

## Determination

### Ampol Limited and Z Limited [2022] NZCC 4

<b>The Commission:</b>	Anna Rawlings Dr John Small Dr Derek Johnston
<b>Summary of application:</b>	An application from Ampol Limited seeking clearance to acquire all of the shares or assets of Z Energy Limited subject to a proposed divestment of Gull New Zealand Limited, Terminals New Zealand Limited and ALD Group Holdings NZ Limited.
<b>Determination:</b>	Under s 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance to the proposed acquisition (subject to the divestment undertaking dated 16 March 2022 provided by Ampol Limited under s 69A of the Commerce Act 1986).
<b>Date of determination:</b>	16 March 2022

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

## The Proposed Acquisition

1. On 2 November 2021, the Commerce Commission registered an application (the Application) from Ampol Limited (Ampol) seeking clearance to acquire 100% of the shares or assets of Z Energy Limited (Z) (the Proposed Acquisition).
2. As part of the Application, Ampol has offered an undertaking (Divestment Undertaking) to divest Gull New Zealand Limited, Terminals New Zealand Limited and ALD Group Holdings NZ Limited (together, Gull) (the Proposed Divestment). We set out our assessment of the Divestment Undertaking in more detail below.

## Our decision

3. Ampol and Z compete to supply fuel through their respective networks of retail service stations. Ampol supplies fuel primarily through its network of Gull-branded service stations, while Z supplies through its Z and Caltex branded service stations. The Proposed Divestment would remove the entire competitive overlap between Ampol and Z for the retail supply of fuel.
4. In light of Ampol having now provided the Commission with the Divestment Undertaking in respect of the Proposed Divestment, the Commission gives clearance to the Proposed Acquisition because it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

## Our framework

5. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).<sup>1</sup>
6. We assess mergers using the substantial lessening of competition test. We assess whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).<sup>2</sup>
7. We may accept undertakings to dispose of assets or shares.<sup>3</sup> If we accept a divestment undertaking, it is deemed to form part of the clearance.
8. As set out in our divestment guidelines,<sup>4</sup> upon receiving a divestment undertaking, we consider whether the proposed divestment is sufficient to remedy any

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<sup>1</sup> Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

<sup>2</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>3</sup> Under s 69A(2) of the Act, we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

<sup>4</sup> *Mergers and Acquisitions Guidelines* above n1 at Attachment F.

substantial lessening of competition that would otherwise arise from the proposed merger.

## **The parties**

### *The Applicant - Ampol*

9. Ampol is an Australian-based fuel company. In New Zealand, Ampol operates through Gull. Gull sources most of its refined fuel requirements from Ampol in Australia and imports it into New Zealand via its storage facility at Mount Maunganui. It supplies commercial and retail customers in New Zealand, primarily through its network of Gull-branded service stations.

### *The Target - Z*

10. Z is a New Zealand-based fuel company. It has operations across the fuel supply chain in New Zealand, including refining, importing, storage, distribution, wholesale supply and retail supply to commercial and retail customers. At the retail level, Z supplies fuel through a network of Z and Caltex-branded service stations.

## **With and without scenarios**

### **With the acquisition**

11. With the acquisition, Ampol would acquire 100% of the shares or assets of Z and would operate Z as a going concern.
12. In the absence of an undertaking to divest Gull to a third party, Ampol would own and operate both Gull and Z in New Zealand. As noted however, in its clearance application Ampol offered an undertaking to divest Gull such that Ampol would not own and operate both Gull and Z on an ongoing basis.

### **Without the acquisition**

13. If the Proposed Acquisition does not proceed, Ampol has submitted that the most appropriate counterfactual is the status quo; that is Ampol continuing to operate Gull, and Z continuing to operate as an independent listed entity.<sup>5</sup>
14. The evidence before us indicates that the appropriate without the merger scenario is the status quo, with Gull and Z continuing to operate as independent competitors in the relevant markets in New Zealand.

## **Market definition**

15. Market definition is a tool that helps identify and assess the competitive constraints the merged firm would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.<sup>6</sup>

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<sup>5</sup> The Application at [8.1] and [8.2].

<sup>6</sup> Commerce Act 1986, s 3(1A).

16. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services that fall outside the market, but which would still impose some degree of competitive constraint on the merged entity.
17. Ampol submitted that, because it is seeking clearance to acquire Z subject to the Proposed Divestment, it is not necessary to conclusively define the relevant markets.<sup>7</sup> Drawing on the markets defined by the Commission in Z/Chevron,<sup>8</sup> Ampol submitted that the markets relevant to the overlap arising from the Proposed Acquisition are:<sup>9</sup>
- 17.1 retail fuel markets – separate, service station specific, local markets for the supply of fuel products (ie, diesel, regular petrol and premium petrol, collectively) to retail customers, using a 2km radius as a starting point to identify areas that may raise competition concerns;
  - 17.2 terminal storage markets – separate regional markets for the storage of each refined fuel product (petrol, diesel, aviation fuel, marine fuel and bitumen), by terminal location;
  - 17.3 a market for commercial supply to distributors – the supply of fuel products to distributors at Mt Maunganui; and
  - 17.4 commercial petroleum product markets – separate markets for supply to the large bulk commercial customers that purchase diesel directly from the major fuel firms and the smaller bulk customers that purchase diesel through resellers.
18. Given the Proposed Divestment would remove all current competitive overlap between Ampol and Z in New Zealand, it has not been necessary to reach a conclusion on the relevant market(s).

## Competition Assessment

19. Ampol noted that the Commission has previously commented on Gull’s competitive position in the markets in which it operates:<sup>10</sup>
- 19.1 in Z/Chevron, the Commission said that Gull “is seen as a challenger brand” that is “aggressive on price, which sees prices being significantly lower in markets where Gull is present”; and

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<sup>7</sup> The Application at [17.1(a)].

<sup>8</sup> *Z Energy Limited and Chevron New Zealand Limited* [2016] NZCC 10.

<sup>9</sup> The Application at [17.2].

<sup>10</sup> The Application at [18.1] and [18.2].

