

Mobil Oil New Zealand Limited

Building B, Level 2, 8 Nugent Street
Grafton, Auckland
New Zealand 1023



Susan Brown and Sam Holmes
Competition Branch
Commerce Commission
Level 12, 55 Shortland Street
Auckland

Cross-submission on Statement of Issues: Ampol Limited / Z Energy Limited

Dear Susan and Sam,

Introduction

1. Mobil Oil New Zealand Limited ("**MONZ**") welcomes the opportunity to provide comments on the Commerce Commission's ("**Commission**") statement of issues ("**SOI**") and related submissions regarding Ampol Limited's ("**Ampol**") proposed acquisition of Z Energy Limited ("**Z**") ("**Acquisition**").
2. Notwithstanding the further concessions that appear to have been offered by Ampol, MONZ continues to have concerns that a divestment of Gull New Zealand Limited ("**Gull**") by way of an IPO will not adequately remedy the competition concerns arising from the Acquisition.
3. In particular, we understand that a divestment by way of an IPO to secure clearance for a transaction is unprecedented both in New Zealand and internationally. Contrary to the submissions of Ampol,¹ the Commission can take no comfort from the fact that the ACCC is understood to have considered a divestment by way of an IPO on two occasions when such IPOs did not eventuate. By retaining the option of obtaining an even greater stake in Gull through the additional shareholding, Ampol is signalling to the Commission that it has doubts that an IPO will be successful absent Ampol continuing to hold a stake in Gull for an undefined period of time. It is difficult to see how the Commission could be satisfied that an IPO will be a suitable divestment remedy given the precedent nature of such a remedy, the time it will inevitably take for an IPO to occur, and the ongoing influence that Ampol will have over Gull.
4. As the Commission will be aware, it cannot give Ampol the benefit of the doubt that a divestment by way of IPO will be effective and successful. The Commission's statutory framework is clear - if the Commission is not satisfied that an IPO will be an effective remedy, it cannot give clearance on the basis of an IPO divestment undertaking.

Ampol's influence over Gull during the divestment period

5. We understand that Ampol is seeking a divestment period that is longer than that usually accepted by Commission. Ampol's justification for seeking such a lengthy period does not withstand scrutiny. Ampol and Z are voluntarily embarking on this transaction and the risks of the transaction not completing should appropriately fall on the merging parties and not other market participants or New Zealand consumers.
6. MONZ has not seen the full details of the formal hold separate and information ring fencing arrangements proposed by Ampol. However, it is of fundamental importance that these are

¹ Clearance Application at [20.10].

robust as possible and that an independent and highly experienced monitoring trustee is appointed to ensure that those arrangements are conscientiously followed.

7. In particular, MONZ requests that the monitoring trustee pay close attention to how Ampol manages the Z and Gull terminals at Mt Maunganui during the divestment period particularly since the merging parties are the only market participants with terminal storage at Mt Maunganui for 95 Octane petrol.
8. The Commission has previously underestimated the potential impediment to competition when terminals at a given port are held by a monopoly provider. When Z acquired Chevron, MONZ made submissions to the Commission identifying the fact that "post-acquisition, Z will have 100% ownership of all terminals in Nelson and Timaru, that is, Z would have a monopoly hold on strategic assets which could lessen competition in these areas".² In clearing Z / Chevron, the Commission dismissed those concerns.³ Unfortunately, the market has not played out as the Commission anticipated and market participants are now beholden to Z in Nelson for terminal access. During the divestment period, Ampol will similarly have a monopoly on 95 Octane Petrol terminals in Mt Maunganui. Based on the developments in Nelson, it is imperative that the monitoring trustee actively supervises this aspect of Z and Gull's business to preserve the existing competition between those assets to avoid a repeat of the issues being experienced in Nelson.

