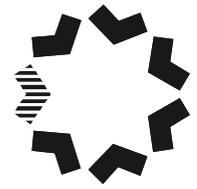


NATIONAL
COMPETITION
COUNCIL



Jet fuel supply infrastructure at Sydney Airport

Applications under s 44F of the
Competition and Consumer Act 2010
for declaration of services provided
by the Caltex pipeline and the joint
user hydrant installation
at Sydney Airport



Final recommendations

13 March 2012

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Abbreviations and defined terms

ACCC	Australian Competition and Consumer Commission (www.accc.gov.au)
ACIL Tasman	ACIL Tasman Pty Ltd
AFS	Airport Fuel Services
Applicant or BARA	Board of Airline Representatives of Australia Inc (www.bara.org.au)
BARA	See Applicant
Caltex Pipeline	The pipeline owned and controlled by Caltex which transports jet fuel from Caltex's Kurnell refinery and from interconnection points with off-site storage facilities at Port Botany to the Sydney JUHI. This is the facility that provides the Caltex Pipeline Service.
Caltex Pipeline Service	The service provided by the Caltex Pipeline for which declaration is sought, as described in paragraph 2.7(a)
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Competition Principles Agreement	Competition Principles Agreement made on 11 April 1995, as amended to 13 April 2007
Council or NCC	National Competition Council (www.ncc.gov.au)
Declaration Guide	<i>NCC Declaration of Services-A guide to Declaration under Part IIIA of the Trade Practices Act 1974</i> (Cth) (2009)
Frontier	Frontier Economics
HHI	Herfindahl-Herschman Index
HWLE	HWL Ebsworth (legal representatives for BARA)
IATA	International Air Transport Association
Jet Fuel Hydrant Pipeline Network Facility	The underground pipelines from the Jet Fuel Storage Facility to apron hydrant outlets located adjacent to aircraft gates at the international and domestic terminals at Sydney Airport, owned by the JUHI JV
Jet Fuel Storage Facility	The jet fuel storage facility, including facilities for dispensing fuel to refuelling trucks, owned by the JUHI JV, at Sydney Airport
JUHI	Joint user hydrant installation
JUHI JV	The joint venture that is the owner of the Sydney JUHI comprising Shell, Caltex, BP, Mobil and Qantas
Master Plan	Sydney Airport Master Plan 2009
National Access Regime	The mechanism established by Part IIIA through which an access seeker can gain access to the service or services provided by a nationally significant infrastructure facility on commercial terms and conditions
NCC	See Council
NERA	NERA Economic Consulting
NOC	National Operating Committee

Part IIIA	Part IIIA of the CCA
Pilbara Rail Decision	The decision of the Full Federal Court in <i>Pilbara Infrastructure Pty Limited v Australian Competition Tribunal</i> (2011) 193 FCR 57
RAAA	Regional Aviation Association of Australia
RBB	RBB Economics
SACL	Sydney Airport Corporation Limited
Sapere	Sapere Research Group
Shell Pipeline	The pipeline owned and controlled by Shell which transports jet fuel from Shell's Clyde refinery to the Sydney JUHI
SJFIWG Report	The Sydney Jet Fuel Infrastructure Working Group Report dated 20 April 2010
Sydney Airport	Sydney Kingsford Smith Airport
Sydney JUHI	The Sydney Airport joint user hydrant installation owned by the JUHI JV and operated by Shell, including the Jet Fuel Storage Facility and the Jet Fuel Hydrant Pipeline Network Facility. This is the facility that provides the Sydney JUHI Service.
Sydney JUHI Service	The service provided by the Sydney JUHI for which declaration is sought, as described in paragraph 2.7(b)
Tribunal	Australian Competition Tribunal
UPS	United Parcel Service
Virgin Blue matter	Application of Virgin Blue for Declaration of Airside Services at Sydney Airport, Final Recommendation, November 2003
Vopak storage facility, Vopak	An independent tank storage facility for jet fuel (and other liquids) at Port Botany, and the operator of that facility respectively

1 Recommendations¹

- 1.1 On 27 September 2011, the Board of Airline Representatives of Australia Inc (**BARA** or the **Applicant**) made two applications for declaration pursuant to Part IIIA of the *Competition and Consumer Act 2010* (Cth).
- 1.2 These applications relate to:
- (a) the service provided by the Caltex Pipeline, which transports jet fuel from the interconnection points with off-site jet fuel storage facilities at Port Botany to the Sydney Joint User Hydrant Installation (**Sydney JUHI**) (the **Caltex Pipeline Service**) and
 - (b) the services provided by the Jet Fuel Storage Facility (including facilities for refuelling trucks) and the Jet Fuel Hydrant Pipeline Network Facility provided by the Sydney JUHI (the **Sydney JUHI Service**).
- 1.3 Based on the consideration of these applications, together with the submissions and other information available, the Council recommends to the decision making Minister that:
- (a) the Caltex Pipeline Service not be declared, and
 - (b) the Sydney JUHI Service not be declared.

¹ The Council President, Mr David Crawford, is also the non-executive chairman of Perth Airport Pty Limited. In order to avoid any perceived conflict of interest, Mr Crawford took no part in the Council's consideration of these applications.

2 Applications, services and process

Applications

- 2.1 BARA made two applications for declaration pursuant to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) of services provided by facilities used to transport, store and distribute jet fuel for Sydney Airport. The relevant services are the Caltex Pipeline Service and the Sydney JUHI Service as described in paragraph 2.7. The applications are available on the Council's website (www.ncc.gov.au).
- 2.2 BARA is an industry organisation representing the interests of most international airlines operating to and from Australia.² Somewhat unusually BARA does not seek access to the services for which declaration is sought for itself, rather it "seeks increased access so that its members have an enhanced ability to source jet fuel from existing and new suppliers and to ensure the declared services are provided on fair and reasonable terms" (paragraph 4.3 of both applications). The CCA does not limit the ability to seek declaration of a service to potential access seekers.
- 2.3 On 28 October 2011 BARA provided a supplementary submission in relation to declaration criterion (b), which should be read into each application (this supplementary submission was published on the Council's website on receipt). BARA further supplemented its application on 4 November 2011 in response to a request from the Council seeking confirmation of the service sought in the Caltex Pipeline application and an invitation to update or supplement its application as a result of Shell's confirmation that it will convert its Clyde refinery to a fuel import terminal.
- 2.4 In its 4 November 2011 response, BARA added to the description of the Caltex Pipeline Service in paragraph 4.1 of its initial application. This addition is incorporated in the description of the Caltex Pipeline Service in paragraph 2.7 below.
- 2.5 BARA also provided a further supplementary submission addressing commercial developments in the market place, in particular, the implications of Shell's plans for the Clyde refinery. As a result of the analysis in this supplementary submission, BARA also amended the duration of the declaration it sought in paragraph 17.1 of the Caltex Pipeline Service application from 10 years to 13 years.
- 2.6 The correspondence between the Council and BARA referred to in the above paragraphs was published on the Council's website on 7 November 2011.

² A list of BARA's airline members is provided in Schedule A to each application.

Services

- 2.7 BARA's applications seek declaration of the following two services:
- (a) The service provided by the Caltex Pipeline facility, which transports jet fuel from the interconnection points with off-site jet fuel storage facilities at Port Botany to the Sydney JUHI. The application is restricted to the service provided by that part of the Caltex Pipeline from its interconnection with the Vopak storage facility, to and including its interconnection with the JUHI, including filtering, straining and other equipment owned by Caltex at the interconnection with the JUHI, together with any other ancillary equipment necessary for the operation of the specified part of the Caltex Pipeline (the **Caltex Pipeline Service**) (Caltex Pipeline Service application at [4.1] as amended by the Applicant's letter of 4 November 2011—the amendments are identified by the double underline).
 - (b) The services provided by the Jet Fuel Storage Facility (including facilities for refuelling trucks) and Jet Fuel Hydrant Pipeline Network Facility provided by the Sydney JUHI (Sydney JUHI Service application at 4.1) (the **Sydney JUHI Service**).
- 2.8 The Applicant provided maps and diagrams illustrating the facilities that provide the services for which declaration is sought. These are reproduced in Appendix A, along with a set of other similar illustrations drawn from material provided to the Council.
- 2.9 The Caltex Pipeline Service is provided by a pipeline running from Caltex's Kurnell refinery to Sydney Airport owned and operated by Caltex.
- 2.10 The Sydney JUHI Service is provided by a complex of storage tanks, fuel pipes, filters and other quality control equipment, and pipeline and hydrant systems for distribution of jet fuel to aircraft at a number of locations throughout Sydney Airport. These facilities are owned and operated by an unincorporated joint venture comprising: the Shell Company of Australia Limited, BP Australia Limited, Mobil Oil Australia Pty Ltd, Caltex Australia Petroleum Pty Limited and Qantas Airways Limited (together the **JUHI JV**). Control of the Sydney JUHI is delegated to an operating committee comprised of representatives of each JV participant. Shell operates the Sydney JUHI on behalf of the JUHI JV.
- 2.11 Caltex and the JUHI JV submit that for a variety of reasons the Applicant's descriptions of the services for which declaration is sought are inadequately or inappropriately defined and/or not amenable to declaration. The Council deals with specific issues raised by these parties below.
- 2.12 More generally, the Council notes that Regulation 6A of the *Competition and Consumer Regulations 2010* requires that an application for declaration provide a description of the service(s) for which declaration is sought and the facility that provides the service(s). A principal purpose of describing a service for which

declaration is sought is to enable an application to be assessed against the declaration criteria and other requirements of Part IIIA. A service must be defined with sufficient specificity for this to occur, but it is not necessary that an applicant for declaration particularise the service or exhaustively list all the elements of the facility which produces the service. Indeed, in many cases, it will be extremely difficult for an applicant to do so. An undue requirement for detail in respect of the service or facility would frustrate the operation of Part IIIA. It should also be remembered that declaration of a service is not specific to the Applicant or any specific access seeker and not all access seekers will necessarily require an identical service. Some access seekers may require only some parts or elements of a more broadly described declared service. This also suggests that relatively all-encompassing service descriptions are appropriate.

- 2.13 The Council is of the view that it is generally for an applicant to identify and describe the service(s) it wishes considered for declaration. If an applicant unduly or artificially narrows a service description it runs the risk that the effect of access on competition in a dependent market is also narrowed, perhaps to a point that criterion (a) is not met. Too broad a service or facility description runs the risk that satisfaction of criterion (b) will be more difficult.

Caltex Pipeline Service

- 2.14 In relation to the Caltex Pipeline, Caltex submits that the appropriate service definition needs to be considered in the context of the jet fuel supply chain and that there is no reason why the storage facility from which jet fuel is transported into the Sydney JUHI needs to be located at Port Botany. Caltex suggests that a more appropriate service definition is the service of “transporting jet fuel from an import available storage facility to the Sydney JUHI” (Caltex [166]).

- 2.15 Caltex also contends that, in its view, the service definition adopted by the Applicant:

does not cover the pumps associated with the Caltex Jet Fuel Pipeline and owned by Caltex, including the pumps that are to be installed as part of the Stage 2 Upgrade, as it could not be said that those pumps are required to transport jet fuel from Vopak to the JUHI (as for that purpose, Vopak’s own pumping infrastructure is used). However, without Caltex’s pumps, particularly, the Stage 2 pumps that allow Caltex to pump greater volumes, there would not be available capacity for third party use. It is therefore critical that Caltex has the opportunity to achieve a commercial return on its investment, otherwise it would have no incentive to invest in upgrading the capacity of the Caltex Jet Fuel Pipeline. For that reason, Caltex would seek to recover the cost of its pumps through commercial terms of access to additional capacity (Caltex [167]).

- 2.16 Caltex reiterates these points in its submission responding to the Council's draft recommendations, focusing on the service definition being 'artificially narrow'. Caltex states:

the narrow service definition proposed by BARA and accepted by the NCC is artificial and does not reflect the actual nature of the relevant service (Caltex2 [2])

and

that it is open to the NCC and appropriate to consider each of the criteria, and importantly criterion (b), in the context of a service definition which practically reflects the nature of the service required, which in this case is the transport of imported jet fuel to Sydney Airport (Caltex2 [16])

- 2.17 In relation to the Caltex Pipeline Service Application, the Council considers the Applicant's service description to be reasonable. The Council does not agree that the service definition is 'artificially narrow', nor that transporting jet fuel via other pipelines from other import/storage facilities should be included in the definition of the service for which declaration is sought in the Caltex Pipeline application. Similarly, the Council does not consider that it is appropriate that other means of transporting jet fuel be included in the relevant service definition. These matters are, however, issues for consideration in the assessment of criterion (a).
- 2.18 The Council notes that had the application been made in the broader terms Caltex suggests, numerous other parties would be included as providers of parts of such a service. This would complicate considerably the consideration of the application against the declaration criteria. The Council also notes that the adoption of a broad service definition such as "transport of imported jet fuel to Sydney airport" would encompass both the Caltex Pipeline and the Sydney JUHI, removing the need for separate applications for each of the Caltex Pipeline Service and the Sydney JUHI Service. Such an approach would also artificially distinguish between the transport of imported and locally produced jet fuel.
- 2.19 In this case (in the Caltex Pipeline Service application) BARA wishes to see jet fuel transported from the Vopak storage facility (at Port Botany) to the Sydney JUHI. This transport service is provided by that part of the Caltex Pipeline that runs from an interconnection point for fuel leaving the Vopak storage facility to the point where fuel enters the Sydney JUHI from the Caltex Pipeline. The Council considers that the definition of the Caltex Pipeline Service proposed by the Applicant provides a satisfactory basis on which to consider BARA's application.
- 2.20 The pipeline which provides this service is somewhat longer, as it extends beyond the Vopak interconnection point to Caltex's Kurnell refinery. The Applicant does not seek declaration of transport services provided by this part of the Caltex Pipeline. However, to the extent that elements of the Caltex Pipeline that are located prior to

the Vopak interconnection point are required to provide the service for which declaration is sought, the Council considers that these are within the service description put forward by BARA—which includes “ancillary equipment necessary for the operation of the specified part [Vopak to JUHI] of the Caltex Pipeline”—and amenable to determinations by the Australian Competition and Consumer Commission (ACCC) in an access arbitration, if necessary.³

Sydney JUHI Service

- 2.21 In relation to the Sydney JUHI Service, the JUHI JV submits that there are a number of services facilitated by the JUHI, including the storage and distribution services specified in the application but also various other services such as product testing, maintenance, into-plane provider and tanker support and management services. The JUHI JV suggests that BARA’s application does not adequately define the service to which access is sought in terms of which of the range of services facilitated by the JUHI is sought to be declared. Further, the JUHI JV suggests the application potentially covers services which are not the type of service to which Part IIIA can apply and that the application does not address the critical issue of how regulated access to a limited range of the services facilitated by the JUHI could practically be provided in light of fuel security, quality and management considerations involved in the operation of the JUHI (JUHI JV [7]-[8]). The JUHI JV maintains these arguments in its submission responding to the draft recommendations (JUHI JV2 [14]).
- 2.22 The Council does not believe the services for which declaration is sought in respect of the Sydney JUHI are limited in the way the JUHI JV suggests. The Applicant seeks all-inclusive access to the services provided by the storage and distribution components of the JUHI that are necessary to deliver jet fuel to aircraft at Sydney Airport. The quality control processes associated with the safe and efficient operation of the JUHI and delivery of fuel to aircraft, maintenance, management and other services which are ancillary to the principal storage and distribution functions noted in the Applicant’s service description are clearly subject to the application. The co-mingling of jet fuel within the Sydney JUHI makes separate testing and quality control procedures impractical. Furthermore, in the Council’s view the full range of services supplied by the Sydney JUHI are amenable to declaration either directly or as “integral but subsidiary parts” of the service for which declaration is sought (see the definition of “service” in s 44B of the CCA).

³ For example, if it were necessary for pumps located at the head of the pipeline to be used to flush the pipeline prior to jet fuel being transported from the Vopak facility and an access dispute were to arise in regard to this, the ACCC could, in the Council’s view, make orders in respect of the use of these pumps as part of an arbitration in relation to the Caltex Pipeline Service as described by the Applicant.

Conclusion

2.23 The Council considers that the services for which declaration is sought in the applications are services within the definition provided for in s 44B of the CCA. The Council is also satisfied that the services are not subject to any access undertakings, approved tender processes or ineligible service decisions such that they could not be declared.

Process

2.24 On 29 September 2011 the Council published notice of the two applications in *The Australian* newspaper. At the same time the Council wrote to the operators of the facilities that provide the Caltex Pipeline and Sydney JUHI services notifying them of the applications. The Council also wrote to other likely interested parties advising them of the applications.

2.25 The Council sought submissions from interested parties in response to the applications. Initially submissions were sought by 2 November 2011. This deadline was subsequently extended to 21 November 2011.

2.26 At the time it gave notice of the applications and invited submissions, the Council indicated its intention to consider the two applications by way of a common process, although the Council indicated that parts of its recommendation report would need to address aspects of each application separately and separate recommendations would be made on each application. The Council noted that, unless specifically advised to the contrary, it intended to regard submissions as being made in respect of both applications. The Council has followed this approach in preparing these recommendations.

2.27 The Council received 14 submissions in response to the applications. A list of submissions is contained in Appendix B and the submissions are available on the Council's website.

