



JUHI SYDNEY

**Submission by Sydney Airport JUHI Joint Venture
responding to the NCC draft recommendation
regarding the JUHI Service**

13 February 2012

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A1. The NCC's conclusion to not declare the JUHI Service is correct

A1.1 The NCC formed the correct view of the following factors which support its decision to not declare the JUHI Service

1. The JV Participants¹ in the joint venture which owns the Joint User Hydrant Installation (**JUHI**) at Sydney Airport submit that the NCC's conclusion in its draft recommendation² to not declare the 'JUHI Service'³ is correct.
2. As the NCC found, regulated access to the JUHI Service does not satisfy all of the mandatory criteria for declaration in the access regime set out in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**).
3. In particular, the NCC correctly found that, as submitted by the JUHI Participants, regulated access would not promote a material increase in competition in any dependent market, and so criterion A could not be met.
4. On the key issue agitated by the Board of Airline Representatives (**BARA**), the state of competition in the supply of jet fuel at Sydney Airport, the NCC found after extensive inquiry that BARA 'has not made out its position that jet fuel supply is characterized by excessive prices or other manifestations of market power.'⁴ It correctly concluded that any level of additional competition that might result from regulated access would be 'very limited',⁵ and in light of the change and investment being undertaken with regard to critical jet fuel infrastructure, 'the market is likely to experience opportunities for increased, or at least enhanced, competition that are not dependent on access and declaration under Part IIIA.'⁶ In short, the NCC was right to find that there was no compelling evidence of a competition problem in need of regulatory intervention, and that access under Part IIIA would not offer a better solution to infrastructure issues than the market is delivering, and that such regulation may in fact act as an impediment.
5. In addition to the lack of any compelling evidence demonstrating the conditions for declaration were met, this conclusion is supported in a practical sense by the fact that

¹ The participants in the joint venture are Shell Company of Australia Limited (**Shell**); BP Australia Pty Ltd (**BP**); Caltex Australia Petroleum Pty Ltd (**Caltex**); Mobil Oil Australia Pty Ltd (**Mobil**); and Qantas Airways Limited (**Qantas**), (together, the **JV Participants**).

² NCC Draft Recommendations regarding Jet Fuel Supply Infrastructure at Sydney Airport, 16 December 2011, available online at: <http://www.ncc.gov.au/images/uploads/DEJFBADR-001.pdf> (**Draft Recommendation**). The NCC addressed both the application regarding the 'JUHI Service' and the separate application regarding the 'Caltex Pipeline Service' in the one document. This submission relates to the NCC's draft recommendation regarding the 'JUHI Service' only.

³ Defined in the NCC Draft Recommendation as 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.

⁴ Draft Recommendation at [4.58].

⁵ Draft Recommendation at [4.75].

⁶ Draft Recommendation at [4.76].

potential fuel suppliers who may wish to use the JUHI Service did not undertake the declaration process themselves, nor complain to the NCC about any lack of access. To the contrary, the only potential supplier who commented on BARA's application was Kuwait Petroleum, which submitted to the NCC that its 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' via equity participation in the JUHI JV, and that it therefore could 'not agree that all the criteria are met.'⁷ In terms of the support BARA's application received from airlines, as the NCC noted,⁸ Qantas and Virgin are likely to represent the largest individual portions of jet fuel demand at Sydney Airport, and Qantas opposed BARA's application and Virgin did not make any comment at all. The JV Participants believe this reflects the fact that the key industry participants recognize that regulated access of the JUHI Service would not increase competition, and will not assist supply reliability at Sydney Airport.

6. The JV Participants welcome the NCC's conclusion as it is consistent with the well-understood rationale for Part IIIA, which is to redress competition problems where ownership of infrastructure (usually by a monopolist) is used or likely to be used to block potential entry to dependent markets by excluding potential competitors from the facility. By contrast, ownership of the JUHI is based on a joint venture model which specifically provides for participation on clear and objectively reasonable criteria, and in circumstances where there has never been any denial of participation to applicants. Declaration of facilities in these circumstances would represent an unwarranted over-reach of Part IIIA.
7. The NCC also found in relation to the alleged market for into-plane services at Sydney Airport that regulated access was not likely to materially promote competition. The JV Participants agree, noting that there is no evidence of structural or behavioural barriers operating to limit competition in into-plane service provision at Sydney Airport, which is already serviced by multiple providers.
8. Finally, in relation to the alleged market for air transport services (involving carriage of passengers and freight in and out of Sydney Airport to domestic and international destinations) the NCC was not minded to assess the impact of access in detail because, as it correctly observed, any competitive impact was likely to be derivative of the competitive impact of access in the supply of jet fuel or the provision of into-plane services and it was difficult to isolate any particular effect of access in this area.⁹ As access to the JUHI Service was found not to promote a material increase in competition in the supply of jet fuel or into-plane services at Sydney Airport, the JV Participants consider access clearly could not have a material impact on air transport services, and the NCC was correct in not finding that criterion A would be satisfied in relation to this alleged market.

