 2020 notwithstanding the non-participation of Briscoe (a 16.27% shareholder).

director) would likely include a recommendation from the Gull board on how to vote. Ampol considers that shareholders would be more influenced by that recommendation, rather than how Ampol intended to vote its shares (if and to the extent that information was public, given important votes are usually conducted by poll (i.e. in writing)). From a company law perspective such directors should not be voting or otherwise acting in the best interests of Ampol. Given Ampol's lack of practical ability to influence other shareholders on any resolution, Ampol considers that the Commission's concerns expressed at paragraph 50.3 of the SoI about Ampol's status as an industry player are unfounded.

3.14 Ampol further notes, in response to footnote 37 of the SoI that a resolution passed under section 109 of the Companies Act 1993 in relation to the management of a company is not binding unless the constitution states otherwise. Constitutions of listed companies would not typically make such a resolution binding, and Ampol expects that Gull ListCo's constitution would adopt the same approach. Further, section 109 resolutions relate to matters that are first raised at the meeting itself and they are unusual. Other shareholders will not know Ampol's views on such a matter ahead of a meeting and would only know Ampol's views if it speaks at the meeting itself.

3.15 For all of the above reasons, the Commission's reference to a possible "passive" influence (at paragraph 49 of the SoI) also seems misplaced. The only source of additional influence that could be said to arise comes from the Divestment Related Agreements (as noted in paragraph 50.5 of the SoI) such that there could be additional connections between Ampol and Gull in addition to the Ampol shareholding. However, as discussed further below, both of these proposed agreements (to be entered into only at the option and at the choice of the Gull directors and following negotiation between Ampol and the Gull directors) contain standard, arm's length terms. There is no reason to suppose that the existence of such agreements would impact how Gull competes in the market to avoid "conflict" with Ampol.[20] Gull already operates petrol stations in a number of the same areas as Z Energy stations, and opening new stations in areas in which Z Energy operates would not affect the existing supplier / customer dynamic. Further:

(a) The fuel supply agreements that are possible here are common between competitors in the market, and there is nothing in the draft PIE Agreement (or TSA) which would allow Ampol to exit the agreements if it did not like Gull's market behaviour. The Gull directors will be able to consider alternative fuel supply arrangements which they consider are preferable from a commercial perspective.

(b) Given the size of Gull, it is expected that experienced independent directors will be appointed to the Board[21] and the existing management of Gull is already well versed in negotiating major contracts, including fuel supply arrangements. Given the knowledge that Ampol is required to divest the Gull business within a certain time frame, Ampol submits that the (independent) Gull Board would be in a strong negotiating position in relation to both the PIE and TSA.

(c) Neither the PIE Agreement nor the TSA are intended to be particularly long term, with the PIE Agreement subject to the requirements of the Fuel Industry Act 2020 (**FIA**) in all respects, including the maximum term of fuel supply agreements and maximum volume of fuel supplied under that legislation.

(d) Ampol does not expect the arrangements under the TSA to be at all material – it is a transitional arrangement expected to be for a relatively limited set of corporate services (as Gull currently operates on a stand-alone basis with minimal support from Ampol) intended to be for a short period. No transition services were provided by the Rae family entities on the completion of the sale of Gull to Ampol. The cost of those services will not be material to Gull or affect its ability to compete against other retail fuel companies. Again, the transitional services will be available to the extent, and for as long as, the independent

[20] As set out in paragraph 50.5 of the SoI.

[21] As noted above, the (independent) Gull directors are obliged to act in best interests of Gull (not its largest shareholder).

directors of a listed Gull determine it is necessary to ensure the seamless operation of Gull's business.

(e) The company itself will be well placed to ensure that it is not "beholden" to Ampol by virtue of any terms of these two agreements and the TSA allows for Gull to exit the TSA early if it wishes to do so.

(f) The PIE Agreement and TSA will be subject to Commission review in advance of being finalised.[22]

3.16 Finally, on this part of the SoI, Ampol does not agree with the suggestion that Gull and its shareholders may not have an incentive to enforce Ampol's undertaking not to vote the Additional Shares.[23] Ampol considers that the Gull board would have a legal obligation to enforce the undertaking because of their fiduciary duties and the shareholders other than Ampol will have purchased their shares in the knowledge that Ampol would not be entitled to exercise voting rights attached to the Additional Shares.[24] Ampol would be happy to modify the undertaking to provide this commitment to the Commission directly.[25]

3.17 Similarly, if the Commission considered that Ampol continuing to hold the Additional Shares should be subject to a more formal commitment as to the period by which they would need to be divested (and that becoming part of the undertaking), Ampol is also open to discussing with the Commission incorporating the commitment into its undertaking on appropriate terms.