2.28 The most substantive submissions were those from the JUHI JV and Caltex—the service providers. Qantas, Airport Fuel Services (**AFS**), BP and Sapere Research Group (**Sapere**) also made substantive submissions, generally opposing declaration. Q8, a potential user of the services (and current jet fuel supplier to Qantas) also made a submission opposing declaration.

2.29 In addition to their submissions, Caltex and the JUHI JV commissioned expert reports to support aspects of their submissions on the applications. Caltex submitted a report from NERA Economic Consulting (**NERA**). The JUHI JV provided reports from Frontier Economics (**Frontier**) and RBB Economics (**RBB**). These reports are listed in Appendix B and public versions have been published on the Council's website.

- 2.30 The Secretary of the Department of Resources, Energy and Tourism also provided a submission essentially updating developments since the Sydney Jet Fuel Infrastructure Working Group Report (**SJFIWG Report**) was published in April 2010.
- 2.31 The other submissions were from airlines or aircraft operators and their representative bodies (International Air Transport Association (**IATA**) and the Regional Aviation Association of Australia (**RAAA**)). These submissions supported BARA's applications, largely based on the reasoning set out in the applications.
- 2.32 The Council released its draft recommendations on 16 December 2011.
- 2.33 The Council sought further submissions in response to the draft recommendations by 13 February 2012.
- 2.34 The Council received 12 submissions in response to the draft recommendations. Again, the substantive submissions made were from Caltex, the JUHI JV and also BARA. These parties also submitted commissioned reports and/or further confidential information. A list of submissions is contained in Appendix B and the submissions are available on the Council's website.
- 2.35 In addition to submissions on the draft recommendations, the Council sought and obtained additional information in relation to the incidence of jet fuel supply issues at Sydney Airport since April 2010. This information is discussed at paragraphs 4.89 and 4.90 of this document.
- 2.36 The Council took material supplied in BARA's applications, and all of the first and second round submissions and reports, into account in preparing its recommendations. In addition the Council undertook its own inquiries and research which informed these recommendations. The critical issues arising from the applications and submissions are addressed in the relevant sections of these recommendations as appropriate.
- 2.37 Section 44GA of the CCA requires the Council to make a recommendation to the designated Minister within 180 days starting at the start of the day an application is received.⁴ As the applications were received by the Council on 27 September 2011, the Council must provide its recommendations to the designated Minister on or before 26 March 2012.

⁴ This period may be extended in specified circumstances, see s 44GA of the CCA.

3 Declaration under Part IIIA

Objectives and character of Part IIIA (the National Access Regime)

- 3.1 The National Access Regime established by Part IIIA of the CCA provides a regulatory mechanism through which an access seeker can gain access to the services provided by an infrastructure facility on commercial terms and conditions.
- 3.2 The regime provides an important means of promoting competition in markets where the ability to compete effectively is dependent on being able to use an infrastructure service provided by a facility that is uneconomical to duplicate. At the same time, the regime ensures that infrastructure owners receive a commercial return on investment and that incentives for efficient investment are not adversely affected.
- 3.3 Declaration is the first stage of one of three access mechanisms⁵ provided by the National Access Regime under Part IIIA. It is the mechanism for determining whether the service or services provided by a particular facility should be subject to access regulation and depends on whether the requirements for declaration, specified in Part IIIA, are satisfied.
- 3.4 Should a service(s) be declared, a negotiate/arbitrate approach to access becomes available. At this stage, a service provider and access seeker seek to negotiate the terms and conditions upon which access may be granted. Where negotiations are unsuccessful, recourse is available to the ACCC to arbitrate an access dispute. The access seeker notifying an access dispute need not be the party which sought the initial declaration of a service.
- 3.5 The Council has published an overview of the National Access Regime which is available on the Council's website at www.ncc.gov.au.⁶

Requirements for declaration

- 3.6 The Council is responsible for considering applications for declaration. Under s 44G(2) of the CCA, the Council cannot recommend that the designated Minister declare a service(s) unless it is satisfied of all of the following matters:
 - (a) access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service (**criterion (a)**)—see Chapter 4

⁵ Part IIIA provides for regulated access through declaration, certified state or territory access regimes and voluntary access undertakings approved to the ACCC.

⁶ NCC, *Access to Monopoly Infrastructure in Australia—National Third Party Access Regime*, Melbourne, October 2011.

- (b) it would be uneconomical for anyone to develop another facility to provide the service (**criterion (b)**)—see Chapter 5
- (c) the facility is of national significance, having regard to:
 - (i) the size of the facility, or
 - (ii) the importance of the facility to constitutional trade or commerce, or
 - (iii) the importance of the facility to the national economy**(criterion (c))**—see Chapter 6
- (d) [repealed]
- (e) that access to the service:
 - (i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), or
 - (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that since the Commonwealth Minister’s decision was published there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement (**criterion (e)**)—see Chapter 7
- (f) access (or increased access) to the service would not be contrary to the public interest (**criterion (f)**)—see Chapter 8.

3.7 Section 44F(4) of the CCA requires that the Council also consider whether it would be economical for anyone to develop another facility that could provide *part* of the service. In respect of these applications, the Council considers s 44F(4) alongside criterion (b) in Chapter 5.

3.8 The Australian Competition Tribunal (**Tribunal**) and various Courts have also held that the Minister also has discretion not to declare a service even where all the declaration criteria are satisfied. The exercise of this discretion is considered along with criterion (f) in Chapter 8.

3.9 Where the Council recommends that a service be declared the Council must also recommend an expiry date for any declaration (see Chapter 9).

3.10 The Council's considerations are also informed by the objects of Part IIIA set out in s 44AA of the CCA:

The objects of this Part are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

3.11 Further information on declaration and the Council's assessment of declaration applications is available in the Council publication *Declaration of services—A guide to Declaration under Part IIIA of the Trade Practices Act 1974 (Cth)* (NCC 2009) (Declaration Guide).⁷

⁷ Available on the Council's website at www.ncc.gov.au/images/uploads/Declaration_Guide.pdf. The Council is updating its guides to reflect recent legislative changes and other developments, including the Australian Competition Tribunal and Full Federal Court decisions in relation to declaration of various Pilbara iron ore railways. Until the update of all of the guides is complete there is a risk that some parts of the guides may not reflect recent legislative amendments or represent the Council's current approach to particular issues.

4 Criterion (a): Promotion of competition

- 4.1 Criterion (a) requires the Council to be satisfied that “access (or increased access) would promote a material increase in competition in at least one market other than the market for the service” (ie a dependent market) before it can recommend a service be declared.

Dependent markets

- 4.2 In both its applications, BARA submits that the dependent markets in which access (or increased access) will promote a material increase in competition are:

- (a) the market for the supply of jet fuel at Sydney Airport
- (b) the market for into-plane services at Sydney Airport, and
- (c) international and domestic markets for the carriage of passengers and freight into and out of Sydney Airport.

BARA submits that each of these markets is separate from the markets for the services for which declaration is sought.

- 4.3 The dependent markets, along with the markets for the services for which declaration is sought, form parts of a chain of supply and demand comprising the following steps (or functional levels):

- (a) jet fuel supply (both from domestic refineries and, increasingly, imports)
- (b) bulk liquids berth (supplied by Sydney Ports Corporation)
- (c) off-site storage facilities (at Vopak and possibly elsewhere)
- (d) pipeline to Sydney JUHI (the Caltex Pipeline Service for which declaration is sought)
- (e) Sydney JUHI (the Sydney JUHI Service for which declaration is sought)
- (f) into-plane services (provided by AFS, ZIP Airport Services and AirRefuel Pty Limited)
- (g) air transport services (involving carriage of passengers and freight in and out of Sydney Airport to domestic and international destinations).

- 4.4 BARA’s case is that access or increased access to steps (d) and (e) will promote competition at steps (a), (f) and (g). These propositions are supported generally by IATA, the RAAA, United Parcel Service (**UPS**) and the various airlines which made submissions on BARA’s applications (except Qantas).

- 4.5 In its submission responding to the draft recommendations, BARA suggests that the consideration of the effect of access on competition in the dependent markets should be segmented and the effects of access on competition considered separately in relation to:

- (a) International airlines (foreign owned), providing international passenger and freight services,⁸ and regional airlines
- (b) Qantas, and
- (c) Virgin Australia (BARA2 [20]).

BARA states that the benefits of competition arising from increased access are likely to be obtained primarily by the international airlines and to a lesser extent Virgin Australia and regional airlines (BARA2 [72]).

4.6 In response to BARA's applications, Caltex contends that the dependent markets proposed "do not accord with the reality of jet fuel supply at Sydney Airport" (Caltex [226]).

4.7 In relation to a jet fuel market, Caltex argues that:

It is simply not possible for a jet fuel supplier, in the context of a global agreement, to price jet fuel at one airport supra-competitively without the risk of losing not only supply to that airport to a competitor, but business at other locations [231].

4.8 In relation to an into-plane services market, Caltex questions whether such services are distinct from the supply of jet fuel. AFS raises the same issue in its submission (at paragraph 4.11).

4.9 The Sydney JUHI JV submits that BARA's definition of dependent markets is artificial (at [66]). The JUHI JV further explains:

BARA's application seeks to define markets through an analysis of the supply of jet fuel by the two vertically integrated producers, Shell and Caltex. It fails to take into account the potential for wholesale competition through ex-refinery sales, the past, current and potential future activities of Mobil and BP, and the relevance of sales of fuel to Qantas, including the portion of self supply Qantas has through imports from the Vopak Terminal. ... it is misconceived to characterise the supply of jet fuel to Sydney Airport as being through two vertically integrated producers. (at [67])

4.10 Qantas takes the view that only the dependent markets for jet fuel and into-plane services are relevant and that access or increased access to the services for which declaration is sought would have no material impact on competition in downstream aviation markets.

⁸ BARA states that there are currently over 30 international airlines operating at Sydney Airport, including those providing international freight services (BARA2 [24]).

Council's view of dependent markets

- 4.11 The Council considers that the first two dependent markets proposed in BARA's applications provide an appropriate basis for considering whether criterion (a) is satisfied in relation to the Caltex Pipeline Service and the Sydney JUHI Service.
- 4.12 The Council does not accept that these markets should be more narrowly defined to require consideration of the effects of competition on international airlines separately from Qantas or Virgin Australia. Apart from Qantas' participation in the Sydney JUHI JV (which is discussed elsewhere in these recommendations), it appears to the Council that all jet fuel users at Sydney Airport face similar supply conditions and there is no basis to distinguish among them.
- 4.13 In the Council's view the issues raised by Caltex and the Sydney JUHI are best addressed in assessing the state of competition in the dependent markets proposed rather than by attempting to adjust the definition of the dependent markets in some way.
- 4.14 The Council accepts that there is a market or markets covering the carriage of passengers and freight in and out of Sydney Airport.⁹ It considers however that any promotion of competition in such markets is likely to be derivative of the promotion of competition in one or both of the dependent markets proposed. Furthermore, it is likely to be difficult to isolate any particular effect of access (or increased access) to the relevant services in these markets, although this does not necessarily mean that any such effects are immaterial.
- 4.15 Criterion (a) can be satisfied on the basis of a material promotion of competition in one dependent market. For the purpose of its consideration of these applications the Council considers it appropriate to focus its consideration on:
- (a) the market for the supply of jet fuel at Sydney Airport, and
 - (b) the market for into-plane services at Sydney Airport.
- 4.16 The Council is satisfied that the two dependent markets identified in paragraph 4.15 are functionally separate from the market for the Caltex Pipeline Service and the Sydney JUHI Service. Broadly, the supply of those services for which declaration is sought involves the use of the infrastructure (pipelines, pumps, storage and distribution facilities etc) to deliver jet fuel from a point of receipt (being the Vopak terminal, in terms of the Applicant's service description) to aircraft at Sydney Airport. The Council considers that these activities do not overlap with activities in the dependent markets proposed nor are there such economies of scope or other inter-relationships in supply such that the services for which declaration is sought and those provided in dependent markets must necessarily be provided together.

⁹ In addition to BARA, IATA submits that this is a relevant dependent market (IATA2).

4.17 Across the various markets, parties offer services individually in some, and in various joint venture combinations in others. While the supply of services in a number of these markets is characterised by joint venture arrangements, often involving the same joint venturers, the combinations and shares each participant holds often differ across the various markets. Furthermore, while some of the participants in these markets are the same, there are independent suppliers in most. Additionally the applications and various submissions describe a range of different ownership and supply arrangements at various airports some of which involve joint supply of all or some of the relevant services and others where the various services are supplied separately. All these factors suggest to the Council that the markets for the services for which declaration is sought and the dependent markets are separate or separable.

Significant issues

4.18 Before turning to examine the effect of access or increased access in the dependent markets identified the Council considers there are several significant issues raised in the applications and submissions which are best considered individually. These issues are:

- the relevance of information relating to jet fuel price differentials provided in the applications
- implications of information on airline tenders for supply of jet fuel
- the scope for additional parties to join the JUHI JV, and
- the use of trucks as a substitute for pipeline delivery of jet fuel.

4.19 The first and second of these issues are relevant to the consideration of both applications whereas the third and fourth are principally relevant to the Sydney JUHI Service and the Caltex Pipeline Service applications respectively.

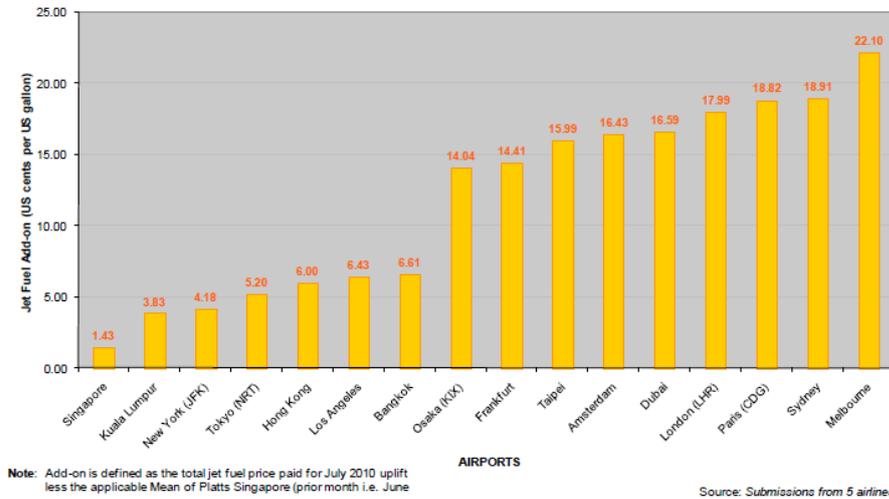
Jet fuel price differentials

4.20 The Applicant characterises the market for supply of jet fuel at Sydney Airport as one with limited competition, arguing that the supply of jet fuel at Sydney Airport involves some of the highest fuel differential¹⁰ rates in the world. This claim is supported by IATA in its first submission. To support this, the Applicant provides data from IATA as set out in the following figure.

¹⁰ A fuel differential is the difference between the price for jet fuel paid by the airlines and an international benchmark market price.

Figure 1: Jet fuel differentials

Figure 1 Jet fuel differentials, US cents per US gallon, July 2010



Source: IATA.

Source: Caltex Pipeline Service application and the JUHI Service application at page 2.

4.21 In its submission, Sapere suggests that this price differential data appears to be the only “evidence provided by BARA in support of its contention that participants in the Sydney Airport JUHI are abusing their market power to set excessive prices for the supply of jet fuel” (Sapere, p iv).

4.22 Several parties take strong issue with the meaningfulness and accuracy of the Applicant’s jet fuel differential information and its purported magnitude at Sydney Airport (see the submissions by Caltex, the JUHI JV, Qantas, BP and Sapere).

4.23 The JUHI JV specifically commissioned RBB to examine the state of competition for supply of jet fuel at Sydney Airport, including the price differential information relied upon by the Applicant. The RBB Report concludes that:

The price differentials presented by BARA provide no meaningful insights into the level of competition at the various international airports considered (page 3).