- 19.2 in its Retail Fuel Market Study, the Commission similarly concluded that Gull tended to have a positive impact in reducing prices for consumers in the areas in which it operates.
20. Ampol submitted that there have been several pro-competitive developments in the market since the Retail Fuel Market Study was released in December 2019, including the increased expansion and independence of competitors. However, in light of the Commission's past comments regarding Gull, Ampol acknowledged that the Commission would wish to work through the likely competition implications of the Proposed Acquisition.
21. Ampol acknowledged that Ampol and Z overlap in several areas (to varying degrees) in relation to retail service stations, terminal storage, supply to resellers and commercial bulk fuel.<sup>11</sup>
22. With respect to retail service stations, Ampol undertook a screening exercise to identify overlaps between Ampol and Z. This exercise identified 67 local retail markets (each defined by a 2km radius from a Gull site) where Gull and Z (including Caltex) retail service stations overlap (as at October 2021). It then assessed the number of independent competitors present within each local retail market. It found nine local retail markets where the number of independent competitors present would reduce from two down to one.<sup>12</sup>
23. Ampol acknowledged that, in the normal course, the Commission would likely want to consider further at least the local retail markets in which the number of independent competitors to the merged entity will reduce from two down to one as a result of the Proposed Acquisition.<sup>13</sup> However, to avoid the need for a full competition analysis, Ampol offered the Proposed Divestment. It says that as this constitutes a divestment of the entirety of Gull, and as Ampol otherwise has no other operations in New Zealand, the Proposed Acquisition will not result in an aggregation between Ampol and Z.<sup>14</sup>
24. Our investigations have confirmed that Ampol is only active in New Zealand through the Gull business. On that basis, we are satisfied that the Proposed Divestment would remove all competitive overlap between Ampol and Z. It has therefore not been necessary to reach a concluded view on the extent of any competitive impact arising from the Proposed Acquisition.<sup>15</sup>

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<sup>11</sup> The Application at [19.1].

<sup>12</sup> The Application at [19.2].

<sup>13</sup> The Application at [19.5].

<sup>14</sup> The Application at [19.6].

<sup>15</sup> For the avoidance of doubt, it has also not been necessary to reach a concluded view on the appropriateness or sufficiency of the methodology employed by Ampol to identify the local retail markets in which Ampol and Z overlap, and in which the number of independent competitors present would reduce from two down to one.

## Assessment of the Proposed Divestment

25. As noted above, Ampol has offered the Divestment Undertaking to complete the Proposed Divestment.
26. We consider that, taking into account the Proposed Divestment, the Proposed Acquisition is not likely to substantially lessen competition in any market, as compared to a scenario where Gull and Z continue to operate as independent competitors.
27. We have found no significant risks associated with the Divestment Undertaking which gives effect to the Proposed Divestment.

### Our framework for assessing divestment undertakings

28. We may clear a merger only if we are satisfied that the merger would not be likely to substantially lessen competition in any market.<sup>16</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.<sup>17</sup>
29. We may accept undertakings to dispose of assets or shares.<sup>18</sup> If divestment undertakings are accepted by us, they are deemed to form part of the clearance.
30. For a divestment undertaking to remedy competition concerns, we must be satisfied that, once the divestment is taken into account, the transaction in question is not likely to give rise to a substantial lessening of competition.
31. In making this assessment, we consider all the relevant risks associated with divestment proposals.
32. We assess three kinds of risks associated with divestment undertakings.
  - 32.1 Composition risk – the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured.
  - 32.2 Asset risk – the risk that the competitive effectiveness of a divestment package will deteriorate prior to completion of the divestment.
  - 32.3 Purchaser risk – the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission.

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<sup>16</sup> Commerce Act 1986, s 66(1) of the Commerce Act 1986.

<sup>17</sup> In *Commerce Commission v Woolworths Limited (CA)*, above n 4 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

<sup>18</sup> Under s 69A(2) of the Commerce Act 1986 we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

33. We have assessed the composition, asset and purchaser risks associated with Ampol's divestment proposal in accordance with our guidelines.<sup>19</sup>

### The Proposed Divestment

34. Ampol has provided a Divestment Undertaking under which it will divest by trade sale Gull New Zealand Limited, Terminals New Zealand Limited and ALD Group Holdings NZ Limited. Under this Divestment Undertaking, Ampol will procure the Proposed Divestment within [ ] of the date on which the Proposed Transaction is completed (the Divestment Period).
35. In the Application at [20.3], Ampol had proposed to divest Gull through either a trade sale or by way of an initial public offering (IPO). Under this proposal, Ampol would progress both sales processes simultaneously, and determine, at a point after which clearance has been granted, which sales process it ultimately preferred. In a Letter of Variation to the Application dated 24 February 2022, Ampol advised the Commission that it was varying the basis on which it was seeking clearance for the Proposed Acquisition, to the effect that it no longer proposed divestment of Gull by way of an IPO. We therefore do not consider this 'IPO option' further in this determination, and have reached no final conclusions regarding the IPO option.<sup>20</sup>
36. In addition to the Proposed Divestment, Ampol will also:<sup>21</sup>
- 36.1 at the option of the purchaser of Gull, enter into a Product Import and Export Agreement (PIE Agreement) with Gull to provide for the continued supply of fuel to Gull's Mount Maunganui terminal on arm's length market competitive terms (but no less favourable as to pricing mechanism and key commercial terms than those that currently exist); and
- 36.2 if required by the purchaser of Gull, enter into a Transitional Services Agreement (TSA) with Gull, for an appropriate transitional period to be determined in negotiations with the purchaser.<sup>22</sup>
- (together, the Divestment Related Agreements).
37. The nature of the Divestment Related Agreements is such that they impose behavioural requirements on Ampol (as opposed to requiring a structural

<sup>19</sup> *Mergers and Acquisitions Guidelines* above n1 at Attachment F.

<sup>20</sup> For completeness, our provisional views on this IPO option are available in our Statement of Issues dated 23 December 2021, at [41] to [67], available [here](#). Submissions and cross-submissions on the Statement of Issues can be found [here](#).

<sup>21</sup> The Application at [20.6].

<sup>22</sup> While the range of transitional services that a TSA would cover is subject to negotiation between Ampol and the purchasers of Gull Ampol notes in the Application at [4.1(b)(ii)] that the TSA would encompass a limited set of services currently provided by Ampol to Gull under a Corporate Services Agreement. Under this Corporate Services Agreement, Gull can access various support services from Ampol on an 'as needed' basis, including: (a) commercial and negotiation support, including in relation to sales marketing and retail; (b) information technology and support; (c) treasury, tax, insurance and human resources advice and support; and (d) legal, secretariat, public affairs, credit risk and accounting support. See the Application at [23.10].



divestment). The Commission is unable to accept behavioural undertakings in the context of its consideration of a merger. However, the Commission can take into account agreements that would exist in the factual (placing the appropriate weight of the likelihood of such agreements being entered into).

38. In assessing whether the Divestment Undertaking will remedy our competition concerns, we have taken into account both the likelihood of, and the likely implications of, Ampol entering into the Divestment Related Agreements with Gull. As such, where relevant, we refer to the likely impacts of the Divestment Related Agreements in our analysis below.
39. We have also taken into account the prevailing geopolitical situation at the time of our decision. In particular, we considered the extent to which Russia's invasion of Ukraine has introduced uncertainty into global fuel markets, and the potential implications of that uncertainty for the Proposed Divestment.