⁷ Kuwait Petroleum, Application for declaration of Sydney JUHI and Caltex Pipeline – Q8 Aviation Submission 21st November 2011, available online at: <http://www.ncc.gov.au/images/uploads/DEJFBASu-008.pdf>.

⁸ Draft Recommendation at [4.64].

⁹ Draft Recommendation at [4.12].

9. The NCC also correctly found that it could not be satisfied that regulated access would not be contrary to the public interest, and so criterion F could not be met as the NCC found 'significant costs are likely to arise' from regulated access of the JUHI Service.¹⁰
10. These costs include delays to investment in necessary additional infrastructure¹¹, as identified by the JV Participants.¹²
11. The NCC was also right to identify additional concerns that the involvement of a regulator in this infrastructure, particularly in terms of determining access, setting prices and directing expansion activity, could 'weaken the incentives and accountability of the commercial parties involved in jet fuel supply to Sydney airport to deliver reliable fuel supplies',¹³ and may 'dilute or obscure accountability for supply failures in the short and longer term'.¹⁴
12. It is undeniable that the costs of regulated access are, as the NCC found, 'likely to be significant'.¹⁵ Given the minimal (if any) perceived benefits of regulated access, the inevitable conclusion is that reached by the NCC, that the costs of regulated access outweigh the benefits, and accordingly the NCC cannot be satisfied that regulated access would not be contrary to the public interest.

A2. There are additional bases for not declaring the JUHI Service

A2.1 Overview

13. In addition to the failure to satisfy criteria A and F, the JV Participants consider there are a number of further reasons why the JUHI Service cannot be declared which lend further support to the NCC's recommendation against declaration.
14. These reasons were addressed in detail by the JV Participants in their original submission to the NCC¹⁶ - and include that BARA has failed to properly describe the JUHI Service, the relevant service is not capable of declaration under Part IIIA, and the alleged dependent 'markets' are artificial constructs. The JV Participants maintain these arguments. In addition, the JV Participants note the following further information relevant to two particular alternative bases for not declaring the JUHI Service that the JV Participants previously raised.

¹⁰ Draft Recommendation at [8.30].

¹¹ See Draft Recommendation at [8.19] and [8.36].

¹² See Draft Recommendation at [8.19] and [8.30].

¹³ Draft Recommendation at [8.33].

¹⁴ Draft Recommendation at [8.35].

¹⁵ Draft Recommendation at [8.36].

¹⁶ Submission by Sydney Airport JUHI Joint Venture regarding the BARA application for 'Service No 1: provided by the Sydney JUHI Facility', 21 November 2011, available online at: <http://www.ncc.gov.au/images/uploads/DEJFBASu-002.pdf>. (*Original JUHI JV Submission*).