4.24 More specifically, RBB notes:

- price differentials do not reflect differences in the margins earned by suppliers of jet fuel (page 3)
- any price differential between jet fuel in Singapore and a jet fuel product in Australia will largely reflect the significant import costs and any additional costs incurred along the supply chain from Singapore to the final consumer (page 6)

- import costs can be considerably higher when transporting smaller volumes: variation in customer sizes across airports can therefore influence the transport cost and final price differentials measured at different airports (page 8)
 - the price differential is primarily determined by these significant costs sustained across the supply chain and a comparison of price differentials across airports cannot inform in any meaningful way the analysis of price competition for the supply of jet fuel at Sydney Airport (page 14).
- 4.25 The RBB Report also identifies several methodological defects in the price differential data used by the Applicant, including: inconsistent benchmark prices, inconsistency in the basis on which local prices are reported, inconsistent treatment of taxes and fees, and the inclusion of a mix of private and state owned suppliers (and parties with varying levels of risk exposure) without allowing for any differences in required rates of return (pages 9-10). Further, RBB notes that “the BARA analysis is presented for one particular month only” which, it suggests, can be very misleading (page 10).
- 4.26 In its submission on the draft recommendations, BARA contends that claims of cost-based jet fuel prices are not supported by the market facts. BARA states that the evidence supports the argument that the outcomes achieved over jet fuel purchases differ greatly across international airlines, Qantas and Virgin Australia (BARA2 [13]). BARA further states that given Qantas’ objection to declaration and the lack of a supporting submission from Virgin Australia, it is reasonable to conclude that both airlines pay lower prices for jet fuel than do international airlines (BARA2 [41]). BARA concludes that the evidence provided to the Council, including submissions by airlines, supports a market description of incumbent oil company market power and price discrimination, rather than one of vigorous competition between sellers and cost-based prices (BARA2 [53]).
- 4.27 Cathay Pacific states that that there is an uneven playing field at Sydney Airport manifesting itself in varying fuel differentials being applied to local and international airlines despite the purchased fuel being supplied through the same infrastructure.
- 4.28 Caltex in responding to the draft recommendations expresses agreement with what it describes as the Council’s “finding that jet fuel supply to Sydney Airport is not characterised by excessive prices or other manifestations of market power” (Caltex2 [5]). Caltex also suggests that the “Draft recommendation reflects an assessment that there is a competitive tender market for the supply of jet fuel to Sydney Airport” (Caltex2 [6]). Neither of these representations of the Council’s views in the draft recommendations is accurate. Specifically, in the draft recommendations the Council stated “the Council does not consider that the Applicant has made out its position that jet fuel supply is characterised by excessive prices ...”. The Council’s conclusion that the Applicant has not made out this part of its position does not amount to the positive assessment of the state of competition in a market for jet fuel supply at Sydney Airport suggested by Caltex.

4.29 Despite, BARA's further submission (and some supporting submissions from various airlines), in the Council's view the critique of the fuel differential issue it initially received in response to these applications remains compelling (see in particular the RBB Report discussed at paragraphs 4.23 to 4.25 above). The Council agrees with submissions made to it that the fuel differential information it has received has limited, if any, value in establishing (or for that matter rejecting) either excessive pricing or an abuse of market power in relation to supply of jet fuel at Sydney Airport

Airline tenders for jet fuel

4.30 In the draft recommendations, the Council noted that several airlines raised concerns about a lack of response and availability of jet fuel supply to the airline's tenders (refer Emirates, Korean Air and UPS). The Council's preliminary conclusion was that these concerns are more likely to reflect overall supply constraints than a lack of competition that could be rectified by access or increased access. However, the Council noted that without further information on the parameters and requirements of the tenders concerned it is difficult to reach a firm conclusion as to whether or not access could improve the tender response and reliability in this regard.¹¹

4.31 The Council received several responses to this issue in submissions on its draft recommendations. BARA notes the commonalities across the submissions of international airlines, being a limited response to tenders for the supply of jet fuel and an inability of most suppliers to fulfil the entire jet fuel requirements of an individual airline (BARA2 [35]-[36]).

4.32 BARA submits that neither the capacity of the Caltex Pipeline, nor that of the Sydney JUHI, has been a constraint in recent times. Airlines have been able to satisfy their increasing demands for supply, although principally from only one supplier (BARA2 [37]). This is reinforced in the analysis of HWL Ebsworth (**HWLE**) of data supplied by airlines. This analysis indicates that while airlines invite up to five suppliers to submit tenders, only one or two initial responses are received, and airlines appear to ordinarily receive only one final response to a tender invitation (HWLE pages 5-6).¹² BARA describes this limited response is suggestive of "little or no competition between suppliers when International Airlines tender for jet fuel at Sydney Airport" (BARA2 [39]).

4.33 Further submissions from airlines and IATA also highlight difficulties airlines have had in obtaining competitive tenders for supply of jet fuel at Sydney Airport. Etihad notes that in March 2010 it received a tender response from two suppliers, both limited to partial volume. However, Etihad managed to contract for 100 per cent of its required volume with one supplier at a higher price. IATA seeks to draw a link between the

¹¹ Draft recommendations [4.61].

¹² With one exception in the data supplied, all airlines received only a final response from only one oil company.

airlines' difficulties in securing multiple bids and difficulties suppliers face in accessing the Sydney jet fuel supply market (the Council assumes this reference is to access to the Caltex Pipeline and the JUHI) (IATA2 page 2).

4.34 Cathay Pacific submits:

A supplier's ability to efficiently and cost-effectively transport jet fuel from Vopak terminal to Sydney airport is directly dependent on its ease of access to the Caltex Pipeline Service. Since 2006, only one jet fuel supplier benefiting from substantial preferential access to this pipeline has been capable of consistently committing to fulfil Cathay Pacific's entire annual demand. Alternative suppliers have at best only been able to commit to a fraction of these same requirements and at substantially higher cost with limited pipeline access frequency and restricted available through-put. As a result, suppliers are not able to freely offer their product in a cost-effective manner ... (pages 1-2)

4.35 United Airlines submits that it experienced difficulty in May 2010 when its incumbent supplier Air BP was suddenly forced to withdraw a preliminary tender bid. In support of declaration, United states that "failure to open the SYD market will severely hamper the airport's ability to support future growth and expansion".

4.36 The JUHI JV concurs with the Council's preliminary conclusions, stating "capacity constraints are the most common factor in JV Participants' inability to supply an airline's requested volumes" (JUHI JV2 [67]). Moreover the JUHI JV submits that:

the examples of a small number of airlines have pointed to where particular suppliers were not able to bid for the airline's business do not in any way illustrate a lack of competition in the supply of jet fuel at Sydney Airport. (JUHI JV [68]).

4.37 RBB claims that the supply of jet fuel at Sydney Airport is competitive and states:

all suppliers have the incentive to compete aggressively, as securing the lowest price will allow them to gain a largest share in future demand, and benefit from improved fixed cost coverage through higher volume throughput. This suggests that the ability for airlines to reward the lowest price bidder with all or a large percentage of volumes will stimulate suppliers of jet fuel to undercut each other. As a result, suppliers of jet fuel will compete, even when there are only a relatively small number of suppliers active on the market. (RBB2 pages 6-7)

4.38 RBB concludes:

Although a given supplier may be unable to bid for certain tenders due to individual capacity constraints, competing suppliers are unlikely to have complete visibility as to which competitors are unable to bid for a given tender, or indeed which tenders are likely to be issued in a given year. As a result suppliers of jet fuel at Sydney Airport have been unable to identify the number of alternative suppliers which may compete for a current or future volume contracts. (RBB2 page 9)

4.39 RBB also provides examples of the re-allocation of volumes across suppliers suggesting a degree of choice in jet fuel supply is available and exercised by airlines (RBB2, pages 9-10). In addition, RBB states that “the recent growth in demand...has pushed the utilisation of the Caltex pipeline close to full capacity” and “internal capability, primarily relating to pipeline capacity constraints, is the most common reason for suppliers not participating in a tender” (RBB2 page 12).

4.40 Caltex outlines its decision making process including the criteria it considers in deciding whether to submit a bid to supply jet fuel. (Caltex2 [26]-[27]). Caltex submits these considerations lead it to support the Council’s conclusions in its draft recommendations that the tender response issue is a reflection of supply constraints rather than a lack of competition.

4.41 The Council notes that the examples cited by HWLE appear to cover less than half of the tenders during the relevant period. On the material presented, airlines (notably international airlines) generally receive only one or two bids to an invitation to tender for the supply of jet fuel. The Council considers that the limited bids are reflective of supply and capacity constraints, more so than a lack of access or abuse of market power by any service provider. In reaching this conclusion, the Council does not consider that the market associated with the supply of jet fuel is effectively competitive nor that there is a vigorously competitive tender market.

Joining the JUHI JV

4.42 The Applicant complains that access to the Sydney JUHI is restricted because equity participation in the JUHI JV is required to use the JUHI. The Applicant goes on to argue that even if equity participation is appropriate, concerns might then arise from the ability for the JUHI JV to levy an excessive charge for joining as a barrier to entry and the time delay involved in the process.

4.43 In response, the JUHI JV (and others) submit that a requirement for equity participation is reasonable (even preferable) and that membership of the JUHI is open to third parties that wish to use the Sydney JUHI to supply jet fuel at Sydney Airport. The JUHI JV states:

[162] It is not credible to suggest, as BARA does, that the mere fact there are criteria for entry and that the JUHI JV may decide which applicants meet that criteria means third parties are effectively dissuaded from applying for equity participation. Moreover, the majority of the qualifying criteria for equity participation would need to be met by a throughputter in any event—equity participation does not act as a significant barrier to entry.

4.44 The JUHI JV contends that:

[101] The JV Agreement governing the operation of the JUHI explicitly provides for a mechanism by which access can be obtained to the services provided by the JUHI. That mechanism is equity participation in the JUHI JV.

[102] The JV Agreement sets out the qualifying criteria¹³ to be met in order for a third party to become an equity participant in the JUHI JV. These criteria each have a reasonable commercial basis ...

4.45 In relation to this contention, the JUHI JV commissioned an expert report from Frontier. Among other matters, Frontier was asked to:

Assess the criteria for third parties to obtain equity participation in the Joint User Hydrant Installation (JUHI) joint venture (JUHI JV), including the principles used in the application of these criteria [18].

4.46 In its report, Frontier concludes:

In our view, there is, with one exception, nothing in the qualifying criteria set out in Clause 15.3 of the JV Agreement that would appear, on its face, to represent a barrier to entry to a potential new JV participant. [91]

4.47 The exception noted by Frontier relates to the inclusion of a requirement for applicants to join the JV to comply with “any other entry criteria imposed by the Participants” (JV Agreement cl 15.3(viii)). Frontier notes that this might be used to create a barrier to entry for potential new entrants, although it is not aware of this clause being used in that way.

4.48 In its draft recommendations, the Council stated that it shared Frontier’s concern. In the event that the specific criteria for joining the JUHI JV became critical to the consideration of criterion (a), the inclusion of an open-ended requirement such as that in cl 15.3(viii) could raise difficulties. The Council suggested that the participants in the JUHI JV might wish to consider removing or amending this provision.

4.49 In its response to the draft recommendations, the JUHI JV submits that the scope to introduce additional criteria for a potential new entrant to the JUHI JV has never

¹³ These criteria are in cl 15 of the JUHI JV Agreement, which is included in the JUHI JV submission as Annexure A. The more relevant criteria are summarised in the Frontier Report at paragraph 45.

been used and there is no reason to suggest that it may be misused to block a potential entrant in the future (JUHI JV2 [34]).

- 4.50 In addition, the JUHI JV prepared a guideline¹⁴ on the application of cl 15.3(viii), noting that additional requirements for entry to the JUHI JV will be imposed on a new participant where regulatory, legal or commercial circumstances render it necessary. The JUHI JV argues that this means that any new provision imposed under cl 15.3(viii) cannot be arbitrary and must be reasonable and appropriate (JUHI JV [37]).
- 4.51 The Council notes the introduction of the guideline for the application of cl 15.3(viii). Its introduction is a positive development, although the certainty available to a potential new participant in relation to the basis on which parties may join the JUHI JV would have been enhanced to a great extent by either removing cl 15.3(viii) from the entry criteria or amending the clause to identify the circumstances now specified in the guideline.
- 4.52 In the draft recommendations the Council also queried whether a party seeking to join the JUHI JV could enforce the provisions of the JV agreement. Once a new participant joins the JUHI JV, the participant is likely to be treated on the same basis as other participants. However, it is unclear to the Council how a party seeking to join the JUHI JV is able to enforce the terms of the JV agreement. A party seeking to join the JV is not (yet) a party to the JV agreement and therefore would not appear to have standing to enforce the agreement. Contractual privity does not appear to extend to parties wishing to join the JUHI JV. While it may be that one of the JV participants would enforce its 'right' to have others join the JV on the terms provided in the JV agreement, it is not clear that any of the existing JV participants will necessarily have a strong incentive to do so.
- 4.53 In response, the JUHI JV, in its submission on the draft recommendations, notes that it considers this issue to be a theoretical concern that should be accorded little weight. Qantas supports this view (Qantas2 [8]). The JUHI JV states that there is no evidence that the JUHI JV has used a mechanism such as cl 15.3(viii) to arbitrarily or inappropriately prevent entry by a prospective participant (JUHI JV2 [40]). Furthermore, the JUHI JV emphasise the availability of protections under the CCA such that should the JV participants refuse to apply the entry criteria reasonably or otherwise refuse to negotiate with prospective participants then that may raise issues under the CCA. The JUHI JV considers that such a prospect acts as a discipline on the JV participants (JUHI JV2 [42]).
- 4.54 The Council does not consider the difficulties a third party would likely face in enforcing the criteria for joining the JUHI JV to be theoretical merely because such issues do not appear to have arisen to date. The Council accepts that the CCA may

¹⁴ Refer JUHI JV2 Annexure.

impose some discipline on the JUHI JV when considering applications to join the JV, although the extent of this is unclear.

- 4.55 In the absence of a clearer ability for parties seeking to join the JUHI JV to enforce the 'right' to access under the terms of the JV agreement, the Council maintains that it cannot attach much weight to the ability to join the JV as a means of obtaining access.
- 4.56 Subject to the matters discussed above, the Council generally agrees with Frontier that the criteria for joining the JUHI JV are not such as to create a barrier to entry.

Supply of jet fuel to the Sydney JUHI by truck

- 4.57 In its Caltex Pipeline Service application BARA contends that "trucking jet fuel to Sydney Airport is not a viable option" (page 28).
- 4.58 Various submitting parties (in particular Caltex and, in its second report, NERA) suggest that trucks are a competitive option for the supply of jet fuel and therefore should be considered as a viable part of the transport infrastructure for the supply of jet fuel providing a competitive constraint on pipeline service providers such as Caltex, with the potential for further investment in order to facilitate greater utilisation. The following points are made.
- The Sydney JUHI can accept jet fuel via pipeline and truck (JUHI JV [42]).
 - BP currently trucks jet fuel from the Vopak terminal to the Sydney JUHI. (JUHI JV [31], Caltex [82]), but BP is unlikely to be making full use of the available trucking capacity, providing scope for expanded use (Caltex2 [41]).
 - Trucking is a low cost, competitive and efficient transport option (Caltex [12]). Caltex uses trucks to transport jet fuel from its geographically associated storage terminals to Williamstown, Canberra and Melbourne airports (Caltex [82]).
 - At Melbourne Airport, Caltex trucks all jet fuel (Caltex [124]), and the distance trucked is much greater than would be the case from Port Botany to Sydney Airport, so trucking costs at Sydney should be no greater than those for trucking to Melbourne Airport (Caltex [127]).
 - The 10km typical truck route from the Vopak terminal to the Sydney JUHI and the number of truck movements needed to service the Sydney JUHI would not have any material impact on traffic conditions in the Port Botany area (Caltex2 [48]).
 - BARA's contention that trucking is rendered infeasible by the relatively small proportion of total needs that could be fulfilled through trucking is incorrect (Caltex [193]).

4.59 In its second submission, Caltex reiterates these points and goes on to examine the commercial viability of trucking jet fuel into Sydney Airport at some length. Having regard to the amount of jet fuel presently trucked into Sydney Airport, Caltex states:

The current utilisation of trucking reflects current commercial conditions and does not give a complete indication of its potential as a competitive constraint.
(Caltex2 [34])

4.60 Caltex further submits that with the existing infrastructure, 305ML of jet fuel could be trucked to the Sydney JUHI each year (Caltex2 [40]) and that with further investment in new facilities this could be increased to 500ML a year (Caltex2 [42]).

4.61 NERA submits:

the ‘peripheral’ use of trucks may simply be symptomatic of the fact that they are *not needed* very often. However, that does not mean that trucking is ‘not a competitive substitute’, and has no effect on the prices that Caltex can charge.
(NERA2 pages 5-6)

4.62 NERA contends that trucking is priced competitively with use of the Caltex Pipeline (NERA2 page 6) and is therefore a close economic substitute to use of the pipeline. NERA states “the cost associated with increasing the use of tanker trucks is ... likely to be similar to the current price charged by Caltex for pipeline capacity” (NERA2 page 6) so it is a constraint on pipeline charges.

4.63 Supply of jet fuel by truck does occur in Australia, including some at Sydney Airport. The Council notes Caltex’s calculations that with the existing facilities, approximately 305ML¹⁵ of jet fuel could be supplied into the Sydney JUHI by truck. However, even with scope to increase jet fuel supply to 500ML, supply by truck is at the periphery of the supply of jet fuel into the Sydney JUHI, and the Council considers this is likely to remain the case. Trucks appear to be used primarily in response to outages or other difficulties in transporting jet fuel by pipeline or to meet some other occasional, low-volume or bespoke requirement.

4.64 The Council understands that BP only supplies a very small proportion of the total amount of jet fuel supplied into the Sydney JUHI by truck and that the bridger facility at the Sydney JUHI is not permanent. While the cost of building a permanent bridger facility at the Sydney JUHI appears modest, particularly when compared to the costs of other infrastructure upgrades around jet fuel supply, it is not an option that has been adopted by the JUHI JV, despite being identified in the recommendations of the SJFIWG Report. Presumably the decision not to take up this option is, at least in part, an indication that those in the industry expect that the anticipated increased demand

¹⁵ On current demand of 2.9GL (see BARA’s applications, page 1) of jet fuel, 305ML represents approximately 11 per cent. On the projected demand level in 2029 of 5.6GL (see BARA’s applications, page 1), 305ML represents around 5 per cent. 500ML pa amounts to 17 per cent and 9 per cent of current and project jet fuel demand respectively.

in jet fuel will be met by the two existing pipelines into the Sydney JUHI until they reach capacity, at which time a third pipeline will be developed.