3.18 Thus, Ampol considers its proposal for effecting the IPO addresses any potential composition risk and any concerns as to possible ongoing Ampol influence.

The IPO will not delay the divestment[26]

3.19 The Commission has indicated that it has some concerns that the IPO process has the potential to take materially longer than a trade sale and has concerns regarding the implications of that timeframe for its analysis and competition in the relevant markets.

3.20 Ampol submits that any potential concerns as to the time it may take to effect an IPO are adequately addressed through the robust hold separate and ring-fencing undertakings provided in the proposed undertaking (and as explained in paras 24.1 – 24.7 of the clearance application). The type of arrangements proposed for this, as set out in the Proposed Divestment Undertaking, have commonly been accepted by the Commission in other divestment contexts so as to enable an orderly sale of the business to be divested post completion of the primary transaction. Ampol does not understand this type of arrangement to have a particular expiry date – as long as the arrangements are robust there is no reason to expect they would lose their effectiveness after a certain period. Here, the robustness of, and confidence in, these arrangements are further bolstered by the way in which Gull has been operated to date i.e. as a largely independent business (see clearance application at paras 23.2 – 23.6).

3.21 Further, Ampol does not agree that the IPO would necessarily take materially longer than a trade sale process in the context of the sale of a business the size of Gull. As outlined in the clearance application, Gull is a significant business that will take some time to sell either by way of trade sale or IPO.[27] Both the trade sale and the IPO require significant pre-sale work to be undertaken

[22] As set out in the confidential 30 November response, [redacted]

[23] As referred to in paragraph 50.4.1 of the SoI.

[24] See also footnote 14 above as to the enforceability of the form of undertaking.

[25] This commitment was already made in the confidential 30 November response and was proposed initially as a commitment to the company on the basis Ampol perceived the Commission may not have wanted an ongoing monitoring role.

[26] See paragraphs 54 to 57 of the SoI.

[27] See further paragraphs 21.1 to 21.4 of the clearance application as to timing.

by Ampol (and its advisers)[28] but Ampol does not think there is undue delay automatically introduced by the IPO process. Both "tracks" have some risk of taking longer than the other, e.g. an IPO is not conditional whereas potentially a trade buyer of Gull may need an OIO approval (or have other conditions). Similarly, the conclusion of negotiations with a buyer in a trade sale is not entirely in Ampol's hands (it may be beholden to the counter-party's timings and regulatory approvals) whereas Ampol is in more control of timing for an IPO and there is a relatively standard period required to complete an IPO. The successful completion of an IPO, on the other hand, may be more contingent on wider financial market conditions and in meeting the relevant IPO windows.

3.22 In addition, the current New Zealand border restrictions caused by potential impacts of Covid-19 (including the current Omicron wave) make it temporarily more difficult than usual for the sale of a large business such as Gull. Importantly, the border restrictions prevent overseas bidders from undertaking the usual due diligence of the business, including undertaking site visits of Gull's infrastructure and direct detailed engagement with the Gull management team.

3.23 All of these factors were reasons why Ampol's undertaking proposed to effect the divestment within [redacted] of its acquisition of Z Energy, whether that be by way of trade sale or IPO. [redacted] Under either option Ampol is strongly incentivised to complete the divestment within the Divestment Period [redacted].

3.24 Importantly, and as outlined above, Ampol's commitment is to achieve the divestment within the Divestment Period and if the conditions for an IPO are such that it could not effect a "complying IPO" within that period then it would need to sell by way of a trade sale.

3.25 Further, and noting the specific issue raised in paragraph 56.1 of the SoI, Ampol would [redacted][29]

Certainty regarding forward looking strategy not required[30]

3.26 The Commission has questioned the degree of certainty it can have regarding forward looking strategy for Gull in the case of an IPO (in particular whether Gull may abandon its aggressive price discounter strategy).