A2.2 Economical duplication

15. The NCC is required to be affirmatively satisfied that it would be 'uneconomical for anyone to develop another facility to provide the service' before it can declare a service, as per criterion B. The NCC is also required, when deciding whether or not to declare a service, to consider whether it would be 'economical for anyone to develop another facility that could provide part of the service.'¹⁷
16. The JV Participants note that the NCC accepted that it may be possible to develop a facility to provide part of the storage component of the JUHI Service, but took the view that a number of theoretical possibilities may lead to duplication of the entire storage component being unprofitable and uneconomical.¹⁸
17. The JV Participants maintain that it would likely be economical for a third party to develop the jet fuel storage facility. They rely upon all the reasons set out in the Original JUHI JV Submission¹⁹ and further note the following.
18. The JV Participants submit that most of the possibilities the NCC identified as leading to duplication not being economical are likely to arise in any situation of part duplication, i.e. the possible degradation of services offered by separate construction and operation of one/a pair of storage tanks; coordination issues in operating a storage facility alongside the JUHI JV; the possibility of an unbalanced usage profile for the duplicated tanks; more and less than optimally sized storage tanks being required; and economies of scope or scale in providing storage as part of the original service.
19. It cannot be sufficient for the NCC to simply identify these common disadvantages of part duplication as a basis for finding duplication is not economical. Such possibilities must in some way be meaningfully balanced against likely commercial returns.
20. Further, the nature of investment in this type of infrastructure, whereby incremental usage and future growth in demand are highly significant, should also be taken into account. To simply rely upon broad assumptions that duplicated infrastructure may not be as profitable as existing infrastructure in the immediate term is inappropriate. A longer term view of profitability should be taken, commensurate to the timeframe over which developers of such infrastructure would typically assess their investment. Similarly, to simply identify the possibility of generalised high level cost disadvantages without any further analysis is insufficient to support a conclusion that duplication is not economically feasible.
21. The remaining factor the NCC identified as counting against economic duplication was the practical issues which would arise in terms of the location and safe construction of further storage tanks.²⁰ The JV Participants reiterate that it is feasible that storage

¹⁷ Section 44F, CCA.

¹⁸ Draft Recommendation at [5.49] – [5.50].

¹⁹ See [214]-[218] of the Original JUHI JV Submission.

²⁰ Draft Recommendation at [5.46]

tanks could be constructed offsite at Sydney Airport, noting that the current Sydney Airport Master Plan highlights offsite storage as a possibility in the longer term.²¹

22. Accordingly, the JV Participants submit that it would be economical to develop storage tanks to provide the storage component of the JUHI Service, and that the storage component is a significant part of the JUHI Service.

A2.3 Factors supporting the exercise of the residual discretion to not declare

23. Even if all of the declaration criteria could be met (which they cannot), the NCC (and the designated Minister) still has a residual discretion that may be exercised against declaration in appropriate circumstances. The JV Participants consider there are a number of factors which would support the exercise of the residual discretion in the present case.
24. First, as discussed above, whether it would be economical for anyone to develop another facility that could provide part of the service is a factor the NCC is required to take into account.²² The storage component can be economically duplicated, and is a significant part of the JUHI Service, and accordingly this factor should weigh heavily against declaration.
25. The JV Participants do not believe there is any evidentiary basis for concluding (nor does it logically follow) that additional capacity in the form of a second storage facility would overall lead to negative consequences for the reliability of jet fuel supply at Sydney Airport.²³ In these circumstances, the JV Participants do not believe that factors against exercising the residual discretion outweigh the factors in favour of exercising the discretion – namely that it would be economical to duplicate a significant part of the JUHI Service.
26. Secondly, the JV Participants contend that the limitations on the ACCC's arbitration powers to interfere with the JV Participants' use of the facility²⁴ make declaration futile, as no greater access is likely to be obtained by third parties under Part IIIA regulation compared to the potential for use under equity participation on commercial terms. Accordingly, any benefits of declaration will be low.
27. By contrast, the costs of declaration will be significant. The JV Participants maintain that regulated access is likely to skew investment incentives and efficient management of supply, in an industry where appropriate and timely investment in infrastructure is key to the main public interest – ensuring the safe and reliable jet fuel supply.
28. The NCC itself recognized the following additional costs of regulation in these circumstances:

²¹ Sydney Airport Corporation Limited, *Sydney Airport Master Plan*, 2009. p.80. Available online at: <http://www.sydneyairport.com.au/corporate/community-environment-and-planning/~media/Files/Corporate/Environment%20Plan/Master%20Plan/MasterPlan09.ashx>.

²² Section 44F(4), CCA.

²³ Which appears to be a concern of the NCC at [5.53].

²⁴ Sections 44X(1)(a) and 44W(1)(c), CCA.

- '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.'²⁵
 - 'the injection of a regulator—that may be called upon to set access prices or direct expansion activity, among other matters—is likely to dilute or obscure accountability for supply failures in the short and longer term.'²⁶
29. The JV Participants agree with the NCC that these costs are likely to be 'significant', noting the NCC's view that 'these costs might be sufficient to give rise to doubts in relation to satisfaction of criterion (f) even where criterion (a) is satisfied.'²⁷
30. In these circumstances, where any benefits of declaration will be low and the costs will be significant, the JV Participants submit that it is appropriate to exercise the residual discretion to not declare.