#### **Assessment of composition risk**

40. Composition risk is the risk that the scope of a divestment undertaking may be too constrained, or not appropriately configured, to attract a suitable purchaser.
41. Overall, we consider that the Divestment Undertaking is sufficient to mitigate composition risk.
42. First, we consider that the Proposed Divestment (taking into account the likelihood of Ampol and Gull entering the Divestment Related Agreements and their likely impacts) comprises everything that the purchaser of Gull would need in order to viably and effectively operate Gull in competition with Z.
43. The Gull business has demonstrated its ability to compete in New Zealand as a standalone entity. Prior to being acquired by Ampol in 2017, Gull had operated as a standalone competitor for just under a decade, pursuing a low-cost challenger market strategy.<sup>23</sup> After being acquired by Ampol, Gull continued to be run largely independently of the Ampol Group.<sup>24</sup>
44. Some aspects of the Gull business are supported by Ampol. In particular:
  - 44.1 Ampol and Gull have entered into a Corporate Services Agreement pursuant to which Gull can access various support services from Ampol on an 'as needed' basis, including commercial and negotiation support; IT advice and support; treasury, tax, insurance and human resources advice and support; and legal, secretariat and public affairs;<sup>25</sup> and

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<sup>23</sup> The Application at [23.2], citing Ampol's ASX announcement regarding its acquisition of Gull on 22 December 2016. Ampol stated that Gull had, at that time, "been successfully operating in the New Zealand fuel market since 1998 and is operationally positioned as a challenger brand."

<sup>24</sup> The Application at [23.6].

<sup>25</sup> The Application at [23.10].

- 44.2 Gull negotiates an annual price with Ampol's business in Singapore for refined fuel for import into New Zealand for supply to Gull's North Island retail fuel sites.<sup>26</sup>
45. As noted above at [36.2], as part of the Proposed Divestment Ampol has offered to enter into a TSA with Gull to provide corporate services to Gull for a period of time post-divestment. It has also offered to enter into a PIE Agreement with Gull to provide refined fuel to Gull for a term to be agreed between Ampol and Gull, on terms that are no less favourable as to pricing and key commercial terms than those that currently exist.
46. The Divestment Undertaking states that the Commission's approval of the purchaser of Gull is contingent on the Commission's approval in writing of all binding transaction documentation between Ampol and the approved purchaser (including any PIE Agreement and/or TSA).<sup>27</sup>
47. Second, we consider that the separation of Gull from Ampol is practically achievable within the timeframe specified in the Divestment Undertaking. As we have noted above, Gull is already run largely independently of Ampol. It also holds all physical assets needed to effectively compete in the market, meaning that no transfer of assets to the Gull business is necessary in order to give effect to the Proposed Divestment.<sup>28</sup>

### **Assessment of asset risk**

48. Asset risk is the risk that the competitive effectiveness of the divestment business or assets will deteriorate prior to completion of the divestment.
49. At the time of this decision, the Russian invasion of Ukraine has created volatility in international oil markets. As the situation is quickly-evolving, it is unclear how the price and reliability of international oil supply will be affected. The current geopolitical climate decreases the certainty with which we can assess the likelihood of the assets deteriorating prior to completion, thereby increasing asset risk. We have taken this heightened asset risk into account when assessing the sufficiency of Ampol's obligations to preserve Gull as an effective competitor (as we discuss below).
50. Overall, we consider that the Divestment Undertaking is sufficient to mitigate asset risk.
51. Ampol has obligations in the Divestment Undertaking related to the preservation of Gull as an effective competitor. In particular:

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<sup>26</sup> The Application at [2.7].

<sup>27</sup> The Divestment Undertaking at [7.3].

<sup>28</sup> The Application at [23.22].

- 51.1 Ampol has undertaken to take all practicable steps available to it ([ ]) to:<sup>29</sup>
- 51.1.1 preserve the reputation and goodwill of Gull;
  - 51.1.2 preserve the economic viability, marketability and competitiveness of Gull at a level materially similar to, and consistent with, the operation of Gull prior to the date of the Divestment Undertaking;
  - 51.1.3 maintain the provision of goods and services to Gull;<sup>30</sup> and
  - 51.1.4 maintain the level of employees at Gull at a level that is materially similar to the level of employees at Gull as at the date of the Divestment Undertaking, including by seeking to retain certain employees within Gull defined as Gull Key Employees;<sup>31</sup>
- 51.2 to the extent that Gull acquires any goods or services from Ampol or its related entities, Ampol will not, and will procure that its related entities will not, amend the terms of supply of those goods or services such that those terms are less favourable, taken as a whole, to Gull;<sup>32</sup> and
- 51.3 Ampol has undertaken to take all practicable steps available to it ([ ]) to mitigate any adverse effects and restore the reputation, goodwill, economic viability, marketability or competitiveness of Gull if an adverse event occurs that compromises Ampol's ability to meet the obligations above,<sup>33</sup>

(together, Preservation Obligations).

52. Ampol also has obligations under the Divestment Undertaking to ensure that the Gull business is held separate from Ampol (and Z) during the Divestment Period. This includes appointing a hold separate manager, whose role will be to manage Gull independently of Ampol/Z during this period, and to report periodically to the Commission on certain matters related to the operation of Gull (Hold Separate Obligations).<sup>34</sup>
53. During the Divestment Period, Ampol also undertakes to take all necessary measures to ensure that neither it nor any of its related entities obtains any confidential and

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<sup>29</sup> The Divestment Undertaking at [4.1].

<sup>30</sup> In accordance with clause 4.4(a) of the Divestment Undertaking.

<sup>31</sup> Specifically the persons holding the positions of [ ] at Gull.

<sup>32</sup> Other than where an upstream supplier, who is not one of Ampol's Related Entities, discontinues supply of a product or service or alters the terms of supply to the company owned or controlled by Ampol that on-sells that product or service to Gull, and then, in the case of alteration of terms of supply by an upstream supplier, Ampol may only make amendments to the terms of supply to Gull to the extent of that alteration. The Divestment Undertaking at [4.4(a)].

<sup>33</sup> The Divestment Undertaking at [4.2].

<sup>34</sup> The Application at [24.1]. The Divestment Undertaking at [5.1] and [5.2].

non-public documents and information relating to Gull, other than where such disclosure is strictly necessary for a particular specified purpose. Ampol also undertakes to comply with protective measures for any confidential and non-public documents and information of that type that it does obtain (Ring-Fencing Obligations).<sup>35</sup>

54. Finally, the Divestment Undertaking requires monthly reporting to the Commission on Ampol's compliance with the Divestment Undertaking (including specifically Ampol's compliance with its Preservation Obligations, Hold Separate Obligations, and Ring-Fencing Obligations), Ampol's progress on the Proposed Divestment, and any other information about Gull or Ampol's compliance with the Divestment Undertaking reasonably requested by the Commission.<sup>36</sup> This includes by allowing the Commission to require Ampol to appoint an independent monitor to audit and send monthly written reports to the Commission (with a copy to Ampol).<sup>37</sup>

### Assessment of purchaser risk

55. Purchaser risk is the risk that there may not be a purchaser found within the timeframe of a divestment undertaking that is acceptable to the Commission.
56. Overall, we consider that that the Proposed Divestment and the Divestment Undertaking are sufficient to mitigate purchaser risk.
57. The Gull business has competed in New Zealand since 1999.<sup>38</sup> In that time it has carved out a strong competitive position as a low-cost "challenger" brand, and has reported strong profits.<sup>39</sup> As we have discussed above, we consider that the Gull business is sufficiently stand-alone that it can be separated from Ampol with relative ease, and in a timely fashion.
58. We therefore expect that Gull would be an attractive investment for a range of purchasers, including industry participants in New Zealand or overseas, and private equity interests internationally.<sup>40</sup>
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<sup>35</sup> The Divestment Undertaking at [6.1] to [6.5].