3.27 As set out in paragraphs 2.1 to 2.2 above, whether Gull's strategy may change over time is not the question that needs to be considered by the Commission. That would likely be impossible to determine in any event and it would not necessarily be desirable for Gull to retain a certain strategy long term ignoring changes to market dynamics. Rather, the key question for the Commission is whether Gull will be structurally, or systematically, less able to be competitive. Ampol has indicated in this response and in its clearance application why it considers that a publicly listed Gull will not be disadvantaged as compared to a privately owned entity such that it would be less able to be competitive in the market.

3.28 Further, as set out in the clearance application (see paragraph 23.8), Ampol notes that one of the "benefits" of an IPO above a trade sale is that there is greater visibility as to the intended strategy for the business moving forward by virtue of the requirement to issue a PDS to prospective investors at the time the IPO is launched. Given that, Ampol has noted that it would be very unusual for a listed issuer to fundamentally change its strategy from that set out in the PDS, at least in the short term because the Gull board would likely be very reluctant to move away from the strategy upon which investors based their investment decision. However, the Commission has noted that something less than a "fundamental change" in operating model may be enough to create a substantial change in competition terms (paragraph 62 of SoI). Ampol considers this risk is more perceived than real and that its own observation holds even in relation to changes that are less than "fundamental". Ampol also considers this risk to be no more present in an IPO than a trade sale. Once the Commission has approved the purchaser under a trade sale, it has no

[28] [redacted]

[29] See further cover email of confidential 30 November 2021 and response at point 6.2(b) of accompanying table.

[30] See paragraphs 58 to 65 of the SoI.

forward-looking assurance around strategy where a private buyer acquires Gull (and indeed, it is not appropriate for the Commission to seek such assurance).

3.29 Gull has operated successfully in its current operating model for a number of years – which made it an attractive business for Ampol to purchase in 2017 and which Ampol thinks will make it an attractive business for investors in 2022. While it is not possible to rule out a change in strategy in the future in particular to adapt to changes in market dynamics, it is not clear to Ampol why an owner – whether through a trade sale or IPO – would be incentivised to make any fundamental, material or even immaterial changes to the existing business model that may lessen Gull's competitiveness. As set out in the clearance application, with lower cost / lower price retailers entering the market and growing, the more obvious incentive for Gull will be to continue with its current model in order to maintain and grow its market share. To the extent that changes to strategy would make sense to adapt to current market conditions, the directors of Gull will be just as incentivised to make those changes as any private owner would (whether that be a purchaser of Gull in a trade sale context or Ampol if it were to maintain ownership, as set out in paragraphs 2.1 to 2.2 above).

No impact on Gull's incentives / ability to operate as it currently does[31]

3.30 The Commission has queried at paragraph 63 of the SoI whether the change to a listed entity could impact Gull's incentives / ability to operate as a low-cost, 'no frills' supplier (e.g. via the extra costs required of a listed entity).

3.31 From Ampol's perspective it cannot see why listed company ownership (over a private trade sale buyer) would change the company's existing competitive incentives as have been discussed above. The Gull model is an existing successful model. An IPO would not result in any structural change to Gull. Current Gull management would remain in place and continue to pursue the existing business model for Gull – they believe in that model currently because it has been successful and there is no basis for the suggestion that they would advocate a change in strategy simply because Gull has become a listed entity.

3.32 As to the issue raised as to cost structures, Ampol set out in the clearance application that the move to a listed company will involve some increased costs (see paragraph 23.20). But, these are not material costs in the context of a business the size of Gull and will be offset to some extent by the other advantages Gull may be able to obtain through being listed e.g. access to new sources of capital to fund expansion and capital investments. A small increase in costs (which is relatively immaterial in the context of Gull's historical EBITDA) would not mean that the operating model Gull has proceeded with over years is no longer competitively sound, particularly in the context of Gull's existing infrastructure offering (e.g. a significant proportion of unmanned stations). The SoI does not specify what other specific concerns there may be in this regard.