A3. Preliminary views by the NCC that are incorrect or require further information/clarification

A3.1 The process for obtaining equity participation in the JUHI JV

31. As the NCC accepted, access to the JUHI is already available to third parties by becoming a member of the JUHI JV on the terms and conditions prescribed in the JV Agreement.²⁸
32. The relevant entry criteria in the JV Agreement are commercially justifiable, transparent and appropriate.²⁹ Moreover, practical experience demonstrates that the entry criteria do not operate as a barrier to entry. Qantas has already used the entry mechanism on two separate occasions to acquire equity interests in the JUHI JV; and more recently, the JUHI JV has received a number of approaches by third parties who have expressed an interest in joining the JUHI, none of whom have indicated that they are unable to meet the entry criteria.
33. The JV Participants note, however, the NCC's comments regarding one of the entry criteria, clause 15.3(viii), which provides that an applicant to the JV 'shall comply with any other entry criteria imposed by the Participants.' The NCC indicated that the ability to include additional requirements for equity participation 'could raise difficulties' if 'the specific criteria for joining the JUHI JV became critical to the consideration of

²⁵ Draft Recommendation at [8.33].

²⁶ Draft Recommendation at [8.35].

²⁷ Draft Recommendation at [8.36].

²⁸ Draft Recommendation at [4.67].

²⁹ This is demonstrated by the detailed explanation of the entry criteria set out in the Original JUHI JV Submission at [101]-[107].

criterion (a)³⁰, and commented that it was unable to assess whether this '[open-ended] scope has or could be exercised'.³¹

34. The JV Participants consider this concern to be unnecessary and unwarranted in the present circumstances where the ability to include additional entry criteria has never been used (let alone misused) in the past, and there is no evidence it is likely to be misused to block entry in the future.
35. To address this concern however, the JV Participants have provided a guideline for the application of clause 15.3(viii) in the attached Annexure. It is intended that this guideline be provided with the entry criteria to all third parties applying to become participants in the JUHI JV in the future.
36. As the guideline for clause 15.3(viii) demonstrates, this provision is intended only to capture reasonable and appropriate requirements which were not identifiable at the time of execution of the JV Agreement.
37. Additional requirements are only to be included where they are necessary by reason of regulatory, legal or commercial circumstances or obligations which apply to parties seeking to provide jet fuel or own or operate jet fuel infrastructure at Sydney Airport. Such requirements may include statutory or mandatory obligations not covered by the JV Agreement as well as possible operational or commercial obligations, and expressly cannot be arbitrary and must be reasonable and appropriate. Identification of any necessary additional requirements shall occur as early as possible in an applicant's entry process and will be promptly communicated in writing to the applicant.
38. By way of illustration, if the following types of obligations or circumstances arose in the future, the JV Participants would need to be able to address these through additional entry criteria:
 - If the CASA imposed a new requirement that fuel suppliers had to provide fuel certifications or carry a certain licence to operate at Sydney Airport, applicants would need to demonstrate their ability to provide the required certification or obtain the mandatory licence;
 - If the JUHI facility was restructured in the future from components A, B and C to some other configuration, specific requirements about levels of equity participation in different components may be required which would need to be embedded in the entry criteria;
 - If additional lease obligations were imposed on the JUHI JV but were not covered under the JV Agreement, agreement by each participant to fulfil these obligations would need to be included as a requirement to entry.
39. The JV Participants also note the NCC's observation that it is 'unclear...how a party seeking to join the JUHI JV is able to enforce the terms of the JV agreement'.³²

³⁰ Draft Recommendation at [4.31].

³¹ Draft Recommendation at [4.70].