- 4.65 In its second submission Qantas agrees with the preliminary views of the Council in its draft recommendations, stating “trucking is of limited value in terms of the product volumes required to supply Sydney Airport” (Qantas2 [9]). IATA also agrees with the Council’s view that trucking “is best viewed as a complementary mechanism to the use of pipelines rather than as a competitive substitute or alternative” (IATA2).
- 4.66 The Council notes that transporting large volumes of fuel from Port Botany to Sydney Airport by road would create additional congestion at both ends and on roads in between thereby generating health and safety concerns. Road congestion at both the airport and port is already significant and of concern to both the state and local governments. NERA contends that matters such as these should be considered externalities and steps could be taken to alleviate such concerns—such as limiting truck movements to night. It appears to the Council however that steps such as this designed to address the limitations of trucking would further restrict the viability of and available volumes of trucking jet fuel (NERA2 page 7).
- 4.67 The Council is of the view that no firm conclusions can be drawn from the comparison of the likely price of trucking jet fuel with charges for transporting fuel on the Caltex Pipeline unless there is a reasonable basis to conclude that the prices of the services being considered (both pipeline transport and trucking) are cost reflective. Purported parity in pricing does not automatically lead to the conclusion that the respective modes of transport are substitutes nor that the current pricing for pipeline services is competitive. It may be that the price of trucking jet fuel sets an upper boundary for pipeline charges and competition between pipelines would yield significantly lower charges.
- 4.68 The Council prefers the view expressed in the SJFIWG Report, which noted:
- Trucking of fuel into the Sydney Airport JUHI is possible, but not normally undertaken.
- Trucking significantly increases traffic congestion around the immediate JUHI area. It also increases safety risks at JUHI. Trucking is not a total solution to the bottlenecks in transporting fuel from off-airport storage facilities to Sydney Airport but can provide incremental supply in the short to medium term or under special or emergency supply conditions [4.1.4].
- 4.69 In the Council’s view trucking jet fuel into Sydney Airport is likely to remain at the periphery, as the Caltex Pipeline provides a safer, more reliable, and arguably less costly, way to supply jet fuel from Port Botany to Sydney Airport. Trucking jet fuel to Sydney Airport is best viewed as a complementary mechanism to the use of pipelines rather than as a competitive substitute or alternative.

Promotion of competition in the market for the supply of jet fuel at Sydney Airport

Applications and submissions

4.70 The Applicant submits that the market for the supply of jet fuel at Sydney Airport is currently characterised by:

- (a) limited competition between incumbent oil company fuel suppliers
- (b) some of the highest differential rates in the world, and
- (c) poor reliability.

(JUHI Service application page 1; Caltex Service application page 1)

4.71 The Applicant adds that:

- the market is currently supplied by Caltex, Shell and BP (being three of the four main oil companies operating in Australia) and Qantas undertakes some self-supply at Sydney Airport
- both Caltex and Shell are vertically integrated in the supply of jet fuel having refineries,¹⁶ import facilities, pipelines, participation in the JUHI JV and part or full control of an into-plane service provider
- the market is highly concentrated with an estimated Herfindahl-Herschman Index (**HHI**) of 4000¹⁷
- there exist substantial barriers to entry for both the Sydney JUHI and the Caltex Pipeline that in turn given the incumbent jet fuel suppliers considerable market power (Caltex Service application; JUHI Service application, pages 1-4).

4.72 These submissions are supported in general terms by: Emirates, IATA, Korean Air, the RAAA and UPS.

4.73 Caltex and the JUHI JV deny that the providers of the services have market power or have an incentive to exercise market power (JUHI JV [160], Caltex [358]). BP also rejects BARA's claims of anti-competitive activity (BP [4.4(d)(iii)]).

4.74 Both Caltex and the JUHI JV submit that third party access already exists to the Caltex Pipeline and entry is available to the Sydney JUHI on commercially reasonable terms and conditions. Caltex states that it currently provides third parties with access to its pipeline to pump jet fuel from the Vopak terminal to the Sydney JUHI, on the basis of approximately 5 days per month. Caltex also states that while the existing capacity

¹⁶ The Council notes Shell Australia's announcements that it will close its Clyde refinery and convert it into an import only facility around mid 2013.

¹⁷ This point is reiterated in IATA's submission (pages 1-2).

constraints on the Caltex Pipeline restrict third party availability to around five days per month, on completion of Caltex's pipeline upgrades more capacity may become available for third party use. Access to the Sydney JUHI by way of participation in the JUHI JV has been discussed earlier.

- 4.75 Qantas notes that its joining the JUHI JV and use of the Caltex Pipeline is evidence that it is possible to access the jet fuel supply infrastructure on commercially reasonable terms. As the most recent entrant to the JUHI JV Qantas states that the qualifying criteria are clearly prescribed in the JUHI JV Agreement and "are applied on a non discriminatory basis". Further,

The criteria are reasonable, having regard to the long term investment required to operate JUHI. The criteria objectively require that users have appropriate technical qualifications and capabilities for supplying jet fuel, as well as the need for the JUHI owners to share the associated costs and risks of operation. (Qantas, page 15)

- 4.76 Q8, the only potential new jet fuel supplier to make a submission on the applications, states:

Q8 Aviation's understanding of the JUHI would suggest there is a properly defined process that can be followed to gain access for the intention of marketing Jet Fuel on the airport. (page 2)

- 4.77 Qantas identifies Q8 as a party the JUHI JV is currently in the process of negotiating with regarding entry to the Sydney JUHI and states that the JUHI JV has never refused a genuine application for equity participation (Qantas page 15).

- 4.78 Q8 goes further to express the view that "declaring the pipeline open access would not necessarily lead to a material increase in Jet Fuel competition as the pipeline is limited by capacity at present" (page 1).

- 4.79 The parties opposing declaration contend that competition in the market for jet fuel at Sydney Airport is unlikely to be materially promoted as a result of access or increased access to either (or both) of the services for which declaration is sought. Some (the JUHI JV [160]; AFS, at least in relation to the market for into-plane services, at [4.35]) argue that these markets are already workably (or effectively) competitive. Various these parties argue that:

- "there are already several suppliers of jet fuel at Sydney airport" and "there is no evidence that further entry would be likely or would materially increase competition" (Caltex [141])
- access and increased access to either service for which declaration is sought is already available (JUHI JV [162], Caltex [359])
- "in relation to into plane services at Sydney Airport, there are a sufficient number of suppliers to manage daily demand, constrained by the service

level requirements of the airlines and the fact that there are minimal barriers to entry” (AFS [4.35])

- requiring that access to the Sydney JUHI occur by way of a party joining the JUHI JV and making an equity contribution is reasonable and economically efficient (this issue is examined in detail in chapters 3 and 4 of the Frontier Report)
- the supply of jet fuel to many airlines is determined by the outcomes of international (or at least national) negotiations and tenders, and access or increased access to infrastructure services at Sydney Airport will not change these outcomes. In this regard the NERA Report notes:

because most international airlines arrange for the supply of jet fuel using tenders for supply to multiple airports around the world, airlines are likely to have greater bargaining power through the prospect of reprisals in other geographic locations if prices in Sydney exceed the level implied by effective competition (page 23)

- the Shell Pipeline is a competitive means of supplying jet fuel to the Sydney JUHI (albeit from different storage facilities) which constrains outcomes in this market and will do so to an increasing extent when the Shell refinery is converted to an import terminal
- declaration will not relieve physical supply constraints (Qantas page 2).

4.80 The issue of the competition among the existing jet fuel suppliers is considered in both the NERA and RBB reports. In respect of the effect on competition of access to the Caltex Pipeline, for the reasons set out in section 4.3.2 of its report, NERA concludes that:

... competition in the dependent market for supply of jet fuel to airlines is already effective and, even if it is not, that access (or increased access) to the service provided by the Caltex pipeline would not promote a material increase in competition in that market. (page 23)

4.81 RBB reaches a similar conclusion in respect of access to the Sydney JUHI:

[3.3.3] The product characteristics and existing equity arrangements mean that current suppliers of jet fuel have the ability and incentive to compete effectively with each other.

4.82 In respect of the change to the operation of the Shell refinery and the implications of this for the Shell Pipeline, BARA submits that:

The most likely outcome of Shell’s ability to increase its supply of jet fuel to Sydney Airport is a modest redistribution of sales between existing suppliers. It cannot be expected to increase the level of effective competition between existing jet fuel suppliers or encourage new suppliers to enter the market. In

summary, marginal increases in the transfer capacity of the existing oil companies will not alter the underlying market conditions.

It is also in Shell's interest not to start or encourage aggressive price competition between suppliers. If Shell did compete aggressively on price to expand sales, then total profits would likely fall given the market power it has on existing sales. One therefore cannot expect Shell's increase in jet fuel transfer capacity to translate into increased competition between jet fuel suppliers at Sydney Airport.

In summary, if Shell does increase the use of its pipeline to the full extent possible, then this is likely to ... increase the market dominance of Shell and Caltex in the market for jet fuel to airlines operating to and from Sydney Airport. Neither Shell nor Caltex has any incentive to increase the level of competition between jet fuel suppliers. Caltex also has no incentive to allow more jet fuel suppliers to enter the market through increased access to its Pipeline (BARA second supplementary submission 4 November 2011).

4.83 In its submission, Sapere takes issue with the assertions put forward by BARA around the HHI stating:

Economic theory would suggest that the level of market concentration alone may not necessarily be the prime determinant for the actual state of competition in a market. Thus, a competition analysis focused solely on market concentration is fundamentally flawed because it ignores other critical factors (page 18).

Council's conclusions

4.84 As noted above (paragraphs 4.20–4.29) the Council does not consider that the Applicant has made out its position that jet fuel supply is characterised by excessive prices or other manifestations of market power. The Council accepts that the market for supply of jet fuel at Sydney produces a high HHI, but does not consider that statistic of itself leads to any relevant conclusions.

4.85 At the present time the market for the supply of jet fuel is serviced by two pipelines feeding into the Sydney JUHI. While the Shell Pipeline does not provide an equivalent service to that of the Caltex Pipeline—ie it does not, and cannot, provide for the transportation of jet fuel from the Vopak import terminal at Port Botany to the Sydney JUHI—its presence must be considered in the competition analysis. The Shell Pipeline is currently underutilised, although that situation is expected to change by mid 2013. The decommissioning of Shell's refinery and its conversion to an import facility can reasonably be expected to allow for a strengthening in competition in the supply of jet fuel. Available capacity will increase, at least in the short term. For this period capacity is likely to exceed demand which is likely to lead to a more competitive environment than has existed for some time. While Shell does not currently provide for third party access on its infrastructure (and this may remain the

case) the increase in capacity may result in Shell increasingly using its own import and supply infrastructure, so reducing its use of storage at the Vopak terminal and, more importantly, freeing up capacity on the Caltex Pipeline. In that situation, more capacity may well become available for new access seekers or existing users on the Caltex Pipeline.

- 4.86 In characterising the market for the supply of jet fuel, the Applicant highlights issues concerning the reliability of supply. The Council accepts that reliability has been an issue at Sydney Airport and nationally. Indeed reliability of supply was the precursor to the establishment of the SJFIWG and its inquiries. As identified by several submitting parties, issues around reliability are not access related, but arise from capacity constraints on the supply infrastructure (principally, the Caltex Pipeline). Various commercial parties are working to address those capacity constraints, notably through the adoption of several of the recommendations of the SJFIWG which are expected to improve supply reliability and by way of the announced upgrades that are expected to increase the capacity of both the Caltex and Shell pipelines. It is not apparent that declaration or access to the services would necessarily enhance competition so as to improve reliability.
- 4.87 Generally, as Qantas notes that “the problem is one of capacity, not access” (Qantas page 14).
- 4.88 It appears to the Council that since jet fuel supply issues first arose in 2003 management of these issues has improved and the number of critical incidences has reduced significantly. A key reason for this was the establishment of the National Operating Committee (**NOC**) in 2003.¹⁸ Warning lights are issued when jet fuel supply issues arise, with a *black light* denoting a critical situation and a *red light* warning of a potential shortage should another incident occur “such as a problem with planned production or ship arrival” (Caltex supplementary submission, Attachment A, 29 November 2011). The Council notes that Caltex in its submissions on the applications advises that there have been no black lights since the SJFIWG Report was issued and that only three red lights occurred in 2011 (Caltex supplementary submission, Attachment A, 29 November 2011).
- 4.89 As noted at paragraph 2.35 in conjunction with releasing the draft recommendations the Council sought additional information in relation to the frequency of jet fuel supply issues at Sydney Airport. In particular, the Council sought details of the

¹⁸ The NOC is responsible for ongoing monitoring and reporting of fuel supplies and reliability at major Australian (and some New Zealand and Pacific) airports. As well as representatives from the commercial parties involved in jet fuel supply at Sydney airport, the NOC includes an independent member appointed by the Australian Government. The NOC coordinates the dissemination of fuel supply and reliability information to aviation stakeholders (including Commonwealth Ministers and officials) on a weekly basis. More detail of management of jet fuel supply through the NOC is set out in the JUHI JV submission at [53]-[56] and the SJFIWG Report.

number of black and red light warnings issued in 2011. In response, the NOC advised there had been no black lights but that seven red lights had occurred in 2011 (NOC Traffic Light Report–Sydney Airport, January 2012).¹⁹

- 4.90 While the number of red light warnings in 2011 represents a small increase on the five red lights that occurred in 2010, the Council accepts the advice from the NOC that this may, in part, be attributable to the fact that the Sydney JUHI had one storage tank out of service during the second half of 2011. While concerns were raised by Etihad on the incidents and duration of red lights at Sydney Airport, it appears to the Council that the coordination and management strategies that have been implemented around the supply of jet fuel are operating appropriately to manage supply issues. It is not apparent that access could improve reliability. It would however be desirable that all parties with an interest in the reliability of supply of jet fuel at Sydney Airport had access to published data on the incidence of supply warnings. The Council considers that the NOC should give consideration to public provision of such information.
- 4.91 Caltex, the JUHI JV and Qantas make much of the fact that access already exists or is available to the Caltex Pipeline and Sydney JUHI facilities and object to BARA's claims that access has been denied or is not available on reasonable terms and conditions. Caltex advises that its pricing for throughput on the Caltex Pipeline is consistent with the price of storage terminal to airport transport at other airports in Australia (Caltex [184]).
- 4.92 The Council accepts that the Caltex Pipeline is a crucial component of the jet fuel supply infrastructure to Sydney Airport. The Council has earlier rejected the argument that trucks are a meaningful substitute for the Caltex Pipeline. While the Shell Pipeline can also transport jet fuel into the Sydney JUHI its location restricts that supply to only Shell product as it does not run proximate to any common user facility or import terminal in the way the Caltex Pipeline does. The Council considers that looking forward 10-13 years it is probable the Caltex Pipeline will once again become capacity constrained and at this point²⁰ the Council expects a third pipeline from Port Botany or with an interconnection point at Port Botany will be constructed. Pipeline transportation is the most effective means for transporting jet fuel into the Sydney JUHI, particularly given the geographical constraints and features relevant to Sydney Airport.
- 4.93 The Council accepts that access is available to the Sydney JUHI by becoming a member of the JUHI JV on the terms and conditions prescribed in the JV Agreement.

¹⁹ The incidence of red light warnings identified by the NOC is greater than that suggested by Caltex in its submission on the applications. Caltex advised the Council of how it considers this discrepancy arose and accepts that the data provided by the NOC is correct.

²⁰ or in all likelihood ahead of this point given the required lead time necessary to plan, build and commission any new pipeline

Submissions from the JUHI JV, BP, Qantas, and the Frontier Report, focus on the need for access to the Sydney JUHI to be by way of equity participation rather than on a throughput basis. The Council accepts these points but notes that should declaration of the Sydney JUHI Service occur pricing for access to that service need not be limited to a throughput charge.

- 4.94 The Council agrees that the existing arrangements requiring equity participation in the JUHI JV as a necessary step to access mean that a third party cannot expect to be able to access and use the Sydney JUHI immediately. Qantas advises that it took 14 months for it to negotiate to join the JUHI JV. Qantas notes that this duration includes time taken to conduct necessary environmental assessments and that it does not regard this time period as unreasonable.
- 4.95 The Council accepts that there is existing third party use of the Caltex Pipeline and some potential for this to increase.
- 4.96 The Council also accepts that the JUHI JV agreement provides for additional participants to join the joint venture. However, there is also concern at the open ended nature of at least one of the participation terms which are not necessarily remedied by the guideline the JUHI JV has introduced (see paragraph 4.48 above). There also remain issues surrounding privity and the enforceability of these access rights.
- 4.97 The Council notes that the key issues raised about entry and access to the Sydney JUHI concern the requirement for equity participation and the timing for completing the application process. The Council does not consider that either of these issues is likely to unreasonably frustrate access to the Sydney JUHI Service.
- 4.98 The key benefit of declaration under Part IIIA is that it gives third party access seekers an enforceable right to seek access to the declared service(s), by notifying an access dispute to the ACCC for arbitration. However declaration cannot create additional capacity where none exists.
- 4.99 Declaration also does not subject a facility to a common carriage regime where all parties are given equal access. The provisions of the CCA that govern access arbitrations ensure an arbitrated access determination cannot deprive an existing user of a declared service of the right to a sufficient amount of the service to meet its reasonably anticipated requirements (see s 44W(1)(a)) or prevent a person from obtaining pre-notification rights to a sufficient amount of a service to meet the person's actual requirements (see s 44W(1)(b)). Very large portions of the capacity of both the Caltex Pipeline and the Sydney JUHI are likely to remain reserved for existing users even in the event access disputes are taken to the ACCC.
- 4.100 In arbitrating an access dispute the ACCC is able to require the expansion of a facility to meet third party demand. However, the Council considers that there is very limited

likelihood that expansion of the Caltex Pipeline through exercise of this power would occur more quickly (or efficiently) than otherwise.

