

[PUBLIC VERSION]

AMPOL LIMITED / Z ENERGY LIMITED

**PARTIES' CROSS SUBMISSION ON
COMMERCE COMMISSION'S STATEMENT OF ISSUES**

11 February 2022

PARTIES' SUBMISSION IN RESPONSE TO SUBMISSIONS OF [ANONYMOUS] DATED 10 JANUARY 2022 AND 5 FEBRUARY 2022

Thank you for the opportunity to provide further cross submissions on the submissions the Commission received from the anonymous submitter dated 10 January 2022 and 5 February 2022.

Many of the matters raised by this submitter were addressed in Ampol's submission on the statement of issues dated 1 February 2022 (**Ampol's Sol submission**). However, for completeness Ampol submits in response as follows:

Response to Submission about Issues Paper para 53

1. The submitter raised a question as to whether Ampol retaining a significant shareholding post IPO could exercise influence over Gull by way of actions that do not involve voting. The example given by the submitter for the ability to exercise influence over Gull without voting rights was that Ampol could affect Gull's ability to raise capital by way of a share issue. Ampol had addressed issues related to capital raisings at paragraph 3.12 of its Sol submission. The submitter has made further submissions on this point in its 5 February submission.
2. It is worth noting at the outset that this issue raised by the submitter would only arise if there was a capital raising whilst Ampol still had a shareholding and Ampol decided not to participate in the capital raising. Ampol maintains its view that a capital raising would be very rare shortly following an IPO. That would be the case even where the IPO only involved a sell-down by Ampol and no new money was being raised in the IPO. This is because investors in the IPO would require Gull to be fully funded, with the correct capital structure in place, to pursue its strategy as outlined in the product disclosure statement from listing.
3. Regardless, the comments in Ampol's Sol submission should not be taken to suggest that Ampol would or would not participate in a theoretical capital raising. Rather, Ampol is simply noting that its participation in this context would not be determinative of the success of such a capital raising. More specifically, in response to points raised by the submitter, there is no evidence to support the proposition that a capital raising could not be completed without Ampol's participation, that such non-participation would make it more difficult for the company to secure underwriting for the share issue, that insufficient funds may be raised to fund a project (if that was the purpose of the capital raising) or that the shares would need to be issued at a deeper discount. There are recent examples of exactly that occurring in the New Zealand capital market, such as the example specified in Ampol's Sol submission regarding Kathmandu's capital raising in 2020. Notwithstanding that Kathmandu's capital raising was in the midst of a Level 4 lock-down whilst its retail stores were closed and during a time of extreme market volatility, the capital raising was still fully underwritten and successfully completed, despite the non-participation of Briscoe, a 16.27% shareholder. This is evidence that the submitter's argument is incorrect.
4. Ampol submits that the key point is that offer structure, underwriting and offer pricing is dependent on multiple factors, including, but not limited to, market conditions, the purpose for the raise, the size of the raise relative to market capitalisation, the industry and the make-up of the share register. In Ampol's view, it is misplaced to suggest that the potential non-participation of a larger shareholder would be determinative of a Board's decision whether or not to pursue a capital raising. The more important consideration for the Board would be the reason for the non-participation of the large shareholder, and whether the reason was linked to concerns about the underlying business or the proposed transaction. In the Kathmandu example, Briscoe was supportive of both the business and the capital raise, but did not participate because its priorities were to its own shareholders and employees as its own retail business faced the impacts of COVID-19.
5. More generally, the submitter's assertion that Ampol (even with no voting rights) could influence the company overlooks that the (independent) Gull Board is required to act in the best interests of the company – not a shareholder. Further, Ampol's Sol submission and clearance application set out in detail other reasons why any shareholding below 10% would not give Ampol influence over Gull – even with voting rights and even if Gull ListCo had entered into Divestment Related Agreements with Gull. Thus, Ampol disagrees that there is any logical reason why its retained

shareholding in Gull would need to be at a level as low as suggested by the submitter, and lower than the level that the Commission points to in its merger guidelines as generally not raising a Commerce Act concern (i.e. 10%)¹. Any possible concerns that could arise with a shareholding between [redacted]% are fully addressed by Ampol's commitment not to exercise voting rights associated with such shares.