Not necessary to vet purchasers below the notification threshold[32]

3.33 The Commission has raised the inability to vet purchasers below the notification threshold as a possible concern with divestment by way of an IPO. In its original clearance application, Ampol proposed that any potential investor above [redacted]% be pre-notified to the Commission, which essentially was to provide a form of vetting regime by enabling the Commission to raise any concerns. This notification regime makes sense given the different nature of a listed company compared to a privately held company in a trade sale process. The criteria traditionally applied by the Commission in considering purchaser approval in a trade sale do not naturally apply to a minority shareholder in an IPO. For example, there is no need to consider a prospective investor's financial resources in an IPO, given they will not be funding a listed Gull post-divestment (as set out in paragraph 23.20 of the clearance application). Gull would be able to access sources of capital via the listed debt and equity markets on its own accord.

[31] See paragraphs 58 to 65 of the SoI.

[32] See paragraphs 66 to 67 of the SoI.

3.34 However, it was recognised the Commission may nonetheless have a view on the identity of significant investors and hence the notification regime was proposed to enable any concerns to be raised in good time. In its confidential 30 November 2021 response, Ampol noted that it would be happy to lower the notification threshold to [redacted]%.

3.35 Ampol considers that notification of investors to the Commission that have advised Ampol of an intention to take a significant (i.e. [redacted]% or more) stake in Gull at an early point in the IPO process will give the Commission time to consider whether it has any competition concerns regarding the investor's intended acquisition under section 47 of the Commerce Act, including in combination with other large shareholders (or indeed any other concerns). The Commission would be able to engage with the prospective investor regarding any such concerns before the launch of the IPO (and the investor could then engage with the Commission to possibly assuage such concerns or determine whether to proceed with the intended share acquisition.)

3.36 For the (likely large number of) investors below the agreed threshold for notification, Ampol considers that the very small shareholding they will each hold in Gull would not give rise to an ability for such investors to influence the competitive strategy of Gull, nor any ability to affect the appointment of directors or senior management (as set out above in relation to Ampol's Retained Shareholding at paragraphs 3.3 to 3.9 above). Ampol cannot see how, realistically, any holdings below a [redacted]% threshold (even if they were holdings held by other New Zealand based fuel industry participants – which seems unlikely) could raise any competition law concerns. Any entities with holdings below that level cannot influence the company in any significant way and it would also be unusual for small shareholders to act together in their capacity as shareholders because they will have different investment objectives. Therefore, there is no need for the Commission to be notified of the identity of such small investors (in the same way that the Commission would not typically investigate such small acquisitions of listed company shares under section 47 of the Commerce Act).

3.37 Ampol therefore submits that notification to the Commission of any parties who intend to hold more than [redacted]% in the company should suffice to address this concern. However, Ampol would be willing to discuss further with the Commission if the Commission has in mind a different means of addressing this matter.

4. Trade Sale

Ampol is not incentivised to sell Gull to a purchaser that may not be an effective competitor[33]

4.1 In regard to the trade sale, the Commission has stated it has concerns in regard to purchaser risk, and, in particular, whether Ampol might have an incentive to sell Gull to a purchaser that may not be an effective competitor. Ampol does not agree that it has this incentive.

4.2 As Ampol advised the Commission as part of its update on the trade sale process in December 2021, [redacted].

4.3 While the Proposed Divestment Undertaking already provides for Commission approval of any buyer of Gull in a trade sale process during the divestment period, Ampol is also happy to continue to have an open and regular dialogue with the Commission about its trade sale process.

A proposed purchaser that does not own upstream assets will not necessarily have different retail pricing incentives for Gull[34]

4.4 As part of the Commission's consideration of purchaser risk in the SoI at paragraph 70 it noted that it would consider the extent to which the proposed purchaser is involved in other levels of the fuel supply chain in New Zealand or overseas (i.e., the proposed purchaser's level of vertical integration). This is because the Commission queries whether a purchaser that owns significant

[33] See paragraphs 68 to 69 of the SoI.

[34] See paragraphs 70 to 72 of the SoI.

upstream assets might have a profit maximising incentive to sell high volumes at the retail level, and therefore presumably at a lower price.