4.101 In the Council's view the effect of these requirements is likely to limit the amount of access or increased access that might be available and consequently any effect of access on competition.

4.102 Further, the Council considers that the level of additional competition that might result from access or increased access to either (or both) of the services for which declaration is sought is very limited, both in respect of the level of additional competition which might result and the time period over which this might occur.

4.103 Despite issues raised by the Applicant and some submitting parties, in the Council's view competition in the market for the supply of jet fuel at Sydney Airport (although imperfect) is unlikely to be materially promoted by access or increased access to either (or both) service(s) for which declaration is sought. With the critical jet fuel infrastructure undergoing a degree of change and investment, the market is likely to experience opportunities for increased competition that are not dependent on access and declaration under Part IIIA.

Promotion of competition in the market for into-plane services at Sydney Airport

4.104 Many of the implications of access for competition in this market parallel the outcomes in the market for jet fuel considered in the preceding section.

4.105 There are three into-plane service providers at Sydney Airport. All of these are wholly owned subsidiaries or joint ventures involving some JUHI JV participants:

- (a) AFS—an incorporated entity with shareholding by Caltex, Mobil, BP and Qantas
- (b) ZIP Airport Services—a subsidiary of Shell, and
- (c) AirRefuel Pty Limited—a subsidiary of BP.

4.106 According to AFS, for an into-plane operator to perform at Sydney Airport it is necessary to:

- obtain a licence from the Sydney Airport Corporation Limited (**SACL**), necessary to have vehicles on the tarmac and presumably to operate on airport roads
- [employ] trained personnel
- acquire the vehicles and equipment necessary to supply jet fuel services to aircraft

- establish a source of supply of jet fuel at the airport or commercial relationship with a fuel supplier
- [obtain] space to park vehicles and run back office (presumably on airport is preferred, but the Council considers that there may be scope for this to occur off site, although nearby) (AFS [2.9]).

4.107 While the three providers are subsidiaries or associates of the incumbent jet fuel supply companies, the Council accepts that the barriers to entry into the market for into-plane services are low and the end users, ie airlines, are not tied into using the into-plane provider connected to its jet fuel supplier. Qantas submits that:

An airline's choice of into-plane supplier will often depend on commercial efficiencies. For example, Qantas uses both AFS and Shell depending on flight schedules (time of day), domestic or international apron refuelling and volume requirements.

The main reason why the Into-Plane Market may not be able to sustain more suppliers is due to gaps in demand (ie the "peak and trough" nature of Sydney traffic) and the subsequent labour costs and lost productivity (Qantas page 13).

4.108 However, in relation to its business, AFS provides the following explanation.

By combining services across multiple jet fuel suppliers, efficiencies were gained through elimination of duplication and costs which enabled AFS to meet the demand of its shareholders and their airline customers (AFS [3.5]).

...AFS does not directly contract with the airlines purchasing jet fuel but with its shareholders who are the suppliers of jet fuel. Further, AFS has no involvement in, or knowledge of the terms or pricing for, the supply of jet fuel to airlines at Sydney Airport (AFS [3.6]).

4.109 While there appears to be some conflict between these two submissions as to the ability of airlines to choose their into-plane provider (ie AFS does not contract directly with airlines, so any airline choice is reduced to the remaining two into-plane providers), the Council notes the submission of AFS that "One does not need a right of access to either the JUHI or the Caltex Pipeline in order to offer into plane services at Sydney Airport; the functions involved are distinct and not interdependent" (AFS [1.11(b)]). Qantas sought to clarify the situation by stating in its subsequent submission that "whilst AFS does not currently contract directly with the airlines purchasing jet fuel, Qantas is not aware of anything preventing AFS from doing so in the future" (Qantas2 [11]).

4.110 The Council is of the view that access to the services for which declaration is sought is not likely to materially promote competition in the market for into-plane services.

Council's conclusions on criterion (a)

4.111 The Council is not satisfied that access (or increased access) to either or both of the services for which declaration is sought will promote a material increase in competition in either of the dependent markets, being the markets for:

- (a) the supply of jet fuel at Sydney Airport, and
- (b) the market for into-plane services.²¹

4.112 Criterion (a) therefore is not satisfied in respect of either application.

²¹ The Council anticipates, however, that access to the Sydney JUHI Service may be likely to promote competition in these markets at the point in time at which a further pipeline is required to meet jet fuel demand at Sydney Airport. The Council expects this to be sometime around 2023 (see Chapters 5 and 9). Were access to the Sydney JUHI Service not available on reasonable terms at that time, it is more likely that criterion (a) would be satisfied. Reasonable terms of access would be such that parties associated with the JUHI JV are not advantaged over other potential developers of a further pipeline.

5 Criterion (b): Uneconomical to develop another facility (including the application of s 44F(4))

5.1 Criterion (b) requires that the Council is satisfied “that it would be uneconomical for anyone to develop another facility to provide the service” for which declaration is sought, before it can recommend the service be declared.

5.2 On 4 May 2011 the Full Court of the Federal Court handed down its judgement in an appeal by the Pilbara Infrastructure Pty Limited against a decision of the Tribunal²² in relation to declaration of certain iron ore railways in the Pilbara.²³ Among other matters the Court considered the interpretation of criterion (b). The Full Court accepted the argument of Rio Tinto Limited that:

[59] ... The word “uneconomical” is used as part of the phrase “uneconomical for anyone”. This usage directs attention to the possibility of someone in the market place, whether by reason of circumstances specific to itself or otherwise, being able to develop a similar facility. Further, the context in which s 44H(4)(b) of the Act came to be enacted is said to show that it is concerned with the facts of the market place, rather than a regulator’s evaluation of efficiency.

5.3 The Court held that:

[100] ... the intention of the legislature was that, if it is economically feasible for someone in the market place to develop an alternative to the facility in dispute, then criterion (b) will not be satisfied ...

5.4 In doing so the Court accepted that:

[100] ... This might occasion some wastage of society’s resources in some cases, but to say that, is to say no more than that the intention of the Parliament to promote economic efficiency did not trump the competing considerations at play in the compromise embodied in s 44H(4)(b) of the Act.

5.5 This interpretation given to criterion (b) departs from the approach that the Council, decision making Ministers and the Tribunal had adopted in previous recommendations and decisions under Part IIIA. Until the Full Court’s Pilbara Rail Decision, criterion (b) was generally seen as focussing on the costs to Australian society as a whole from wasteful duplication of facilities that exhibited natural monopoly characteristics such that likely demand was most efficiently produced by a single facility. This approach is inconsistent with the Full Court’s interpretation of criterion (b).

²² *Re Fortescue Metals Group Limited* (2010) 271 ALR 256.

²³ *Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* (2011) 193 FCR 57 (**Pilbara Rail Decision**).

- 5.6 The Council has indicated that it respectfully disagrees with the approach taken by the Full Court in its Pilbara Rail Decision and that decision is now subject to an appeal to the High Court.²⁴
- 5.7 The Council is however bound to follow the interpretation given to criterion (b) by the Full Court and has sought to do so in these recommendations.

Application of criterion (b) to the Caltex Pipeline

- 5.8 In its application, BARA contends that it is uneconomical to develop a competing pipeline to the Caltex Pipeline until jet fuel demands reach the maximum capacity of the Caltex Pipeline according to both the social benefit and unprofitability tests (Caltex Pipeline Service application, section 10).
- 5.9 In its supplementary submission of 28 October 2011, BARA undertakes a more detailed examination of parties that it considers might possibly develop a second pipeline from the Vopak storage facility to the Sydney JUHI. It identifies five categories of potential providers of a second pipeline:
- a provider independent of current market participants
 - an airline or group of airlines
 - a jet fuel supplier or group of jet fuel providers, other than Caltex or Shell
 - Vopak
 - SACL.
- 5.10 Generally, and in respect of each of these categories, BARA concludes that until at least 2020²⁵ it would be unprofitable for any party to duplicate the facility that provides the Caltex Pipeline Service. The Applicant's supplementary submission offers the following conclusions:

²⁴ The High Court is unlikely to determine this appeal before the designated Minister is required to make his decision.

²⁵ The Council assumes this 2020 date is intended to coincide with the point at which demand for jet fuel necessitates development of a further pipeline to supply fuel to Sydney airport and the duration of the declaration sought in respect of the Caltex Pipeline Service. However the duration of the declaration period initially sought—10 years—does not exactly line up with the 2020 date. It is likely that the variability of demand, and to a degree capacity, forecasts are such that this is of little consequence. The Council also notes that in its supplementary submission in relation to commercial developments in the marketplace (4 November 2011) the Applicant sought to extend the duration of declaration from 10 years to 13 years, presumably on the basis that developments in relation to the Shell Pipeline pushed out the date at which jet fuel demand will outstrip pipeline capacity. The Council discusses the period for which duplication of the Caltex Pipeline may be uneconomic later in this chapter. This issue is also discussed in relation to the Council's conclusions on criterion (a) in Chapter 4 and in relation to the duration of any declaration of the Caltex Pipeline in Chapter 9.

The incentives for any market or non-market participant to construct a second pipeline prior to one being necessary in about 2020 are low. The expected outcome from the investment would be loss making when considered on a stand-alone basis. Neither airlines, jet fuel suppliers, Vopak or SACL have an incentive to subsidise the losses on the investment through additional profits earned in either upstream or downstream markets. The profits either simply don't exist (airlines), would be competed away (jet fuel suppliers), require unrealistic commitments from airlines (Vopak) or require marginal non-aeronautical revenue increases to exceed the losses on the second pipeline (SACL). As such, the Applicant considers that the private profitability test is not met for any identified market and nonmarket participants (BARA supplementary submission in relation to criterion (b), pages 9-10).

5.11 In this supplementary submission the Applicant also observes that “given the well informed position of long standing market participants, in this case the private profitability test can be readily answered by the lack of interest of those participants in investing in a second pipeline to date” (page 2).

5.12 In its submission on the draft recommendations, BARA reiterates its earlier points stating:

no other provider has an incentive to construct a second pipeline until the Caltex Pipeline approaches capacity. (BARA2 [93])

5.13 Caltex addresses the application of criterion (b) to the Caltex Pipeline Service in section 5 of its submission on the applications. However, it does so on the basis of the relevant service being the transport of jet fuel from import available storage (not necessarily at Port Botany, let alone from the Vopak storage facility) to the Sydney JUHI and including the use of trucks. Sections 4 and 5 of Caltex’s submission in response to the draft recommendations also address the application of criterion (b).

5.14 As noted in the Council’s consideration of the appropriateness of BARA’s service description, the Council does not accept the approach adopted by Caltex. Nevertheless, the Council has considered Caltex’s submissions in relation to criterion (b) to the extent it can apply these to the question of whether it is uneconomic to develop another facility to provide the Caltex Pipeline Service as described in paragraph 2.7 of these recommendations.

5.15 Caltex contends that the Caltex Pipeline is not a natural monopoly and does not display natural monopoly characteristics. Further Caltex contends that it is economical to develop another means of providing the service. Although this contention is made in respect of the broader service proposed by Caltex, Caltex’s reasoning suggests this would also be the case in relation to the Applicant’s service description. In particular the Council notes Caltex’s analysis in relation to the possibility of constructing a new pipeline from the Vopak storage facility, commencing at [309] of its submission. This seems to be analogous to the development of another facility to provide the Caltex Pipeline Service as proposed by BARA. Caltex’s

submission on the draft recommendations and reports commissioned from ACIL Tasman and NERA explore this further in examining the feasibility of developing a new pipeline.

5.16 Caltex, in its submission on the applications, notes that:

- a duplicate pipeline [from Vopak to the Sydney JUHI] would require construction of less than 10 km of pipe [309]
- given the desirability of an alternative pipeline and that such a pipeline will be unlikely to traverse privately owned land the relevant government entities and SACL are likely to act favourably in granting the necessary land access rights [311]
- it would likely be economically feasible for Vopak, another fuel supplier storing jet fuel at Vopak or an airline or consortium of airlines to construct a new Vopak-Airport pipeline [312].

5.17 Caltex makes a number of points in support of the last of these propositions in paragraphs 313 to 317 of its submission on the applications, although the Council does not accept all of these as valid or relevant.

5.18 In its submission in response to the draft recommendations, Caltex makes the following additional points:

- The Council's preliminary conclusions in its draft recommendation appear to be premised on the untested conjecture that new investment will be unable to recover its own costs, where spare capacity exists. (Caltex2 [77]). Caltex submits that this is incorrect and that the issue of whether a new pipeline is economic or not is determined by the expected returns over the life of the pipeline, compared to the cost—ie it is a long term investment, so costs must be considered in the context of the entire economic life of the pipeline, not confined to immediate anticipated short term returns (Caltex2 [78], [82]).
- If the capital cost of constructing an additional pipeline is \$50-60 million, then based on supply of jet fuel at Sydney Airport worth \$3 billion and growing, the cost of a new pipeline is approximately 2 per cent of the total annual revenue of the jet fuel market at Sydney Airport (Caltex2 [84]).

5.19 In its report ACIL Tasman states that “it would be viable to build another pipeline and still remain competitive in the supply of jet fuel at Sydney Airport” (page 3). In support of this ACIL Tasman contends that:

- a potential new investor could consider investing in a new pipeline before 2019 if there were available volumes of jet fuel that could be transported through its pipeline in the period prior to the Caltex Pipeline and Shell

Pipeline reaching full capacity (page 14) and assuming that pipeline ultimately assumes 40 per cent of total average demand (page 18).

- some customers are not able to gain access to the Caltex Pipeline to meet their increasing demand and it is therefore rational for them to contract for capacity on a new pipeline (page 14).

5.20 In its report NERA reaches similar conclusions to those of ACIL Tasman. NERA concludes that regard must be had to the anticipated life of a pipeline (being 40 years or more). Given this, notwithstanding that a new pipeline is not profitable during a period immediately following its construction, so long as “the total cost of the asset, plus a commercial return, can be recovered over its 40 to 50 year life” it is not uneconomical within the meaning of criterion (b).

Council’s conclusions

5.21 The Council agrees that it will be economical (in the sense of being profitable for anyone) to develop another facility to provide the Caltex Pipeline Service at some point in the future. However, the Council considers that it is unlikely to be economical to develop such a facility until such time as demand for jet fuel at Sydney Airport approaches the capacity for jet fuel to be delivered to (or, potentially, for supply to be replenished at) the Sydney JUHI. Until that point, any party developing a duplicate pipeline will face competition from existing capacity such that it is reasonable to expect that its business would be unprofitable at least compared to the development of such a pipeline at a later point of time.

5.22 The Council does not accept that criterion (b) can be held to not be satisfied on the basis suggested by NERA (see paragraph 5.20). The assessment of criterion (b) must at least, to some meaningful extent, reflect likely commercial decision making.

5.23 Other than Caltex and its advisors, no party suggests that it would be in a position to profitably develop a new pipeline to provide the Caltex Pipeline Service until the existing facility approaches capacity. Indeed, the Council is aware of one party that having made significant progress in developing and considering a business case for such a pipeline project shelved that project on the announcement of Caltex’s plans for expansion of its pipeline capacity. This deferral is likely to be extended further if developments in relation to the Shell Pipeline push out the point at which new pipeline investment is needed to meet demand.

5.24 Although the Council accepts that a new pipeline will likely be profitable over the 40 to 50 year life of that pipeline, the Council does not accept that this means that a new pipeline will be “given life” at a time at which capacity exists on the existing pipeline(s) when it will be more profitable for such a pipeline to be commissioned at a later period in time.

5.25 The question is then for what period it is uneconomic to develop another facility and whether that period is such that criterion (b) is satisfied. This issue also impacts on the issue of the duration of any declaration of the Caltex Pipeline Service (see Chapter 9).