Ampol's influence over Gull post-IPO

The retained shareholding and additional shareholding

9. The IPO structure is flawed as a divestment mechanism as market convention requires that the sellers retain a stake in the target for a period of time. We understand that the Commission would not countenance a similar retained shareholding in the event of a trade sale and we do not consider that IPO "market convention" is a sufficient justification for the Commission to depart from its past practice. This is particularly pertinent given that Ampol wishes to not only have a retained shareholding but also be allowed to vote the retained shareholding, which will give it influence over Gull. It is difficult to see how the Commission could satisfy itself that such influence will not be substantial when there is no certainty as to the composition of shareholders or expected shareholder turnover. As far as we are aware, Ampol has provided no adequate justification as to why voting rights need to attach to the retained shareholding.
10. If the Commission is minded to give Ampol the benefit of the doubt and allow a divestment by way of an IPO then at a minimum it should ensure that as part of its divestment undertaking to the Commission that Ampol undertakes that:
 - (a) Ampol will not vote **any** of the retained shareholding or additional shareholding;⁴
 - (b) Ampol will divest itself of both the retained shareholding and additional shareholding (at no minimum price) within five working days after the announcement of Gull's 2023 annual financial results;⁵
 - (c) That the IPO will be completed no later than six months after the date that clearance is given; and

² Mobil Oil NZ *Submission on Z Energy Clearance Application* (31 July 2015) at [5].

³ Commerce Commission *Z Energy Limited and Chevron New Zealand* [2016] NZCC 10 at [86] – [108].

⁴ We note Ampol have already offered this to the Commission with respect to the additional shareholding – see Ampol Limited *Submission on Statement of Issues* at [3.16].

⁵ We note Ampol appears to be willing to enter into such an arrangement with respect to at least the additional shares - see Ampol Limited *Submission on Statement of Issues* at [3.17].

- (d) Neither Ampol, nor any interconnected body corporate of Ampol, will acquire any shares (other than the retained shareholding and additional shareholding) in Gull for a period of three years from the date of the divestment without the prior written approval of the Commission.

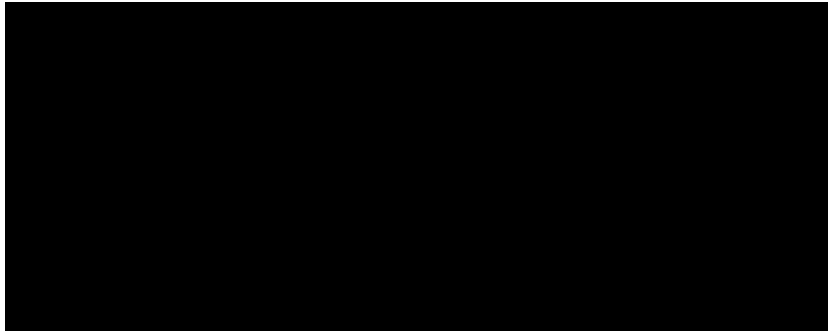
Supply arrangements

11. As set out in our submission on the Statement of Preliminary Issues, MONZ considers that Gull should not be tied into any form of long-term supply contract with Ampol/Z. Ampol places undue weight on the fact that it is merely offering a supply contract to Gull as sufficient a constraint to ensure that Gull receives competitive supply arrangements.⁶ However, this fails to recognise the behavioural biases that are likely to impact the decision making of the Gull board and the existing management of Gull. The existing management are accountable to Ampol and likely have extensive working relationships with Ampol management. The Commission cannot be satisfied that any terms negotiated between such parties will be competitive or arm's length unless Gull is required to test the market through a formal RFP process. Alternatively, if the Commission is minded to accept an uncontested transitional supply agreement, so that the Commission can be confident that Gull is receiving competitive supply options, any supply arrangements between Ampol and Gull should have a maximum duration of one year. This would be consistent with Gull's past practice before it was acquired by Ampol where it would run a competitive tender for its volumes every 1-2 years.

Concluding remarks

12. We are happy to provide more detail to the Commission on any of the points raised in this submission.

Yours faithfully,



Mobil Oil New Zealand Limited



⁶ Ampol Limited *Submission on Statement of Issues* at [3.15].