4.5 The counter argument, which has already been acknowledged by the Commission in paragraph 72 of the SoI, is that the proposed transaction itself in fact increases the level of vertical integration in the market and therefore by the Commission's logic, increases competitiveness. This increase in vertical integration, under any purchaser, occurs as a result of Ampol, which has upstream refinery interests, acquiring a (previously not vertically integrated) larger retail market participant than it currently owns. If, as the Commission speculates (but which Ampol does not consider to be the case), owning refining assets means that a party will be incentivised to maximise volumes via a lower retail price, then the change of control of Z Energy from publicly owned to being owned by Ampol with its Australian refining capabilities should improve competition in the retail market via the Z Energy influence on the market (which we note is likely to be more material than the influence of the smaller Gull business). Not only is Z Energy a significantly larger market participant than Gull (with outlets in significantly more local markets), but Z Energy also supplies wholesale fuel to a number of other retail market participants and would likewise be incentivised to ensure high volumes via lower prices through those entities. This could lead to other market participants also lowering their prices in the market.

4.6 However, Ampol does not believe that vertical integration makes a systematic difference to a market participant's competitiveness. Ampol notes that Gull was successfully operating in the same low cost manner, focusing on low prices, prior to Ampol's acquisition in 2017 when it was owned by the Rae family. The Rae family was not a vertically integrated owner of Gull. Despite not owning refining assets, the Rae family operated Gull under a low price strategy, presumably because that made good commercial sense based on Gull's low cost structure (e.g. considering Gull's unmanned stations, their geographic location, i.e. predominantly concentrated around areas of high population, and areas that are easily serviceable, and outsourced convenience stores) and given the nature of the other players in the market. As was set out in the clearance application at paragraphs 23.3 – 23.5, this low cost structure means it is not likely to be commercially rational, in the current competitive environment, for any purchaser to change Gull's low cost strategy, regardless of their upstream assets. In Ampol's submission, the Rae family example is the best evidence of what a non-vertically integrated purchaser is likely to do and there does not appear to be any reliable evidence indicating otherwise.

4.7 Further, and more generally, it is not clear to Ampol that the connection the Commission is considering follows when looking more widely across the New Zealand market. There is no consistency of operating model across market participants whether they are vertically integrated upstream or not and the approach they take to prices – e.g., Waitomo and NPD take a lower price approach but are not vertically integrated.

4.8 Finally, Ampol has also [redacted][35] [redacted].

5. Divestment Related Agreements

The Divestment Related Agreements will not give Ampol influence over the strategic decisions or behaviour of Gull in a way that diminishes the competitive tension between Gull and Z[36]

5.1 The Commission has raised some additional issues in relation to the offer of a PIE Agreement and TSA to the purchaser of Gull or directors of Gull in an IPO context. The Commission has stated that it is not yet satisfied that these agreements 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 Energy. Ampol notes this appears to be a lower threshold than the test articulated in paragraph 43 of the SoI (which Ampol submits reflects the legal test), i.e., that Ampol would have the ability to bring real pressure to bear on the decision-making ability of Gull.

[35] See [redacted].

[36] See paragraphs 73 to 78 of the SoI.

5.2 Ampol notes that the SoI references that Ampol "intends to provide" the template agreements and so Ampol assumes that at the time of writing the Commission had not yet considered the actual templates provided shortly before the SoI release. Ampol is confident that the template agreements themselves will have given comfort to the Commission that they will not give rise to an ability for Ampol to influence Gull post-Divestment. As the Commission will now have seen, the agreements contain standard terms and are intended to reflect an arms-length relationship. As the Commission would expect, neither of the template agreements allow Ampol to "look into" or direct or influence the Gull business over time. The terms will be negotiated between the purchaser and Ampol and then operate in accordance with their terms. Ampol will not have unilateral rights to change the terms.

5.3 The Divestment Related Agreements are offered as an option as part of the divestment, they are not mandatory. Any purchaser can elect to take up the agreements or not, at their absolute discretion, and, if any purchaser does wish to avail itself of an agreement, it is open to them to negotiate any terms that cause them concern. It may be that some purchasers do not require either agreement and, given the other options for fuel supply in New Zealand (see below) and the relatively limited nature of any transitional services that may be required, it is Ampol's view that neither are necessarily essential for a successful divestment.[37] Nevertheless, offering the Divestment Related Agreements provides purchasers with a choice, and ensures that from "day one" of ownership by the purchaser, Gull can continue to operate largely as it has been operating under Ampol's ownership. Ampol is not seeking to withhold services from Gull. In fact, it is inviting prospective purchasers to tell it what transitional services it needs from Ampol and then discuss the terms for the provision of those services. It is also offering a fuel supply arrangement largely on the existing terms between Ampol and Gull. Ampol submits that offering such a choice is more likely to support Gull's competitiveness than hinder it.