5.26 The SJFIWG Report concludes that:

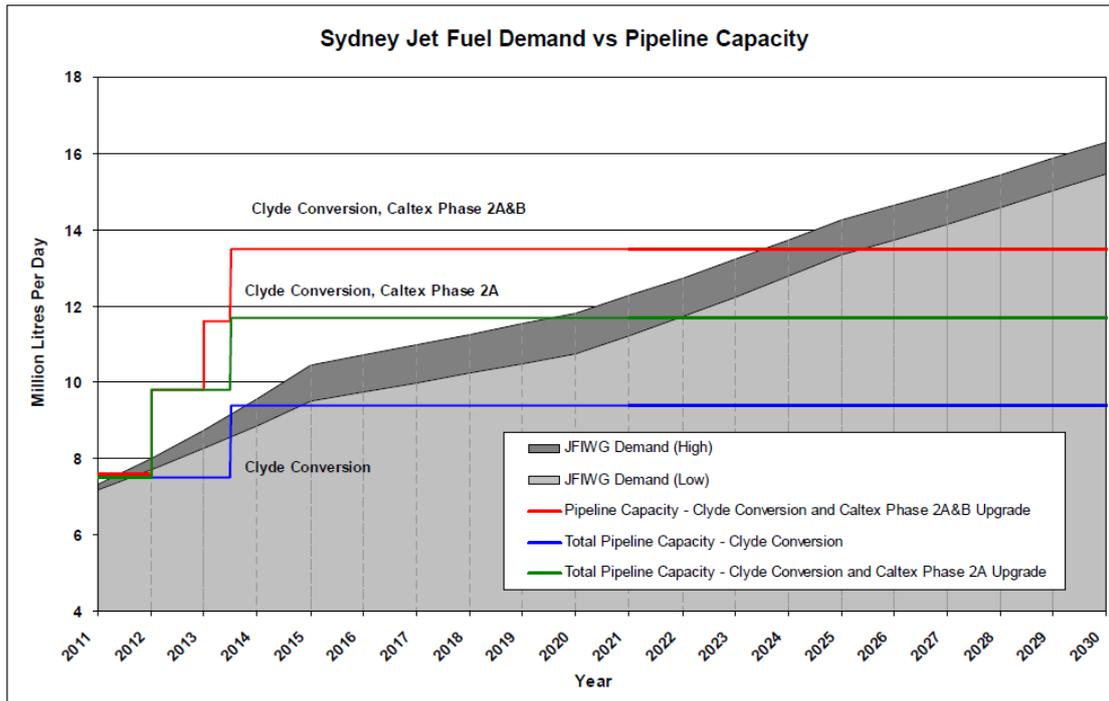
The key factors affecting the capacity and reliability of the Sydney Airport jet fuel supply system are the capacity of existing jet fuel supply infrastructure to transfer jet fuel into the on-airport storage facility and the ability of the existing bulk liquids berth to receive the projected growth in jet fuel imports (page 10).

5.27 The Working Group notes Caltex's announcement that it will proceed with the second phase of its pipeline upgrade and the announcement by Sydney Ports of the development of a second bulk liquids berth in Port Botany. Taking these developments into account the Working Group "considers that Sydney Airport can expect a higher level of jet fuel supply security to 2019" (SJFIWG Report, page 48). But the Working Group then notes that further investment in jet fuel supply infrastructure will be required to meet demand in the medium to long term and, in particular, "investment of up to an additional 2.4ML to 6.6ML per day jet fuel supply capacity is required to ensure transfers of jet fuel from off-airport storage facilities to the on-airport storage facility is sufficient to meet demand in 2029" (at page 48).

5.28 Since the Working Group reported in April 2010, Shell has announced that it intends to convert its Clyde refinery into a fuel import terminal. This will make available additional capacity to transport jet fuel to Sydney Airport using the Shell Pipeline and it is reasonable to expect that Shell will divert at least some of its existing jet fuel transport activity to its own pipeline from the Caltex Pipeline.

5.29 Qantas analyses the effect of various capacity enhancements on the balance of demand and pipeline capacity for delivery of jet fuel to Sydney Airport. This analysis is summarised in Figure 6 of the Qantas submission on the application which is reproduced as Figure 2 here.

Figure 2: Demand and pipeline capacity (Qantas' estimates)



Source: Qantas submission, page 11.

- 5.30 The Qantas analysis takes the SJFIWG Report’s high and low estimates of likely jet fuel demand over time and compares likely capacity to pipe jet fuel to the Sydney JUHI under various capacity enhancement scenarios, including the Caltex Pipeline expansion projects identified in the SJFIWG Report, and allowing for expanded capacity on the Shell Pipeline.
- 5.31 The analysis shows that pipeline capacity is likely to exceed jet fuel demand until at least 2023. Inevitably there some uncertainties associated with the forecasts and projections that underpin such an analysis. Nonetheless the Council considers that the analysis should be accorded considerable weight as it is likely to be informed by Qantas’ involvement in the SJFIWG process, its ongoing involvement in the supply of jet fuel at Sydney Airport and its keen interest in and need for reliable jet fuel availability.
- 5.32 Caltex raises a number of issues in relation to determining pipeline capacity, particularly the requirement to have regard to the replenishment rate, in its submission on the draft recommendations (see Caltex2 [60]-[66]). The view of Caltex is that it may be necessary to duplicate the Caltex Pipeline as early as 2018.
- 5.33 The Council considers 2018 to be at the extreme near point in time at which duplication of the pipeline might be viable. It considers a date between 2023 and 2025, consistent with the Qantas’ analysis, to be more likely.

- 5.34 In reaching this view the Council notes that it could well take five years or more to build another pipeline that could be commissioned in or around 2018, meaning work would need to commence on such a project within a year or two. The Council has no evidence to suggest that any party is likely to engage in such an exercise in the near future. Indeed, it appears that recent activity along such lines has been deferred given Caltex's moves to upgrade its pipeline (see paragraph 5.23 above). The Council expects the developments concerning the Shell Pipeline are likely to delay any such moves even further.
- 5.35 In addition there is uncertainty surrounding the tenure of the Sydney JUHI at its current location within the Sydney Airport precinct. While Caltex and ACIL Tasman dismiss the impact of this uncertainty on any decision to build a new pipeline, the Council considers it highly unlikely that, as a practical matter, any party will look to construct a new pipeline until it knows where such a pipeline needs to end. The Council accepts that this issue should become clearer when the outcome of the next Sydney Airport Master Plan revision is known. This location uncertainty adds to the Council's confidence that it will be uneconomical to develop another facility to provide the Caltex Pipeline Service for some time.
- 5.36 Considering all information available, the Council's view is that it is uneconomical to duplicate the facility that provides the Caltex Pipeline Service until at least 2023 and in all likelihood until sometime after 2025. The Council considers therefore that it is uneconomical to develop another facility to provide the Caltex Pipeline Service for at least the period for which declaration is sought. The Council is satisfied criterion (b) is met in respect of this service.

Application of s 44F(4) to the Caltex Pipeline Service

- 5.37 For completeness the Council has also considered whether it might be economical for any party to develop a facility that could provide part of the Caltex Pipeline Service. Under s 44F(4) of the CCA, in deciding what recommendation to make (in relation to declaration of a service) the Council must consider whether it is economical to develop a facility which provides part of the service for which declaration is sought.
- 5.38 No party raised any matters concerning s 44F(4).
- 5.39 In respect of the Caltex Pipeline and the Caltex Pipeline Service, the Council considers that no material issues arise under s 44F(4).

Application of criterion (b) to the Sydney JUHI

- 5.40 In its application in respect of the Sydney JUHI Service, BARA contends that criterion (b) is satisfied because the Sydney JUHI is a natural monopoly such that meeting projected demand for the services provided by the Sydney JUHI can be achieved at least cost by way of a single facility. BARA submits that the cost

associated with developing a competing facility is likely to be at least three times the cost of augmenting the existing facility.

5.41 BARA also submits that:

It would be financially unprofitable to build a competing Sydney JUHI. A second facility would ensure excess capacity, resulting in strong competition between two providers with high sunk costs, but low marginal costs. The excess capacity would likely lead to prices that would be too low to recover the sunk costs (i.e. prices close to the low marginal cost) of building the infrastructure. Anticipating this outcome, no new provider could reasonably expect to earn its cost of capital on the investment it would make in the competing facility, (Sydney JUHI Service application, page 20).

5.42 BARA also notes:

Building a second facility is also uneconomic because it cannot occur given the current plans of SACL – the possibility of a second jet-fuel supply infrastructure is not mentioned in the Sydney Airport Master Plan. A facility that cannot conceivably be built cannot be a profitable proposition (Sydney JUHI Service application, page 20).

5.43 Further, in its first supplementary submission BARA states that “duplicating the Jet Fuel Hydrant Network would involve considerable disruption at Sydney Airport” and that “The applicant cannot conceive of any situation where Sydney Airport Corporation Limited (SACL) would permit duplication of this infrastructure” (Supplementary submission (28 October), page 1).

5.44 In so far as these submissions relate to the distribution of jet fuel throughout Sydney Airport using the system of pumps, pipes, hydrants and associated facilities operated by the JUHI JV, no party (including the JUHI JV) submits a contrary view.

5.45 The JUHI JV contends more generally however (in its submission on the applications) that:

[211] BARA's application makes it clear that it is seeking declaration of a service provided by two distinct types of facilities:

- the 'jet fuel storage facility'; and
- the 'jet fuel hydrant pipeline network facility'.

[212] BARA has not discharged its burden to demonstrate that the NCC can be affirmatively satisfied that Criterion B is met in relation to either set of facilities, as it has not identified all the social costs and benefits, nor attempted to assess private profitability, for either set of facilities.

[213] More significantly, the JV participants consider it would be economical for a third party to develop the storage facility.

- 5.46 In part this contention goes to issues concerning BARA's service description, which the Council has considered at paragraph 2.22 of these recommendations. However, the submission also addresses the issue the Council is required to consider under s 44F(4) (whether it is economical to develop a facility to provide part of the service for which declaration is sought) and may perhaps be relevant to the satisfaction of criterion (b) in respect of the Sydney JUHI as described by the Applicant.
- 5.47 In its submission in response to the draft recommendations the JUHI JV maintains that it would likely be economical for a third party to develop a storage facility (JUHI JV2 [17]). JUHI JV submits that the NCC cannot focus on the common disadvantages of part duplication in concluding that duplication is not economical. It argues that the scope for duplication must be balanced against likely commercial returns (JUHI JV2 [19]).
- 5.48 BARA has made a single application in respect of the Sydney JUHI Service and identified the facility that provides the service as the Sydney JUHI. BARA then, as the JUHI JV notes, describes the JUHI facility as comprising the two elements: the storage facility; and the jet fuel hydrant pipeline network facility (see s 5.1 of the Sydney JUHI Service application). It is nevertheless clear that BARA envisages declaration of all the facility(ies) that provide the Sydney JUHI Service as described. In the Sydney JUHI Service Application the minimum bundle of assets that must be declared to provide the service includes both the Jet Fuel Storage Facility and the Jet Fuel Hydrant Pipeline Network Facility. BARA states:

The services provided by the Jet Fuel Storage Facility and Jet Fuel Hydrant Pipeline Network Facility are both essential elements of the jet fuel supply infrastructure chain; they are strictly complementary assets in the network of delivery of jet fuel at the airport to the airline customers. Given the current infrastructure arrangement at Sydney Airport, access to one is of no value without access to the other asset. Specifically, jet fuel cannot be supplied to international aircraft (or any other jet aircraft) at Sydney Airport without it first being transferred to the storage tanks of the Sydney JUHI. The jet fuel is then transferred from the storage tanks to the hydrant pipeline infrastructure or to refuelling trucks so the jet fuel can be delivered into aircraft through 'into-plane' services. (Sydney JUHI Service application, s 4 and Caltex Pipeline Service application, s 5.3)

- 5.49 The Council considers the JUHI JV's arguments on whether it may be economical to develop a facility to provide part of the Sydney JUHI Service in the following section of these recommendations. It then sets out its conclusions in relation to this issue and in relation to criterion (b) generally at the end of this chapter.

Provision of the storage part of Sydney JUHI Service / Application of s44F(4) to the Sydney JUHI Service

5.50 The JUHI JV contends that it would be economical for a third party to develop another facility to provide the storage part of the Sydney JUHI Service. It notes that “the jet fuel storage facility comprises five storage tanks with a total capacity of approximately 29 million litres (2x approximately 10 million litres and 3x approximately 3 million litres)”. Further, the JUHI JV argues “Given the expected rapid growth in demand for jet fuel outlined in the BARA application, it seems likely that additional storage tanks will need to be constructed at Sydney Airport during the 15 year proposed period of declaration” (JUHI JV [214]).

5.51 In the context of a social benefits test approach to criterion (b), the JUHI JV states in its submission that:

[216] There are already five facilities (tanks) and there is no reason to believe that there would be any significant cost saving in a sixth, seventh or subsequent tank being constructed by the JUHI facility rather than a third party. The capital cost of a tank will be the same whoever constructs it. Tanks by their nature can be sized to meet relevant demand. Depending on the size of the tanks there may also be minimal operating cost efficiencies from one party operating six tanks rather than one party operating five and another one.

5.52 The JUHI JV then contends:

[217] Applying a private test, there is no reason to conclude that it would not be privately economically feasible for a third party to construct its own storage tank. For the reasons discussed above [see paragraph 5.51 immediately above] in relation to the social cost benefit tests, it is unlikely that there would be substantial cost savings from a sixth, seventh or subsequent tank being constructed and operated by the JUHI facility rather than a third party. Given this, if it is economically feasible for the JUHI facility to construct a tank then it is likely to be economically feasible for a third party to construct a tank.

[218] Furthermore, there is nothing to suggest that a third party would face insurmountable practical problems in constructing its own storage tank, notably it is feasible that storage tanks could be constructed offsite. In this respect, the current Sydney Airport Master Plan highlights that in the longer term offsite storage is a possibility.

5.53 The Council observes that, although jet fuel storage at Sydney Airport is provided by way of a number of tanks, each is not operated on a stand-alone basis. As the Council understands it, jet fuel received at the Sydney JUHI is first stored separately from fuel which is available for reticulation on the hydrant system for fuelling aircraft. This is to enable testing and quality control to be undertaken before co-mingling of fuel occurs. This suggests that, at a minimum, a pair of tanks is required to provide the storage part of the Sydney JUHI Service. The Council also considers that in order to provide

reliability of jet fuel supply redundant storage (or at least access to back up storage facilities) is likely to be required.

- 5.54 In the Council's view, operating the various storage tanks which are part of the Sydney JUHI in an integrated fashion is a significant element in providing the storage part of the Sydney JUHI Service. The level of service which might be provided on the basis of a separate party constructing and operating one storage tank (or even a pair of storage tanks) is likely to be inferior to the service the Sydney JUHI provides. The operator of a separate storage facility is also likely to face significant coordination issues in operating such a facility alongside the JUHI JV.
- 5.55 Furthermore, given the limited space available for construction of storage tanks adjacent to the JUHI and the need for interconnection between storage tanks and the fuel distribution system significant issues seem likely to arise in relation to where, when and how additional separately owned tanks might safely be constructed while minimising disruption to JUHI operations. The JUHI JV addresses this point in its submission in response to the draft recommendations by reiterating that off-airport storage is possible, and is even recognised in the current Master Plan as a possibility in the longer term (JUHI JV2 [21]). While the Council accepts that several possible locations for storage tanks exist, until a decision under the Master Plan is made any owner/operator of a separate storage facility faces significant uncertainty. This uncertainty adds to the difficulty in considering the questions of where, when and how additional separately owned storage tanks might be constructed because ultimately to have a useful economic life such storage tanks need to be incorporated into, or at least be able to access in some way, the Sydney JUHI in the medium to long term.
- 5.56 The JUHI JV responded to the issue of the profitability of a separate storage facility by submitting that the nature of the investment needs to be considered—ie that it is long term—and generalised high level cost disadvantages are insufficient to conclude that duplication is not economically feasible (JUHI JV2 [20]).
- 5.57 Depending on how a separate storage facility is configured and the precise parts of the storage service such a facility seeks to supply, it also appears to the Council that an unbalanced usage profile is likely to result. Overall, more (and less than optimally sized) storage tanks are likely to be required than would be the case if the storage tanks are all operated together. The Council accepts that this wasteful result is of greater relevance in the context of a social cost view of criterion (b), but such an outcome is also likely to affect the profitability of a separate storage facility as it is this facility that is likely to bear higher operating costs and face lower throughput.
- 5.58 It also appears to the Council that additional separately owned storage facilities at Sydney Airport are likely to further complicate coordination and management of reliable fuel supply.

Council's conclusions

- 5.59 There are significant economies of scope (and probably scale) in providing the storage part of the Sydney JUHI Service and in providing these services in conjunction with the distribution service which is also part of the Sydney JUHI Service. It seems to the Council that these economies are likely to be such as to render unprofitable (and hence uneconomical) separate provision of the storage part of the Sydney JUHI Service.
- 5.60 Moreover there is currently uncertainty about the long term location of the JUHI. Until such a time that the long term location of the JUHI is determined it would appear to be unlikely for a part of the service to be provided, if ever.
- 5.61 The Council also considers that separate operation of (some) storage tanks, which draw supply from the existing Caltex and/or Shell pipelines and then distribute through the Sydney JUHI distribution pipeline and hydrant system while at least occasionally relying on the JUHI JV storage tanks for backup and possibly elements of quality control, would be likely to increase the difficulties in ensuring reliable supply of jet fuel at Sydney Airport. Separate operation would also loosen accountability for ensuring reliable supply. (This issue is examined further in the Chapter 8 discussion of criterion (f) and the Minister's discretion to decline to declare a service).
- 5.62 While the Council accepts that it may be possible to develop a facility to provide part of the storage component of the Sydney JUHI Service (particularly after the long term location of the JUHI is determined), the Council's view, for the reasons above, is that it is unlikely that such a facility would be developed. Moreover, if a facility is developed it is not clear how much of the storage part would be provided or if all elements of what is likely seen as the storage part would be provided. The Council does not consider that the extent of any part of a facility that may be developed is such that the overall service should not be declared (assuming all the other criteria are satisfied).
- 5.63 As noted above, the Council considers that a separately operated storage facility is likely to complicate and add complexity to the coordination and management of reliable jet fuel supply at Sydney Airport. Because of this the Council considers that it would be inappropriate for the Minister to exercise his discretion not to declare a service, because part of it could be provided by a separate facility.²⁶
- 5.64 More generally the Council believes it is uneconomical to develop other facilities to provide the Sydney JUHI Service for which declaration is sought. The Council is therefore satisfied that criterion (b) is met in relation to the Sydney JUHI Service.