<sup>36</sup> The Divestment Undertaking at [8.1].

<sup>37</sup> The Divestment Undertaking at [9.1].

<sup>38</sup> Gull made its first retail sale of petrol in 1999. <https://gull.nz/about-us/>.

<sup>39</sup> Net revenues for ALD Group Holdings NZ Limited (formerly CAL Group Holdings NZ Limited) were: \$33,148,053 for the year ended 31 December 2018, \$32,700,326 for year ended 31 December 2019, and \$31,566,596 for year ended 31 December 2020.

<sup>40</sup> Ampol notified the Commission on 14 March 2022 (ie prior to the Commission's clearance determination) that it had agreed a sale and purchase agreement with Allegro Funds (Allegro) for the sale of the Gull business. For the avoidance of doubt, the Commission's conclusion that the Proposed Divestment and the Divestment Undertaking are sufficient to mitigate purchaser risk is not reliant on the specific sale and purchase agreement executed between Ampol and Allegro (which had not been assessed or approved at the time of the Commission's clearance determination).

59. Clause 7 of the Divestment Undertaking requires Ampol to notify the Commission of the identity of the proposed purchaser of Gull at least 20 business days prior to completion of the Proposed Divestment. It must also satisfy the Commission that this proposed purchaser of Gull:<sup>41</sup>
- 59.1 is not associated with, or an interconnected body corporate of, Ampol or any of its related entities (including Z);
  - 59.2 has the financial resources, business expertise, and incentive to viably operate and develop Gull in competition with Z in the relevant market(s);
  - 59.3 is not likely to create competition concerns that would result in a contravention of s 47(1) of the Commerce Act 1986;<sup>42</sup>
  - 59.4 is not likely to give rise to a risk that the completion of the Proposed Divestment will be unduly delayed; and
  - 59.5 must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of Gull.
60. Under clause 7.3(a) of the Divestment Undertaking, the Commission's approval of the proposed purchaser is also contingent on its approval of the Divestment Related Agreements discussed above at [36].

### **Overall conclusion**

61. Subject to the Proposed Divestment occurring, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition.

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<sup>41</sup> The Divestment Undertaking at [7].

<sup>42</sup> Section 47(1) of the Commerce Act 1986 prohibits any person from acquiring assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.

## **Determination on notice of clearance**

62. Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Ampol Limited to acquire Z Energy Limited subject to the divestment undertaking dated 16 March 2022 provided by Ampol Limited under s 69A of the Commerce Act 1986.

Dated this 16<sup>th</sup> day of March 2022

Anna Rawlings  
Chair

**Attachment A: Divestment Undertaking**





This **Deed** is made on

2022

and is given by Ampol Limited, a company incorporated in Australia with incorporation number ACN 004 201 307 and its registered office at 29-33 Bourke Road, Alexandria, NSW, Australia, 2015 (**Ampol**)

in favour of **the Commerce Commission** (the **Commission**)

If accepted, this Deed forms part of the Commission's clearance to Ampol's proposed acquisition (through Ampol Bidco) of 100% of the shares of Z Energy Limited (**Z**) under section 66(3)(a) of the Commerce Act 1986.

## **Introduction**

- A. Ampol has applied to the Commission for clearance of the Proposed Transaction pursuant to section 66 of the Commerce Act 1986.
- B. Z and Ampol, as the owner of Gull, are both participants in the New Zealand retail fuel market.
- C. In order to address any actual or potential issues that may otherwise have arisen as to whether the Proposed Transaction could have had the effect or likely effect of substantially lessening competition in a market in New Zealand, Ampol undertakes to carry out the Divestment of Gull in accordance with the terms and conditions of this Deed.
- D. Gull is wholly-owned by Gull Holdco. Gull Holdco is wholly-owned by Ampol.

## **It is agreed**

### **1. DEFINITIONS AND RELATED MATTERS**

#### **1.1 In this Deed:**

- (a) **Approved Purchaser** means a purchaser of the Divestment Shares under the Divestment, as approved by the Commission pursuant to clause 7.
- (b) **Ampol** means Ampol Limited a company incorporated in Australia with incorporation number ACN 004 201 307 and its registered office at 29-33 Bourke Road, Alexandria, NSW, Australia, 2015.
- (c) **Ampol BidCo** means Ampol Holdings NZ Limited, a company incorporated in New Zealand, which is wholly-owned, directly or indirectly, by Ampol, with the company number 8243546.
- (d) **Business Day** means any day of the week other than:
  - (i) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, Te Rā Aro ki a Matariki/Matariki Observance Day, the Sovereign's birthday, and Waitangi Day;
  - (ii) if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday; and
  - (iii) a day in the period commencing with 25 December in any year and ending with 15 January in the following year.

A Business Day starts at 8:30am and ends at 5:00pm.

- (e) **Divestment** means the divestment by Ampol of the Divestment Shares, in accordance with the terms and conditions of this Deed.

- (f) [Redacted]
- (g) **Divestment Period** means the period commencing at 11.59pm on the Proposed Transaction Completion Date [Redacted].
- (h) **Divestment Shares** means all of the shares in Gull Holdco (provided it is the owner of all the shares in Gull at the time of sale) [Redacted].
- (i) **Divestment Undertakings** means clause 2.1 of this Deed.
- (j) **Gull** means Gull New Zealand Limited, and Terminals New Zealand Limited collectively, which are companies incorporated in New Zealand with incorporation numbers 1130963 and 6219252 respectively and each with the registered office of Buddle Findlay, Level 18, HSBC Tower, 188 Quay Street, Auckland, 1010, New Zealand.
- (k) **Gull Holdco** means ALD Group Holdings NZ Limited, a company incorporated in New Zealand with incorporation number 6218580 and its registered office of Buddle Findlay, Level 18, HSBC Tower, 188 Quay Street, Auckland, 1010, New Zealand. Gull Holdco is the 100% owner of Gull.
- (l) **Gull Key Employees** means the persons holding the positions of [Redacted].
- (m) **Hold Separate Manager** means a person approved by the Commission and appointed pursuant to clause 5.1.
- (n) **Independent Monitor** means a natural or legal person who (a) is approved by the Commission and appointed pursuant to clause 9 of this Deed; (b) is independent of Ampol and its Related Entities; and (c) possesses the necessary qualifications to carry out its obligations.
- (o) **Interconnected Body Corporate** has the meaning set out in section 2(7) of the Commerce Act 1986.
- (p) **Material Issue** means:
- (i) an issue, event or circumstance arising following the commencement of the Divestment Period which the Hold Separate Manager, acting reasonably, believes:  
  