Response to Submission about Issues Paper paras 54-57

6. The submitter has suggested that the timing of an IPO (to fall within standard "IPO windows") should not dictate the time Ampol should be given to divest Gull and made submissions as to the timing of preparatory work Ampol should be required to undertake ahead of an IPO (and ahead of clearance). In response Ampol notes:
- (a) There is no issue with Ampol making relevant preparations for an IPO in good time. But, the suggestion by the submitter that Ampol should be required to complete an IPO within a 14 day period of completion of its acquisition of the Z Energy transaction is not practical or realistic due to the extent of preparations required which are not purely internal (such as, for example, engagement with various regulators who review the offer materials before launch, engagement with research analysts who produce research reports before launch and with potential institutional investors as part of an investor education and market sounding process), and because an IPO cannot be completed conditional on the completion of Ampol's acquisition of Z.
 - (b) The submitter's suggestion overlooks the fact that Ampol has proposed a dual track divestment process (i.e., that Ampol can progress and explore a trade sale alongside an IPO option) and is seeking a [redacted] period to divest the Gull business by either method. The submitter's proposal appears to seek to tie Ampol into an IPO at an early point in the divestment process that may exclude Ampol fully exploring trade sale options. In Ampol's submission, an unworkably short period post acquisition for Ampol to complete an IPO is not required under the Commerce Act and is not consistent with the post-acquisition divestment periods that the Commission has historically agreed to in the context of a trade sale. Where the Commission is comfortable that an appropriately structured IPO is an appropriate transaction by which a divestment can occur, a very much shorter timeframe is neither logical nor justified.
 - (c) As Ampol submitted (see paras 3.20 of its Sol response), any concerns as to the time it may take Ampol to divest Gull post completion of the Z Energy transaction are adequately addressed through the robust hold separate and ring fencing undertakings that Ampol has proposed in its Proposed Divestment Undertaking. A slightly longer divestment period is justified given the size of the Gull business, potential regulatory approvals with respect to the sale (such as OIO) and the difficulties presented (e.g., border closures/isolation rules) by the COVID pandemic (see clearance application at paras 21.1 to 21.15).
 - (d) In any event, Ampol does not agree that an IPO will delay the divestment overall. As Ampol has submitted, while the timing of an IPO would need to coincide with relevant market considerations, this is not expected to unduly extend the time for the divestment over and above the time that may be required to effect a trade sale (see paras 3.21 – 3.24 of the Sol response). The period sought by Ampol to complete an IPO is no longer than the period it seeks (and would seek in the absence of an IPO) to execute a trade sale.

Response to Submission about "Other Issues Identified by Commerce Commission"

7. Finally, the submitter has suggested that the Commission should consider a condition whereby Ampol would need to divest Gull before acquiring Z Energy. Again, this is simply not necessary

¹ As suggested in paragraph 2.9 of the Commission's merger guidelines that indicates – albeit in a negative phrasing – that a shareholding above 10% may raise a concern.

in light of the robust hold separate and ring fencing undertakings that Ampol has proposed in its Proposed Divestment Undertaking.

- (a) As set out in Ampol's Sol submission (at para 3.20), the type of arrangements Ampol has proposed have commonly been accepted by the Commission in other divestment contexts so as to enable an orderly sale of the divestment business post completion of the primary transaction.
- (b) The process proposed by Ampol is consistent with the indication given in the Commission's merger guidelines (at para F27.2) that a post completion process will be acceptable (alongside appropriate terms in the required divestment undertaking to manage that process).
- (c) As long as the hold separate arrangements are robust there is no reason to expect they would lose their effectiveness after a certain period and, in this particular instance, the robustness of, and confidence in, these arrangements are bolstered by the way in which Gull has been operated to date, i.e., as a largely independent successful and profitable business led by a local management team (see clearance application at paras 23.2 – 23.6).

8. Ampol would be happy to discuss this submission further with the Commission.