²⁶ There may be other reasons for the Minister to exercise the discretion not to declare a service notwithstanding that the declaration criteria are satisfied, these are discussed in Chapter 8 along with the Council's consideration of criterion (f).

6 Criterion (c): National significance

- 6.1 This criterion requires that the Council is satisfied that the facility (that provides the service for which declaration is sought) is of national significance, having regard to:
- (i) the size of the facility; or
 - (ii) the importance of the facility to *constitutional trade or commerce*²⁷; or
 - (iii) the importance of the facility to the national economy.
- 6.2 This criterion is a test of materiality, putting less important facilities outside the scope of Part IIIA. While declaration is concerned with access to “services” rather than “facilities” criterion (c) relates national significance to the facility providing the service for which declaration is sought. A facility needs to meet only one of the benchmarks for materiality for this criterion to be satisfied.
- 6.3 The Applicant in relation to the Caltex Pipeline states the pipeline is approximately 17km in length and serves domestic and international jet aircraft operating at Sydney Airport to provide passenger and freight services to all major airports in Australia and many overseas airports. The Applicant estimates that the Caltex Pipeline transports approximately 72 per cent of Sydney Airport’s jet fuel needs amounting to some 2 GL per year. Based on a price of \$1 per litre the value of jet fuel transported is said by the applicant to be over \$2 billion per year.
- 6.4 In relation to the Sydney JUHI, the Applicant states the facility occupies an area of approximately 2.5 hectares and serves domestic and international jet aircraft operating at Sydney Airport to provide passenger and freight services to all major airports in Australia and many overseas airports. The Applicant estimates that the Sydney JUHI stores and distributes 2.9 GL of jet fuel per year with an estimated value of approximately \$3 billion per year.
- 6.5 The Applicant states in each application that the relevant facility “represents essential infrastructure in enabling the passenger and freight movements through Sydney Airport to occur” (paragraph 12.4 of both applications). The Applicant then notes that Sydney Airport is the largest airport in Australia in terms of domestic and international passengers (23.5 million domestic passenger as against 20.6 million for Melbourne airport, the next largest and 11.4 million international passengers compared to 5.7 million for Melbourne). The Applicant states that Sydney Airport contributes greatly to commerce between the states and territories with the direct

27 The term constitutional trade or commerce is defined in s44B of the CCA:
constitutional trade or commerce means any of the following:
(a) trade or commerce among the States;
(b) trade or commerce between Australia and places outside Australia;
(c) trade or commerce between a State and a Territory, or between 2 Territories.

value of all trade through Sydney Airport estimated at about \$8 billion per year or some 6 per cent of NSW gross state product.

- 6.6 BARA points to the inclusion of Sydney Airport in the airport monitoring regime established under s 95ZF of the CCA as a further indication of Sydney Airport's national significance. Further, the Applicant notes that aircraft refuelling (including a system of fixed storage tanks, pipeline and hydrant distribution equipment) is included within the range of aeronautical services considered to be necessary for the operation and maintenance of civil aviation at an airport. On this basis the Applicant contends that the Sydney JUHI is an essential element of Sydney Airport, although it is not monitored because it is not owned by the owner of Sydney Airport—SACL.
- 6.7 BARA notes that the Council was satisfied that Sydney Airport met criterion (c) in the assessment of this criterion in the *Virgin Blue matter*²⁸ and contends that the same conclusion should be drawn here.
- 6.8 BARA contends the national significance of the Caltex Pipeline and the Sydney JUHI is “no different to the runways and terminals operated by SACL” which provided the services for which declaration was sought in the *Virgin Blue matter*.
- 6.9 In its submission on the applications Caltex contends that the Applicant wrongly equates the significance of Sydney Airport itself with the significance of the Caltex Pipeline and notes that the Caltex Pipeline is a short pipeline and only one of a number of petroleum related pipelines that supply or could supply Sydney Airport. Caltex submits that it is incorrect to equate the significance of the Caltex Pipeline to that of the runways and terminals at the airport (Caltex [379]). In its submission on the draft recommendations, Caltex reiterates its position that while Sydney Airport itself has been found to be nationally significant it does not follow that the Caltex Pipeline is itself of national significance (Caltex2 [113]). Caltex contends further that the Caltex Pipeline cannot be of national significance because it is only one of several means supplying jet fuel to Sydney Airport—the others being via the Shell Pipeline and trucking—which must thereby temper its contribution to the national economy (Caltex2 [115]).
- 6.10 The Council does not agree with these submissions for the reasons that follow.
- 6.11 As the Applicant points out, the Council found Sydney Airport to be of national significance in the *Virgin Blue matter*. The decision making Minister concurred with this view in his decision.²⁹ The Tribunal was also satisfied that Sydney Airport was of national significance when it reviewed the Minister's decision and when the

28 NCC, Application by Virgin Blue for Declaration of Airside Services at Sydney Airport, Final Recommendation, November 2003.

29 Decision of the Parliamentary Secretary to the Treasurer, the Hon Ross Cameron MP, 29 January 2004.

Tribunal's decision was appealed to the Full Federal Court the earlier conclusions in regard to criterion (c) were not in issue.³⁰

- 6.12 The Council considers that Sydney Airport is of national significance in terms of size (measured by passenger numbers, aircraft movements or almost any other relevant metric), importance to constitutional trade and commerce and importance to the national economy.
- 6.13 The Sydney JUHI is essential to the fuelling of most aircraft using Sydney Airport and is integral to the overall operation of the airport. There is no facility or combination of facilities that could replace the Sydney JUHI without severely disrupting the operations of the airport and user airlines.
- 6.14 The Caltex Pipeline is one of two pipelines delivering jet fuel to on-airport storage (provided and operated by the Sydney JUHI). The Caltex Pipeline has greater capacity than the Shell Pipeline but neither pipeline could alone supply sufficient jet fuel to meet current, let alone future, demand. While not as essential as the Sydney JUHI, the Caltex Pipeline nevertheless makes a significant contribution to airport operations. As discussed at paragraph 4.69, trucking is likely to be able to provide jet fuel supply services only at the periphery.
- 6.15 Neither the Sydney JUHI nor the Caltex Pipeline could be removed from the range of facilities necessary to enable provision of airport services at Sydney Airport without very significantly reducing the contribution made by the airport to both constitutional trade and commerce, and the national economy.
- 6.16 The Council considers that the Caltex Pipeline and Sydney JUHI are of national significance as a consequence of the contributions these facilities make to the operation of Sydney Airport and thereby the importance of each facility to constitutional trade and commerce and the national economy.
- 6.17 Criterion (c) is satisfied in relation to both the Caltex Pipeline and the Sydney JUHI.

30 *Virgin Blue Airlines Pty Limited* [2005] ACompT 5; *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146.

7 Criterion (e): Application of an effective access regime

- 7.1 This criterion prevents the declaration of a service that is subject to an access regime that has been certified as effective by the Commonwealth Minister in accordance with s 44N of the CCA, unless the relevant access regime or the relevant principles in the Competition Principles Agreement have been substantially modified since the Minister's decision.
- 7.2 The services for which BARA seeks declaration in its applications are not subject to any certified access regimes. The issue of substantial modification does not arise.
- 7.3 In its submission, Q8 suggests that the process by which new parties can participate in the JUHI JV provides an effective regime for access to the Sydney JUHI. This misunderstands the requirements of criterion (e). The issue of the ability of new participants to join the JUHI JV is addressed in the Council's discussion of criterion (a). The issue for criterion (e) is whether the services for which declaration is sought are subject to a certified access regime. They are not.
- 7.4 Criterion (e) is satisfied in relation to both applications.

8 Criterion (f): Not contrary to the public interest / Discretion not to declare

Requirements of criterion (f)

- 8.1 This criterion requires that before it recommends that a service is declared, the Council must be satisfied that “access (or increased access) to the service would not be contrary to the public interest”.
- 8.2 While the term “public interest” is not defined in the CCA, the Council considers that this term allows for consideration of a broad range of issues relevant to whether a service should be declared.
- 8.3 Consideration of criterion (f) does not revisit the issues considered under the other declaration criteria. Rather it draws on the Council’s conclusions in relation to those criteria. For example, where the Council concludes that access will promote a material increase in competition in one or more dependent markets, this will usually give rise to benefits that should be included in the assessment of criterion (f). Similarly, where access will aid in avoiding duplication of a facility that satisfies the uneconomical to duplicate test, this too will lead to benefits that are appropriately considered under criterion (f).
- 8.4 The Council considers that in determining criterion (f) it is required to be satisfied that the overall costs to the Australian public that arise from access to the service do not exceed the overall benefits. Where the likely costs exceed the likely benefits then access would be contrary to the national interest and criterion (f) is not satisfied.

Discretion not to declare

- 8.5 Even in circumstances where all the declaration criteria are satisfied, the Minister has discretion not to declare a service. The ability to exercise this discretion presumably operates in addition to the ability to decline to declare a service where one or more declaration criterion is not satisfied, to allow for consideration of matters beyond those addressed in those criteria. In exercising such discretion the Council considers the Minister would, however, have to have regard to the objects of Part IIIA.
- 8.6 In the Council’s view this discretion also allows for the Minister to address the consequence of finding (on consideration of ss 44F(4) and 44H(2)) that it is economical to develop a facility to provide part of a service for which declaration is sought.
- 8.7 In the Council’s view the matters that would go to the Minister’s discretion not to declare are likely to engage similar issues and controversies as those that arise in consideration of criterion (f) and it is difficult to discern a line between matters that

are appropriately considered in each. For this reason the Council finds it useful to consider criterion (f), and the discretion not to declare, together.

Applications and submissions

8.8 The Applicant identifies no factors which would result in access being contrary to the public interest in relation to either application. This position is unsurprisingly predicated on the basis that access will promote a material increase in relevant dependent markets. The Applicant in respect of each application has considered the impact of access on:

- the development of alternative access regimes and arrangements
- consistency across access regimes or arrangements
- effects on incentives to invest
- other costs associated with access
- the achievement of other government policy objectives
- ecologically sustainable development
- social welfare and equity considerations
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity
- economic and regional development, including employment and investment growth
- the interests of consumers generally or of a class of consumers
- the competitiveness of Australian businesses
- the efficient allocation of resources.

8.9 In relation to the effects of access on other means of accessing the relevant services, the Applicant submits that:

declaration is timely and appropriate in terms of the long term competitive provision of jet fuel at Sydney Airport. Declaration will not undermine the development of alternative access regimes or arrangements.

It is open for Caltex to submit an access undertaking with the ACCC for access to the Caltex Pipeline. Such an undertaking, if accepted, would revoke declaration (both applications at s 15.1).³¹

³¹ The Council does not believe that acceptance of an access undertaking would revoke declaration. See s 44ZZCC of the CCA.

8.10 On the effect of access on incentives to invest, in relation to the Caltex Pipeline Service Application and the Sydney JUHI Service Application respectively, the Applicant contends:

Declaration will not reduce the incentive for timely investment in the Caltex Pipeline. Caltex has already committed to upgrading the Caltex Pipeline to its maximum capacity. Once this occurs, Caltex has advised that it cannot further meaningfully increase the capacity of the Caltex Pipeline (Caltex Pipeline Application, s 15.1 (c)).

Declaration will not reduce the incentive for timely investment in the Sydney JUHI. Instead, it will provide a mechanism to encourage greater participation in the market for the supply of jet fuel at Sydney Airport. The enhancement in competitive conditions is likely to encourage a greater degree of transparency and consultation by the Sydney JUHI with jet fuel suppliers and airlines. This, in turn, will facilitate timely investment in the necessary infrastructure (Sydney JUHI Service Application, s 15.1 (c)).

8.11 In relation to the other issues noted in paragraph 8.8, the Applicant notes that the enhanced competitive conditions it sees as resulting from access will have beneficial effects on economic and regional development, consumer interests, Australian competitiveness, the efficiency of resource allocation, and achievement of general government policy objectives.

8.12 The Applicant does not suggest any specific considerations that should be taken into account in relation to the Minister's discretion not to declare.

8.13 Caltex and the JUHI JV each submits that the Council could not be satisfied in respect of criterion (f) in relation to the Caltex Pipeline Service and the Sydney JUHI Service respectively.

8.14 The arguments of Caltex and the JUHI JV in relation to this criterion are predicated on access to either facility not promoting a material increase in competition in any relevant dependent market. On this basis, they argue the public benefits of access against which the costs must be weighed are minimal.

8.15 Each of these parties identifies a range of factors that it contends will give rise to significant costs of access and which are significantly greater than any benefits, such that access would be contrary to the public interest (or at least such that the Council could not be satisfied it is not).

8.16 In its submission Caltex identifies a number of costs of regulated access to the Caltex Pipeline Service. These are listed as:

- interfering with commercial incentives to upgrade the capacity of the Caltex Pipeline
- reducing efficiency of operation of the Caltex Pipeline

- increasing reliability risks through the Caltex Pipeline
- interfering with commercial incentives for the investment in the upgrade of pumping capacity by Vopak
- interfering with commercial incentives to maximise the use of, and invest in capacity upgrades for, the Shell Pipeline
- interfering with commercial incentives for efficient trucking and investment in trucking facilities
- delaying, through regulated access, the development of a further pipeline connecting Port Botany storage terminals to Sydney Airport
- by interfering with and delaying investment in alternative transport options, reducing overall supply reliability
- delaying or imposing other costs on the coordination of jet fuel supply assets at Sydney Airport, including coordinating investment in those assets and
- undermining investment incentives for transport infrastructure at other airports by reason of the precedent (Caltex [389]).

8.17 Caltex then concludes:

Given the lack of a clear competition benefit case, it is unlikely that any assessment of the costs and benefits would satisfy a public interest test. In any event, without such a proper analysis, it is not possible to be positively satisfied that regulated access is not contrary to the public interest (Caltex [390]).

8.18 Caltex does not make any specific submissions on the exercise of the discretion not to declare a service.

8.19 BARA, in its response to the draft recommendations, states that the claims of potential cost increases and investment disincentives are overstated (BARA2 [77]). In respect to Caltex's claim that declaration would interfere with the reliable and efficient operation of the Caltex Pipeline, BARA draws attention to the fact that Caltex already provides some third party access so could be expected to be experienced in operating its pipeline reliably and efficiently with third party users (BARA2 [78]).

8.20 The JUHI JV submits that in respect of access to the Sydney JUHI Service:

- potential benefits (if any) are small, and would be outweighed by the costs of regulation leading to disincentives to efficiently invest in the infrastructure and regulatory error
- regulated access is unlikely to lead to any increased usage of the JUHI infrastructure by third parties compared to the status quo, and so the lack of utility in regulated access must be weighed against the costs of regulated access and

- the key public interest issue in this context is ensuring reliable supply of jet fuel to Sydney Airport, and regulated access is likely to undermine incentives for the efficient investment in infrastructure, whilst not having any positive impact on supply reliability (JUHI JV [221]).

8.21 On the issue of the exercise of discretion not to declare a service, the JUHI JV submits that the discretion is a very broad one and that even if satisfied of the declaration criteria, the Council ought to recommend that the Minister exercise his discretion not to recommend declaration of the Sydney JUHI Service because:

- the current procedure for obtaining access to the JUHI through equity participation is sufficient
- it is clearly economical to duplicate part of the service (i.e. another storage facility) (see also JUHI JV2 [24]-[25])
- declaration would have little utility in light of the protections that must be afforded to the JV participants in the event of an ACCC arbitration, so the benefits of declaration are low (see also JUHI JV2 [26])
- there are significant costs of regulation in circumstances where declaration would have little utility (see JUHI JV [221], JUHI JV2 [27]).

8.22 Additionally, the JUHI JV submits that “BARA has failed to identify any deficiency in the current procedure for obtaining access to the JUHI” and notes that “[g]iven BARA itself only recently approached the JUHI and inquired about throughputting, its request for declaration under Part IIIA is premature” (JUHI JV [235]). The JV characterises BARA’s application as “opportunistic in nature as it will place leverage on the JUHI JV at a time that a parallel process of discussions has only just commenced with BARA and a range of other potential applicants regarding entry into the JUHI JV” [236]. The JV suggests the distraction created by BARA’s application may mean that applications for equity participation in the JUHI JV are slowed or suspended, thus delaying potential entry.

8.23 Finally, in relation to the exercise of the discretion not to declare, the JUHI JV identifies a number of improvements in the infrastructure upstream of the JUHI, occurring as a result of normal market forces, which will deliver many of the benefits that the BARA application claims will be achieved upon declaration. The JUHI JV submits that “It is therefore premature for BARA’s application to be made at this time of expected significant structural changes to the manner in which jet fuel is supplied to Sydney Airport” (JUHI JV [237]-[238]).

8.24 Qantas too submits that increased access “may in fact be contrary to the public interest because it will stifle investment or delay any intended expansion” (Qantas page 14).