[Redacted]
  - (ii) where the Hold Separate Manager concludes, acting reasonably, that Ampol has failed to comply with this Deed in any material respect.
- (q) **Proposed Transaction** means the proposed acquisition of 100% of the shares of Z by Ampol BidCo by way of a scheme of arrangement in accordance with Part 15 of the Companies Act 1993.
- (r) **Proposed Transaction Completion Date** means the date on which completion of the Proposed Transaction occurs in accordance with its terms.
- (s) **Related Company** has the meaning given to that expression in section 2(3) of the Companies Act 1993, provided that, for this purpose, references to company in that section will extend to any body corporate wherever incorporated or registered.
- (t) **Related Entity** means an Interconnected Body Corporate and/or a Related Company and/or an “associated person” as defined in section 47(3) of the Commerce Act 1986.

- (u) **Ring-fenced Information** means confidential and non-public documents and information, to the extent containing commercially sensitive information relating to Gull's business or operations, including but not limited to:
  - (i) pricing information that is not publicly available, including future prices, pricing policies, strategies or formulae, margins, revenues, rebates and/or payment terms;
  - (ii) site specific and aggregated information on costs, capacity, demand and expected volumes;
  - (iii) information regarding future potential transactions with other parties or upcoming (re)negotiations of existing contracts;
  - (iv) information about any existing customer's upcoming fuel requirements or volumes;
  - (v) non-announced significant capital expansion plans;
  - (vi) detailed capex and opex, and in particular, forward looking data, in each case to the extent not in the public domain; and
  - (vii) information as to current or future Gull terminal availability and maintenance schedules.
- (v) [Redacted]
- (w) **Z** means Z Energy Limited, a company incorporated in New Zealand with company number 12046.

1.2 References to dates and time in this Deed are references to New Zealand Standard Time or Daylight Savings Time as applicable.

1.3 This Deed will be governed by, and construed in accordance with, the laws of New Zealand and Ampol accepts the exclusive jurisdiction of the New Zealand Courts.

1.4 Any disputes in relation to this Deed may be referred to the High Court Commercial Panel and Ampol undertakes that it will cooperate with the Commission to ensure any such proceedings are dealt with expeditiously.

1.5 Any notice or communication that is given or served under or in connection with this Deed must be given in writing in the following manner:

- (a) if addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission  
Level 9, 44 The Terrace, Wellington 6011  
Attention: Mergers Manager ([mergers@comcom.govt.nz](mailto:mergers@comcom.govt.nz))

- (b) if addressed to Ampol, by hand delivery or email to the following address:

C/- Bell Gully  
Level 21, Vero Centre, 48 Shortland Street, Auckland 1010  
Attention: Jenny Stevens/Glenn Shewan/James Gibson  
[jenny.stevens@bellgully.com](mailto:jenny.stevens@bellgully.com); [glenn.shewan@bellgully.com](mailto:glenn.shewan@bellgully.com);  
[james.gibson@bellgully.com](mailto:james.gibson@bellgully.com)

## 2. DIVESTMENT

2.1 Ampol undertakes to the Commission that it will:

- (a) within 2 Business Days after the Proposed Transaction Completion Date, notify the Commission in writing of the commencement of the Divestment Period;
- (b) procure, in accordance with the terms of this Deed, the Divestment within the Divestment Period (which, for the avoidance of doubt, is a period that only commences once the Proposed Transaction has completed);
- (c) ensure that all assets owned by Gull and any contractual rights held by Gull to use assets, and which Gull requires to continue to operate its business in the ordinary course, and consistent with operations at the date of this Deed, will form part of Gull's business at the time of transfer of the Divestment Shares; and
- (d) if the Divestment has not occurred within the Divestment Period, [Redacted].

2.2 If the Divestment has not occurred by the expiry of the Divestment Period, [Redacted].

2.3 Prior to completion of the Divestment, Ampol will, and will procure that its Related Entities will, use all reasonable endeavours to procure, obtain or assist the Approved Purchaser or Gull to obtain any consents of third parties required under the terms and conditions of Gull's material contracts to the change of control of Gull occurring as a result of the Divestment.

2.4 Ampol acknowledges that the Divestment Undertakings:

- (a) form part of any clearance given by the Commission for the Proposed Transaction under section 66(3)(a) of the Commerce Act 1986;
- (b) impose legal obligations on it;
- (c) may be enforced by the Commission under sections 85A and 85B of the Commerce Act; and
- (d) may only be varied by application under section 69AC of the Commerce Act.

### 3. COMMENCEMENT AND TERM

3.1 This Deed comes into effect when it is signed by Ampol and accepted by the Commission under section 69A of the Commerce Act 1986.

3.2 The terms of this Deed come into effect as follows:

- (a) clauses 1, 2, 3, 4, 5.1, 5.2, 7, 8.1(a)(i), 8.1(b), 8.1(c)(ii), 8.3, 8.4, 8.5 and 9 come into effect upon acceptance of this Deed by the Commission under clause 3.1;
- (b) [Redacted]; and
- (c) otherwise, all clauses come into effect at the beginning of the Divestment Period.

3.3 The terms of this Deed expire, and Ampol's obligations are considered discharged, as follows:

- (a) where the Commission has provided written confirmation that Ampol is released from its obligations on the basis that the Proposed Transaction will no longer proceed to completion, all terms of this Deed expire upon the date of that written confirmation.
- (b) otherwise:

- (i) clauses 1, 3, 6, 8.1(a)(ii)(A), 8.1(b) and 8.1(c)(ii) expire upon completion of Ampol's obligations under clause 6.5 or upon completion of the Divestment in accordance with this Deed, whichever occurs later; and
- (ii) all other terms of this Deed expire upon completion of the Divestment in accordance with this Deed.

#### 4. PRESERVATION OBLIGATIONS

4.1 Ampol will (either directly or indirectly through its Related Entities) take all practicable steps available to it ([Redacted]) to:

- (a) preserve the reputation and goodwill of Gull;
- (b) preserve the economic viability, marketability and competitiveness of Gull at a level materially similar to, and consistent with, the operation of Gull prior to the date of this Deed, including having regard to the annual budget or capital plan adopted by Gull prior to the date of this Deed;
- (c) maintain the provision of goods and services to Gull in accordance with clause 4.4(a); and
- (d) maintain the level of employees at Gull that is materially similar to the level of employees at Gull as at the date of this Deed, including by seeking to retain the Gull Key Employees [Redacted].