5.4 In terms of the proposed PIE Agreement, Ampol further notes that:

(a) The purchaser of Gull will have many other options to obtain fuel supply on competitive terms. Ampol has separately provided to the Commission [redacted].[38] [redacted.]

(b) The proposed PIE Agreement has been prepared on the basis of the current fuel supply agreement between Ampol and Gull, with terms that are no less favourable to Gull as to pricing mechanism and key commercial terms than those that currently exist (noting that the current agreement is an agreement between group companies [redacted]).

(c) Further, the Commission's apparent concerns do not reflect that the PIE Agreement is compliant with the FIA, which is aimed at addressing the very concerns the Commission appears to be raising. The FIA limits the time period for the PIE Agreement to a maximum of five years (aside from other restrictions, such as preventing exclusivity). Ampol is not proposing to lock bidders into any specific term. Rather, Ampol has asked bidders to specify their preferred term, and has made it clear that it is making available a term of at least [redacted] if that is what bidders desire. However, it is open to bidders to opt for a shorter or longer time period (within the confines of the FIA of course). A purchaser may not seek up to the five years supply allowable under the FIA (and so the point may be academic) but, even if it did, Ampol cannot see how a further gloss or limitation on the existing FIA framework would be required in this particular context (as Mobil has proposed). That framework was the result of prior significant work and analysis by the Commission. It is also of note that the PIE Agreement [redacted.]

5.5 Given the above, Ampol submits that there is no need to limit the period of any PIE Agreement to shorter than what is acceptable under the FIA. The terms of the proposed PIE Agreement (if it is desired by the purchaser of Gull or directors of Gull) will not allow Ampol strategic influence over Gull, nor will it prevent Gull from choosing to obtain supply elsewhere (either for 20% of its

[37] To this end and noting the Commission's query at paragraph 77 of the SoI, Ampol does not consider a purchaser would require any other assets, supply or support services in order to operate Gull. However, it would be open to discussing how it could offer further support to a purchaser if any other such items were identified as being required.

[38] [redacted]

demand at any point, or for the entirety of its demand if the purchaser terminates the PIE Agreement in accordance with its terms, or at the expiry of this agreement).

5.6 The Commission can be satisfied that the PIE Agreement will not be altered in a way that is detrimental to Gull moving forward. Ampol has committed to ensure a divested Gull is offered PIE Agreement terms that are arms' length and no less favourable to Gull as to pricing mechanism and key commercial terms than those that currently exist, as is reflected in the current template which has already been received by bidders that requested it.

5.7 In regard to the TSA Agreement, as set out above, Gull currently operates on a stand-alone basis, with minimal support from Ampol. Any TSA required by the purchaser of Gull or the directors of Gull in an IPO context can therefore be expected to be for a relatively limited set of corporate services, and for a short period of time. Gull will not be dependent on Ampol to such an extent that it would give rise to an ability for Ampol to bring real pressure to bear on the decision-making ability of Gull.

6. Other considerations

Iwi can participate in the trade sale process or any IPO[39]

6.1 The NZCC also quoted from Waka Resources' submission that an IPO ignores the ability for local Iwi to purchase the terminal being adjacent to their land and that purchasing Gull in its entirety via a trade sale is the only way for Iwi to effectively enter the fuel industry in New Zealand. Ampol notes that this submission does not appear to raise a competition law issue for the Commission to consider. Waka Resources (and/or any other entity including other Iwi entities) was/is able to participate in the trade sale process (just as it could also choose to participate in any IPO), if it chooses to do so and wished to acquire some ownership interests over the terminal land or in a fuel industry business more generally. There is no exclusivity proposed in those processes.

7. Conclusion

7.1 For the reasons set out above, Ampol is confident that the Proposed Divestment Undertaking will remedy any substantial lessening of competition that could have occurred as a result of Ampol's proposed acquisition of Z Energy.

7.2 As set out above, Ampol would welcome an opportunity to discuss this submission further with the Commission, and any residual questions or concerns the Commission may have regarding Ampol's Proposed Divestment Undertaking.

[39] See paragraphs 79 to 80 of the SoI.