- 8.25 Parties other than those whose submissions are discussed above do not specifically address this criterion or the discretion issue. Of course a number of parties generally express support for BARA's position.
- 8.26 For completeness the Council notes that in its submission, Mobil "questions whether it [the Sydney JUHI Service Application] is made in good faith". The issue of an application not being made in good faith engages s 44F(3) of the CCA which gives the Council a further discretion to recommend against declaration. The Council deals with this matter along with its conclusions in relation to criterion (f) and the discretion not to declare in the next section of these recommendations.

Council's conclusions

Criterion (f)

- 8.27 Access to a service inevitably generates some costs to society (the public) including the direct costs of regulatory activity and costs reflective of actual or market-perceived regulatory risk. In addition, in particular cases, a range of other costs may arise from issues such as delayed investment, additional coordination costs or a need to change procedures and processes to accommodate additional users of a service.
- 8.28 In situations where access to a service (which must by definition be provided by a nationally significant facility) is likely to promote a material increase in competition in one or more dependent markets, often the costs of access will be outweighed by the benefits from increased competition and associated efficiency gains, including from the avoidance of the uneconomic development of facilities. Where competition is likely to be introduced into significant dependent markets as a result of access to a service being available, the benefits to the public are likely to dwarf the costs.
- 8.29 However, in situations where access to a service does not promote a material increase in competition in a relevant dependent market (that is where criterion (a) is not satisfied), it is difficult to envisage how the costs of access would not exceed the benefits of access—which must be immaterial at best. In such a situation access is contrary to the public interest, and criterion (f) cannot be satisfied.
- 8.30 The latter situation arises in this case in relation to both the Caltex Pipeline Service and the Sydney JUHI Service. For the reasons set out in Chapter 4 the Council is not satisfied that access to either service is likely to promote a material increase in competition in any dependent market.
- 8.31 The Council accepts that significant costs are likely to arise from access or increased access to the Caltex Pipeline Service or the Sydney JUHI Service. These costs are likely to arise from a variety of sources including some, but not necessarily all, of the cost sources identified by Caltex (see paragraph 8.16), the JUHI JV (paragraph 8.20) and Qantas (paragraph 8.24).

- 8.32 Some of the costs of access suggested by Caltex and others (for example costs associated with trucking alternatives to pipeline usage) are not costs that are relevant given conclusions the Council reaches elsewhere in these recommendations (see, for example, the Council’s conclusions regarding the utility of trucks as an alternative to pipeline transport of jet fuel to Sydney Airport at paragraphs 4.64-4.69). Some other costs are costs to a service provider that would likely be mitigated in the terms and conditions of access or compensated for in access pricing. The Council notes that, in responding to the draft recommendations, Caltex focuses on this point, querying the costs to which the Council refers. Caltex goes on to note that it considers “there are very substantial costs associated with access that could not be adequately dealt with through terms and conditions of access” but does not identify the “substantial costs”, nor explain why compensation or mitigation is not possible through access terms and conditions (Caltex2 [124]). The Council remains of the view that costs that can be reflected in access prices or managed through access conditions should not be included in consideration of criterion (f).
- 8.33 Some of the potential costs put before the Council in submissions may also be overstated. The JUHI JV, for example, states that “regulated access is likely to skew investment incentives and efficient management of supply” (JUHI JV2 [27]). As BARA notes in an environment where the prospect of new participation in the JUHI JV (and also third party access to the Caltex Pipeline) already exists arguments such as this must be tempered by the existing arrangements which must mean the service providers are experienced in operating and developing multi-user facilities.
- 8.34 It is nevertheless clear to the Council that the costs likely to flow from access to the Caltex Pipeline Service and the Sydney JUHI Service are sufficient to outweigh the (necessarily very limited) benefits from access in the circumstance where access to either service will not promote a material increase in competition in any dependent market.
- 8.35 In addition to the cost issues raised in submissions, the Council is concerned that the involvement of a regulator in determining access to either service for which declaration is sought could weaken the incentives and accountability of the commercial parties involved in jet fuel supply to Sydney Airport to deliver reliable fuel supplies.
- 8.36 It is clear from the SJFIWG Report that increasingly tight capacity conditions present challenges for coordination, short and long term operational planning and investment decision making. Until another pipeline can be justified commercially, these challenges are likely to increase. Under present arrangements the commercial parties responsible for supply of jet fuel are collectively accountable for ensuring reliable jet fuel supply at Sydney Airport through mechanisms such as the NOC.³² As a result these parties have strong incentives to do what it takes to appropriately

³² Refer footnote 21, at paragraph 4.88.

manage supply, sometimes at the expense of the commercial advantage of one or more of the parties.

- 8.37 The Council notes that BARA takes issue with its conclusions on the potential detriment that may arise from regulatory involvement in jet fuel supply at Sydney Airport. BARA states that the fragmented nature of the ownership of jet fuel supply infrastructure means the commercial interests of the various parties often conflict and “are not aligned with promoting the long-term efficient provision of jet fuel at Sydney Airport” (BARA2 [87]). BARA also suggests that as the Caltex Pipeline approaches capacity it is inevitable that “some form of intervention by the Australian Government will be necessary” (BARA2 [89]).
- 8.38 In the Council’s view, the concern surrounding the potential disadvantages of injecting a regulator into the process, along with delay to investments in necessary additional infrastructure are likely to be significant costs of declared access to both the Caltex Pipeline Service and Sydney JUHI Service.
- 8.39 The Council is not satisfied that access is not contrary to the public interest in the case of each application.
- 8.40 Neither application satisfies criterion (f).

Discretion not to declare

- 8.41 The Council considers that the issues raised by the JUHI JV in relation to the exercise of discretion are adequately addressed by the conclusions the Council has reached in relation to the relevant declaration criteria and do not need to be further taken into account in considering the exercise of the designated Minister’s discretion.
- 8.42 Despite the suggestions from Mobil and the JUHI JV noted above, the Council does not consider either of BARA’s applications is not in good faith. The National Access Regime operates as a complement to private negotiations for access to services provided by infrastructure facilities. Even where a service is declared, commercial negotiations are viewed as the preferred means of determining access prices and other conditions of access. In these circumstances it is not surprising or inappropriate that declaration applications may arise at the same time as commercial efforts to gain access or in circumstances where some leverage is sought.
- 8.43 The Council does not consider that either the Caltex Pipeline Service Application or the Sydney JUHI Service Application gives rise to issues that should cause the Minister to exercise the discretion not to declare a service in the event all the criteria for declaration are found to be met.

9 Duration of declaration

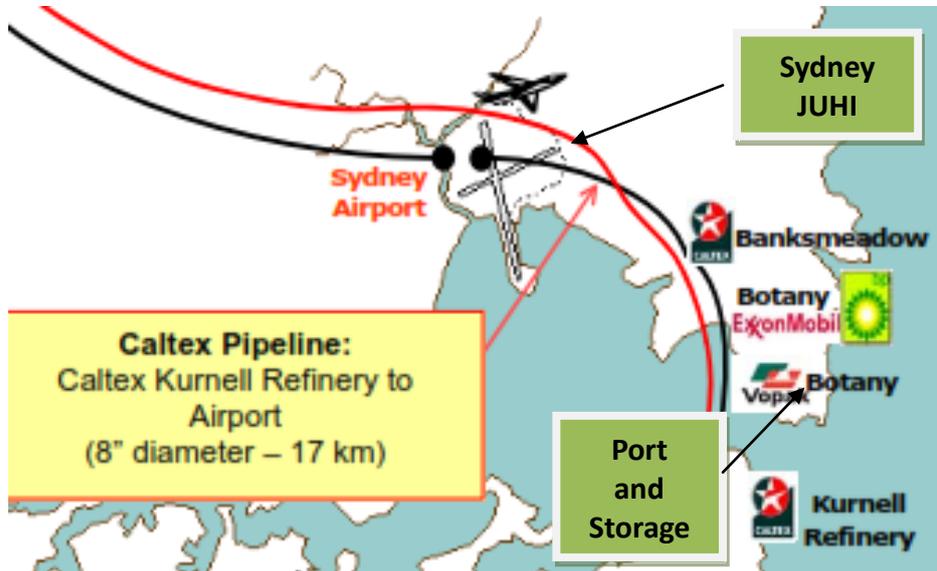
- 9.1 The law requires that where a service is declared, the declaration must specify an expiry date for the declaration (s 44H(8) of the CCA). Accordingly, the Council as a matter of course considers the duration in its recommendation, whether its recommendation is in favour of or against declaration, in recognition of the possibility that the designated Minister may decide to declare a service in circumstances where the Council does not recommend declaration.
- 9.2 A declaration begins at the time specified in the declaration, which cannot be earlier than 21 days after the declaration is published (s 44I of the CCA). The Council notes that following amendments to Part IIIA in 2010, where an application for review of a declaration is made to the Tribunal the declaration is not automatically stayed pending the outcome of those review proceedings. The declaration can only be stayed by order of the Tribunal (ss 44I(2)(b) and 44KA of the CCA).
- 9.3 The Applicant seeks the following periods of declaration.
- (a) Caltex Pipeline Service—the period of declaration sought in its application is 10 years. As noted in chapter 2, the Applicant amended the period to 13 years in its supplementary submission of 4 November 2011.
 - (b) Sydney JUHI Service—the period of declaration sought is 15 years.
- 9.4 In the event that the Minister is to declare the Caltex Pipeline Service, the Council considers that an expiry date for such a declaration should be 30 June 2023. This date is in line with the period for which the Council is satisfied that it is likely to be uneconomic to develop another facility to provide the Caltex Pipeline Service (see Chapter 5). The Council notes Caltex’s suggestion that it may become economical to build a new pipeline prior to 2023 (and possibly as early as 2018). The Council thinks this is unlikely, but notes that were concrete steps to that end to occur any existing declaration could be reviewed and revoked if appropriate.
- 9.5 In the event the Minister is to declare the Sydney JUHI Service, the Council considers that this declaration should be timed to expire at the same time as any declaration of the Caltex Pipeline Service; that is on 30 June 2023.
- 9.6 Although this is a shorter duration than that sought by the Applicant, the Council considers that the interrelationship between the Caltex Pipeline Service and the Sydney JUHI Service is such that the expiry of declaration of the former should trigger reconsideration of the declaration of the latter.³³ As the Applicant notes in the Sydney JUHI Service Application (see quotation set out at paragraph 5.48 of these recommendations) the two services are both essential elements in the jet fuel supply

³³ The Council notes that in its submission on the draft recommendations, BARA accepts that this proposed declaration period is reasonable (BARA2 [95]).

chain and involve use of “strictly complementary assets”. While this situation might change if an alternative pipeline is developed (some time after 2023), the Council considers that such a development is best considered in the context of fresh applications for declaration of one or other or both of the services considered here, along with any further services for which declaration might be sought at such a future time.

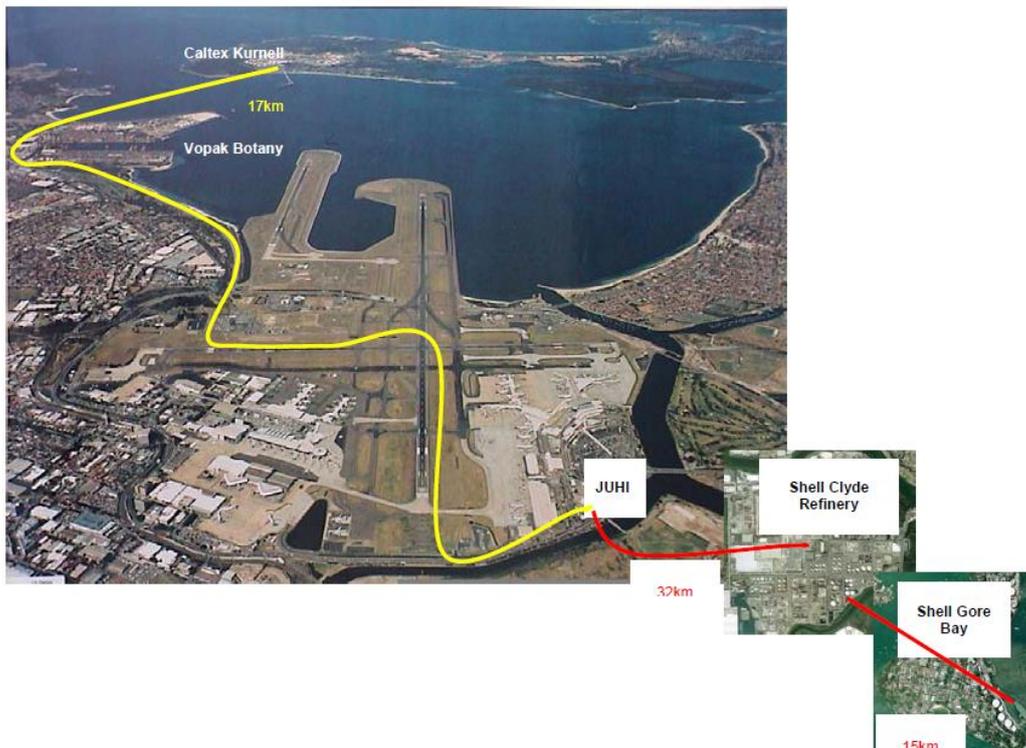
Appendix A Useful maps and diagrams

Map of the supply infrastructure for imported jet fuel



Source: BARA applications, figure 2 (page 3 of each application).

Pipelines supplying jet fuel to Sydney JUHI



Source: Qantas submission, figure 1 (page 4).

Appendix B List of application materials and submissions

B.1 Applications

- Caltex Pipeline
 - Cover Letter
 - Application for declaration (**Caltex Pipeline Service Application**)
 - Annexures:
 1. Sydney Jet Fuel Infrastructure Working Group, *Infrastructure for the provision of jet fuel at Sydney airport for the period to 2029*, April 2010 (**SJFIWG Report**)
 2. Sydney Airport Master Plan 2009 (**Master Plan**)
 3. Caltex Press Release 5 May 2010
 4. Shell Press Release 12 April 2011
 - BARA, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, undated (received 28 October 2011)
 - Council’s letter to the Applicant, 27 October 2011
 - Applicant’s response (Letter from HWL Ebsworth) 4 November 2011, including:
 1. BARA *Supplementary submission in relation to Commercial Developments in the marketplace*, 4 November 2011
- Sydney JUHI
 - Cover Letter
 - Application for declaration (**Sydney JUHI Service Application**)
 - Annexures:
 1. Sydney Jet Fuel Infrastructure Working Group *Infrastructure for the provision of jet fuel at Sydney airport for the period to 2029*, April 2010 (**SJFIWG Report**)
 2. Sydney Airport Master Plan 2009
 3. Shell Press Release 12 April 2011
 - BARA, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, undated (received 28 October 2011)
 - Council’s letter to the Applicant, 27 October 2011

- Applicant's response (Letter from HWL Ebsworth) 4 November 2011, including:
 1. *BARA Supplementary submission in relation to Commercial Developments in the marketplace*, 4 November 2011

B.2 Submissions on the application

- Caltex Australia (represented by Gilbert+Tobin), 21 November 2011
- Letter from Gilbert+Tobin on behalf of Caltex, 29 November 2011 including:
 1. Attachment A: Response to submissions published on 21 November
 2. Corrected version of Figure 5 in earlier submitted submission
 3. Report by NERA Economic Consulting *Caltex Jet Fuel Pipeline – Assessment of Declaration Criteria* 29 November 2011 (**NERA Report**)
- Sydney JUHI JV (represented by Allens Arthur Robinson), 21 November 2011
 - Frontier Economics, *Competition effects of declaration of Sydney JUHI facility*, November 2011 (**Frontier Report**)
 - RBB Economics, *Economic assessment of the supply of jet fuel at Sydney airport*, 2 December 2011 (**RBB Report**)
- Airport Fuel Services Pty Limited (**AFS**) (represented by Clayton Utz)
- BP Australia
- Emirates
- International Air Transport Association (**IATA**)
- Korean Air
- Q8 Aviation
- Qantas Group
- Regional Aviation Association of Australia (**RAAA**)
- Sapere Research Group (**Sapere**) (engaged by BP Australia)
- United Parcel Service (**UPS**)
- Department of Resources, Energy and Tourism
- Mobil Oil Australia Pty Limited
- BARA, *Supplementary submission in relation to arguments contained in submissions objecting to the applications for declaration* 29 November 2011

B.3 Submissions on the draft recommendations

- BARA, 8 February 2012 (BARA2)
- HWLE, undated (**HWLE**)
- Caltex Australia, 13 February 2012 (Caltex2)
- ACIL Tasman, *Economics of a new jet fuel pipeline from Vopak terminal; An analysis of the economics of a new pipeline*, February 2012 (ACIL Tasman)
- NERA, *Review of Draft Recommendations*, 13 February 2012 (NERA2)
- Sydney JUHI JV, 13 February 2012 (JUHI JV2)
- RBB Economics, *Assessing the impact of tendering on competition for the supply of jet fuel at Sydney Airport*, 13 February 2012 (RBB2)
- Qantas, 13 February 2012 (Qantas2)
- Cathay Pacific, 27 January 2012
- Etihad Airlines, 4 December 2011
- United Airlines, 1 December 2011
- IATA, undated (IATA2)

B.4 Other

NOC Traffic Light Report – Sydney Airport (January 2012)