4.2 If an issue, event or circumstance arises in relation to Gull's business (the **Adverse Event**) that Ampol reasonably considers is sufficiently material and adverse that its ability to operate the Gull business in accordance with clauses 4.1(a) – (d) is or may be compromised (after, and for the avoidance of doubt, Ampol has considered and sought to take all practicable steps available to it ([Redacted]) to meet the requirements of clauses 4.1(a) – (d)), Ampol shall, as soon as practicable after it becomes aware of the Adverse Event:

- (a) take all practicable steps available to it ([Redacted]) to:
  - (i) mitigate the adverse effects on Gull of the Adverse Event; and
  - (ii) restore (as relevant) the reputation, goodwill, economic viability, marketability or competitiveness of Gull to a level of materially similar to, and consistent with, the operation of Gull prior to the date of this Deed;
- (b) report in writing to the Hold Separate Manager (once appointed), and either the Commission or the Independent Monitor (where an Independent Monitor has been appointed under clause 9), on:
  - (i) the nature of the Adverse Event and when and how it arose;
  - (ii) why the Adverse Event has or may compromise Ampol's ability to operate the Gull business in accordance with clauses 4.1(a) – (d);
  - (iii) what steps have been taken, or are planned to be taken, by Ampol in compliance with clause 4.2(a); and
  - (iv) any other material information relevant to the Adverse Event.

4.3 Ampol will:

- (a) not, and will ensure that its Related Entities will not, carry out any act upon its own authority that might reasonably be expected to have a significant adverse impact on the value or

competitiveness of Gull or that might reasonably be expected to significantly adversely alter the nature and scope of activity, or the industrial or commercial strategy in relation to Gull;

- (b) not, and will procure that its Related Entities will not, sell, issue or transfer any shares in Gull or Gull Holdco, or assets owned by Gull or contractual rights to use assets which it requires to continue to operate its business in the ordinary course and in a manner that is materially similar to, and consistent with, the operation of Gull as at the date of this Deed, to any person other than an Approved Purchaser; and
- (c) not, and will procure that its Related Entities will not, solicit any Gull Key Employee, other than where that person responds to a bona fide public advertisement for a vacant position (provided that the advertisement is not targeted specifically at the person concerned).

4.4 To the extent that Gull acquires any goods or services from Ampol or its Related Entities (the **Supplied Goods & Services**), Ampol will, and will procure that its Related Entities will (to the extent applicable):

- (a) not amend the terms of supply of the Supplied Goods & Services to the effect that those terms are less favourable, taken as a whole, to Gull (other than where an upstream supplier, who is not one of Ampol's Related Entities, discontinues supply of a product or service or alters the terms of supply to the company owned or controlled by Ampol that on-sells that product or service to Gull, and then, in the case of alteration of terms of supply by an upstream supplier, Ampol may only make amendments to the terms of supply to Gull to the extent of that alteration);
- (b) prior to or on completion of the Divestment, Ampol will advise the Approved Purchaser that the Approved Purchaser has the right to request, and if the Approved Purchaser so requests Ampol will enter into, an agreement granting Gull the right to acquire any of the Supplied Goods & Services (other than fuel covered by the agreement referred to in clause 4.4(c)) on arms' length terms for up to a further 24 months; and
- (c) prior to or on completion of the Divestment, Ampol will advise the Approved Purchaser that the Approved Purchaser has the right to request and, if the Approved Purchaser so requests Ampol will enter into, a product import and export agreement (being one of the Supplied Goods & Services) with Gull on the following basis:
  - (i) the agreement will be on arms' length 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 will need amendment to reflect that it will no longer be between group companies);
  - (ii) the agreement will be for a term as requested by the Approved Purchaser but, where such term is greater than 12 months, the Approved Purchaser shall have the ability to terminate that agreement without cause in each 12 month period by giving notice within a specified and reasonable termination window; and
  - (iii) on such other terms and conditions to be agreed between the Approved Purchaser and Ampol.

4.5 Nothing in this clause 4 prevents:

- (a) Ampol or any of its Related Entities from discontinuing the provision of Supplied Goods & Services to Gull which are no longer required (as determined by Ampol and Gull, and approved by the Hold Separate Manager (all acting reasonably)) as a result of the transfer to, or establishment within, Gull (prior to the Divestment) of standalone capabilities which were previously the subject of a supply of Supplied Goods & Services; or

- (b) Ampol or any of its Related Entities (including Gull Holdco and Gull or any of its subsidiaries) and each of their respective directors, officers and employees from doing or omitting to do anything that is a reasonable response:
  - (i) to an existing or pending emergency, war or conflict (or escalation of the same), act of god or disaster, including a natural disaster; or
  - (ii) to the Coronavirus or COVID-19 pandemic, including the outbreak, escalation or any impact of, the Coronavirus or COVID-19 pandemic, including as a result of lockdowns, travel and operating restrictions, social distancing and restrictions of and on activities, venues and gatherings; or
- (c) Ampol or any of its Related Entities from taking steps in relation to the operation of Gull with the approval of an Approved Purchaser pending completion of a sale of Gull to that Approved Purchaser and where such steps are notified to the Commission.

4.6 For the purposes of clause 4.5(b), a reasonable response is one that does no more damage to the reputation, goodwill, economic viability, marketability and competitiveness of Gull than is necessary and where another response option that is less damaging to any of those matters is not available or viable.

4.7 Where a step is taken or omitted to be taken under clause 4.5(b) Ampol shall, as soon as practicable thereafter:

- (a) take all practicable steps available to it ([Redacted]) to restore the reputation, goodwill, economic viability, marketability and competitiveness of Gull to the position it was in prior to the relevant event occurring; and
- (b) report to the Hold Separate Manager, and either the Commission or, where an Independent Monitor has been appointed under clause 9, the Independent Monitor, on such acts done or not done to demonstrate that the response was reasonable in terms of clause 4.6 and to advise what steps are to be taken under clause 4.7(a).

## 5. HOLD SEPARATE OBLIGATIONS

5.1 Ampol will appoint an independent manager who will, during the Divestment Period [Redacted] manage Gull in accordance with clause 5.2 (the **Hold Separate Manager**).

- (a) Ampol will provide, for approval by the Commission, the name of the Hold Separate Manager, and the terms of engagement between Ampol and the Hold Separate Manager at least 20 Business Days prior to the commencement of the Divestment Period.
- (b) If the Commission has not approved the name or terms of appointment of the Hold Separate Manager 10 Business Days prior to the commencement of the Divestment Period, the Commission may nominate or arrange directly for the appointment of a Hold Separate Manager and Ampol will accept any terms, timelines or other steps imposed by the Commission (including as to payment of the Hold Separate Manager's costs) for this to take effect.

5.2 Subject to clauses 5.3 and 4.5 to 4.7, Ampol will procure that the Hold Separate Manager uses all reasonable endeavours to operate Gull, during the Divestment Period [Redacted] as it was operated at the date of this Deed and as a going concern separate from the businesses operated by Ampol and its other Related Entities (including, for the avoidance of doubt, Z), including procuring that:

- (a) the day-to-day management of Gull is the responsibility of the relevant Hold Separate Manager;
- (b) the Hold Separate Manager's terms of engagement provide that it is required to operate Gull in such a way that preserves the economic viability, marketability, competitiveness and

goodwill of Gull, including having regard to the annual budget or capital plan adopted by Gull prior to the commencement of the Divestment Period;

- (c) the Hold Separate Manager's terms of engagement provide that the Hold Separate Manager will provide sufficient information to Andrew Brewer, Gull director (or a suitably qualified replacement as nominated by Ampol to the Hold Separate Manager) to the extent required for Ampol or its Related Entities to comply with their legal, reporting and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or their contractual obligations or to progress, conduct or resolve any legal dispute. For the avoidance of doubt, no more information than is strictly required to meet the relevant obligation or purpose may be provided under this clause; and
- (d) the Hold Separate Manager's terms of engagement provide that in the event of a Material Issue arising, the Hold Separate Manager passes on all relevant information directly to Andrew Brewer, Gull director (or a suitably qualified replacement as nominated by Ampol to the Hold Separate Manager) and to the Commission or, if an Independent Monitor has been appointed under clause 9, the Independent Monitor.

5.3 If Ampol or any of its Related Entities receives any Ring-fenced Information through the reporting process in clause 5.2(c) or 5.2(d) above, the Ring-fenced Information will be subject to clause 6 (Ring-fencing) below.

## 6. RING-FENCING

6.1 Ampol shall implement all necessary measures to ensure that neither it nor its Related Entities (other than Gull) or their respective directors, officers, employees, contractors, agents or advisers obtain any Ring-fenced Information relating to Gull otherwise than as provided for by clause 6.3 or where such disclosure is strictly necessary for one or more of the purposes of:

- (a) progressing the Divestment;
- (b) complying with legal, reporting and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or contractual obligations or to progress, conduct or resolve any legal dispute, including following any reporting received under clause 5.2(c);
- (c) responding to a Material Issue notified to Ampol or reporting to the Commission or to the Independent Monitor (if one has been appointed under clause 9) under clause 5.2(d);
- (d) in connection with the negotiation of and performance by Ampol of its obligations under the transitional services agreement or product import and export agreement with Gull; and
- (e) the continued provision of any other services to Gull by Ampol including under an existing corporate services agreement between the parties,

and provided such information is disclosed only to those directors, officers, employees, contractors, agents or advisers who are subject to a binding confidentiality obligation and need to know the information in order to carry out any of the purposes listed at clauses 6.1(a) - (e), above.

6.2 The necessary measures referred to in clause 6.1 include, but are not limited to securely storing any Ring-fenced Information including by taking reasonable steps to protect against the inadvertent access to or use of information for purposes or by individuals not permitted under the terms of this Deed.

6.3 Ampol shall ensure that any employees, directors, officers, contractors, agents and advisers of Ampol or any of its Related Entities (other than Gull) with access to Ring-fenced Information, including through having access to files or folders containing Ring-fenced Information within any computer systems used or operated by Ampol or any of its Related Entities (other than Gull), are



subject to a binding confidentiality obligation for the benefit of Gull and enforceable by each of Gull and the Commission prohibiting the disclosure or use of Ring-fenced Information, except for the purposes set out in clauses 6.1(a) - (e) above.

- 6.4 If any employee, director, officer, contractor, agent or adviser of Ampol (or, for the avoidance of doubt, any of its Related Entities (other than Gull)) receives Ring-fenced Information in relation to Gull and such party is not already subject to a confidentiality obligation, Ampol will ensure that such person enters into a confidentiality undertaking for the benefit of Gull and enforceable by each of Gull and the Commission, prohibiting the access, disclosure or use of such information except for the purposes set out in clauses 6.1(a) - (e) above.
- 6.5 Ampol shall take all reasonable steps to ensure that any Ring-fenced Information that remains in its control at the end of the Divestment Period ([Redacted]) is provided to the Approved Purchaser or Gull and, to the extent Ampol is reasonably able to destroy the information, the Ring-Fenced Information is destroyed within 20 Business Days. Nothing in this clause prevents Ampol from retaining Ring-fenced Information where necessary to comply with its legal, reporting or regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or contractual obligations or to progress, conduct or resolve any legal dispute, provided that:
- (a) the provisions of this clause 6 shall continue to apply to such information for as long as it is held; and
  - (b) information is provided to the Approved Purchaser or Gull and destroyed (to the extent Ampol is reasonably able to destroy the information) within 20 Business Days of the need to retain that information ceasing.

## 7. PURCHASER APPROVAL

7.1 In connection with the Divestment:

- (a) as soon as practicable and no later than 20 Business Days before the anticipated date of completion of the Divestment, Ampol [Redacted] will notify the Commission in writing:
  - (i) of the identity of the proposed purchaser (or where negotiations are ongoing with more than one potential purchaser, the potential proposed purchasers) of Gull or Gull Holdco; and
  - (ii) that Ampol is formally seeking purchaser approval for that proposed purchaser (or those potential proposed purchasers);
- (b) Ampol will ensure that final binding agreements entered into in relation to the Divestment to a proposed purchaser provide that settlement of the Divestment is conditional on obtaining the Commission's approval of the proposed purchaser based on the criteria set out in clause 7.1(c) (except where such approval has already been given by the Commission);
- (c) Ampol must satisfy the Commission that the Divestment will be carried out in a manner consistent with this Deed and that the Approved Purchaser of the Divestment Shares (as applicable):
  - (i) is not associated with, or an Interconnected Body Corporate of, Ampol or any of its Related Entities (including, for the avoidance of doubt, Z or any Z subsidiary which is indirectly acquired by Ampol as part of the Proposed Transaction);
  - (ii) has the financial resources, business expertise and incentive to viably operate and develop Gull in competition with Z in the relevant market(s);
  - (iii) is not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986;

- (iv) is not likely to give rise to a risk that the completion of the Divestment will be unduly delayed (and, in any event, delayed beyond the expiry of the Divestment Period), without limiting Ampol's obligations under clause 2.1 of this Deed; and
    - (v) must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of Gull or Gull Holdco; and
  - (d) subject to clause 7.4, the Commission shall have the discretion to approve or reject in writing any purchaser proposed by Ampol [Redacted].
- 7.2 Should the Divestment not proceed to a purchaser approved by the Commission pursuant to clause 7.1(d) for any reason, Ampol [Redacted] may notify the Commission of the identity of an alternative purchaser (or potential purchasers). The terms of clause 7.1 will equally apply to such alternative purchaser(s).
- 7.3 The Commission's approval of the purchaser shall also be contingent on:
- (a) Ampol [Redacted] providing all binding transaction documentation entered into with the Approved Purchaser or documentation intended to be entered into with the proposed purchaser (including on completion of the Divestment) and at the same time as the notification given under clause 7.1(a) (including sale and purchase, transitional services, supply and other ancillary agreements) to the Commission at least 20 Business Days before the anticipated date of completion of the Divestment; and
  - (b) the Commission's approval in writing of that transaction documentation.
- 7.4 [Redacted] Ampol [Redacted] can proceed with the Divestment until such time as a written request for approval under this clause 7 has been made to the Commission and, Ampol [Redacted] and/or the proposed purchaser, has provided the information contemplated by this Deed or as requested by the Commission and:
- (a) the Commission advises in writing that it has, at its discretion, approved the proposed purchaser and the form of transaction documents; or
  - (b) 15 Business Days has elapsed or such longer period as the Commission advises in writing that it requires in connection with its assessments under this clause 7 has elapsed.
- 7.5 Ampol acknowledges that:
- (a) an approval of a potential purchaser by the Commission under this clause 7 is, once given, an approval for the relevant purchaser to acquire Gull pursuant to the Divestment during the Divestment Period in accordance with the proposed transaction documents provided to the Commission [Redacted]; and
  - (b) if the Divestment does not occur during the Divestment Period [Redacted].

## 8. **MONITORING COMPLIANCE WITH THIS DEED**

### 8.1 Ampol will provide:

- (a) reports to the Commission, or, if applicable, to the Independent Monitor, on a monthly basis (or at different times as notified by the Commission) as follows:
  - (i) from the date of the commencement of this Deed, regarding Ampol's compliance with clause 4 (Preservation Obligations);
  - (ii) from the date of the commencement of the Divestment Period regarding:

- (A) Ampol's implementation of, and compliance with, clause 6 (Ring-Fencing); and
    - (B) Ampol's compliance with all other clauses of this Deed;
  - (b) reports regarding any actual or potential breach of this Deed to the Commission, and if applicable the Independent Monitor, within 2 Business Days of Ampol becoming aware of the actual or potential breach; and
  - (c) at the Commission's request, any other information and documents to the Commission that the Commission reasonably requires:
    - (i) about the Divestment and Ampol's progress towards carrying out the Divestment; and
    - (ii) demonstrating Ampol's conduct (and, where relevant, that of its Related Entities) complies with the Divestment Undertakings.
- 8.2 Ampol will procure that the Hold Separate Manager ([Redacted]) provides monthly reports to the Commission, or if applicable the Independent Monitor, detailing, to the extent reasonably required by the Commission, the performance of Gull, so the Commission can assess whether Gull is being operated and managed in a manner consistent with this Deed.
- 8.3 If requested, Ampol will attend a meeting with the Commission at a time and place appointed by the Commission to answer any questions the Commission may have related to the Divestment Undertakings or the performance by Ampol of its obligations (and, where relevant, obligations relating to its Related Entities) under this Deed (including by telephone or video conference if more convenient).
- 8.4 Without limiting clause 8.1, Ampol will provide to the Commission:
- (a) a copy of any information memorandum relating to Gull or Gull Holdco and provided to potential purchasers in connection with the Divestment; and
  - (b) notification of the completion of the Divestment, within 2 Business Days after completion has occurred.
- 8.5 Nothing in this Deed requires Ampol to provide legally privileged information or documents to the Commission or any other party.

## 9. **INDEPENDENT MONITOR**

- 9.1 If requested by the Commission in writing, Ampol will appoint an Independent Monitor, approved by the Commission, to audit and report to the Commission (with a copy to Ampol) on Ampol's compliance with this Deed (and, where relevant, obligations of Ampol relating to its Related Entities):
- (a) Ampol will provide, for approval by the Commission, the name of the Independent Monitor, and the terms of engagement between Ampol and the Independent Monitor within 10 Business Days of receiving the Commission's written request.
  - (b) If the Commission has not approved the name or terms of appointment of the Independent Monitor within 20 Business Days of issuing its written request, the Commission may nominate or arrange directly for the appointment of an Independent Monitor and Ampol will accept any terms, timelines or other steps imposed by the Commission (including as to payment of the Independent Monitor's costs) for this to take effect.

- 9.2 Once the Commission has notified Ampol that it has either approved the name and terms of engagement of the Independent Monitor under clause 9.1(a), or has nominated another Independent Monitor and terms of engagement under clause 9.1(b):
- (a) Ampol will appoint the Independent Monitor approved or nominated by the Commission within 2 Business Days of that notification;
  - (b) Ampol will provide the Commission a copy of the executed terms of appointment within 2 Business Days of the appointment agreement being executed; and
  - (c) to avoid doubt, if Ampol fails to appoint the Independent Monitor approved or nominated by the Commission in accordance with clause 9.2(a), the Commission may directly appoint an Independent Monitor and Ampol will accept any terms, timelines or other steps imposed by the Commission (including as to payment of the Independent Monitor's costs) for this to take effect.
- 9.3 Ampol will procure that the Independent Monitor will submit a written report to the Commission:
- (a) on a monthly basis regarding the following:
    - (i) Ampol's compliance with:
      - (A) clause 4 (Preservation Obligations);
      - (B) clause 5 (Hold Separate Obligations) including the performance of the Hold Separate Manager's obligations; and
      - (C) clause 6 (Ring-Fencing);
    - (ii) Ampol's compliance with any other obligations under this Deed;
    - (iii) Ampol's progress on the Divestment; and
    - (iv) any other information about Gull or Ampol's compliance with this Deed reasonably requested by the Commission; and
  - (b) as soon as practicable following the receipt by the Independent Monitor of any other reports or notifications that Ampol is required to make to it under this Deed, other than the monthly reports required under clause 8.1(a).
- 9.4 Where an Independent Monitor is appointed under this clause **Error! Reference source not found.**, Ampol will (and will procure that, where applicable, the Hold Separate Manager will) report on matters identified in this Deed to that Independent Monitor and otherwise comply with any reasonable request for information or assistance to enable the performance of the Independent Monitor's obligations as set out in this clause **Error! Reference source not found.**
- 9.5 In the event that Ampol receives notice that the Independent Monitor's term will end before its obligations in this Deed have expired in accordance with clause 3.3, this clause 9 shall apply to the appointment of a replacement Independent Monitor as though the Commission had issued a written request for appointment of a replacement Independent Monitor on the date that Ampol received that notice.

## 10. EXECUTION

Executed as a deed

**Ampol Limited by**

\_\_\_\_\_  
Director

\_\_\_\_\_  
Company Secretary

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Name

[Redacted]