40. The entry criteria have never been used to deny an applicant entry into the JUHI JV. Significantly, BARA's application was not triggered by any rejection of a third party application to join the JUHI JV, but rather, came about because BARA preferred an entry option which it considered might benefit a particular group of third party suppliers. Hence, all the evidence from prior and current experience in relation to the application of the entry criteria supports the JV Participants' position that such criteria are not used to arbitrarily or inappropriately prevent entry by third parties seeking equity participation.
41. Nor is this a situation where the JV Participants have uniform incentives which suggest there is a real risk they may seek to limit entry into the JUHI JV in the future. To the contrary, there would be some benefits to the JV Participants in having additional entry to enable cost/risk sharing in relation to infrastructure that is so capital intensive and has the potential to attract significant future liabilities.
42. Furthermore, any refusal by the JV Participants to apply the entry criteria reasonably or to otherwise refuse to negotiate with applicants may raise issues under the CCA, which acts as a significant discipline on the JV Participants, further ameliorating any theoretical concerns regarding lack of enforceability of the entry criteria.
43. Hence any concerns around the inability of third parties to enforce the terms of the JV Agreement are theoretical only and not borne out by experience, and so should be accorded little weight.

A3.2 Future assessment of competition

44. While the JV Participants welcome the NCC's conclusion that access to the JUHI Service would not promote a material increase in competition in any dependent market, they are concerned with the NCC's comment that '*Were access to the Sydney JUHI Service not available on reasonable terms at that time [post 2023 when a further pipeline may be required to meet jet fuel demand at Sydney Airport], it is 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.*'³³
45. The JV Participants consider that it is premature for the NCC to form a view on the likely state of competition in relevant markets 'sometime after 2023', and that it is inappropriate to set out such a narrow ground on which it may assess criterion A at that time or to otherwise fetter its discretion to assess any future application on its merits.
46. As the NCC has recognised, there are planned changes to the key infrastructure which will be implemented in the near future, such as the expansion of the Caltex pipeline's capacity, conversion of the Shell Clyde refinery into an import terminal, and the change in available capacity on the Shell pipeline.³⁴ Further, 'significant uncertainty

³² Draft Recommendation at [4.33]. See also [4.34] –[4.35].

³³ Draft recommendations, footnote 15.

³⁴ Draft recommendations, at [5.18] and [4.59].

surrounds the tenure of the Sydney JUHI at its current location'.³⁵ In these circumstances, the JV Participants submit that predictions made now about the state of the market in ten years are highly speculative and inappropriate.

47. Moreover, the JV Participants have already addressed the 'reasonableness' of the terms of equity participation in the JUHI JV, demonstrating why the existing entry criteria are transparent, objective and reasonable, and there is no provision in those criteria for JV Participants to be advantaged over other potential developers of a new pipeline.
48. Accordingly, the JV Participants note for the record that should there need to be an assessment of criterion A again in the future, such an assessment should be made on its merits at that time, with full consideration of the market conditions in effect at that time.

A3.3 Pricing under regulated access

49. The JV Participants welcome the NCC's acceptance of the need for access to the JUHI to be by way of equity participation rather than on a throughput basis.³⁶ This is clearly the case.
50. For the sake of clarity, the JV Participants wish to address the NCC's observation that pricing for a declared service need not be limited to a throughput charge but could instead be 'determined on a two-part tariff basis, for example, thereby providing for both a usage charge and a risk or investment component'.³⁷ Whilst this observation does not impact the NCC's correct conclusion that criterion A is not satisfied in relation to the JUHI Service, the JV Participants consider it would be helpful to clarify the position.
51. The advantages and disadvantages of a two-part tariff, compared to both a throughput or 'linear' charge, and the current cost allocation mechanisms under the JV Agreement, were analysed in the report by Frontier Economics filed with the NCC.³⁸
52. The JV Participants wish to draw the NCC's attention to the two main problems identified for a two-part tariff in the Frontier Report.
53. The first problem arises because the pricing structure for a two-part tariff requires that the price per unit of the service (the marginal price) be set at marginal cost, and then the consumer of the service makes a contribution to the capital cost of the facility in the form of a lump-sum payment (i.e. a payment that is not contingent upon the rate at which the service is consumed).³⁹ The key issue here arises in assessing how to set the lump-sum contributions to capital expenditure where capital charges are not to be contingent on the rate at which a party uses the asset. Frontier Economics observed

³⁵ Draft recommendations, at [5.27].

³⁶ Draft Recommendation at [4.67].

³⁷ Draft Recommendation at [4.67].

³⁸ Frontier Economics, 'Competition effects of declaration of Sydney JUHI facility' November 2011 (*Frontier Report*). Available online at: <http://www.ncc.gov.au/images/uploads/DEJFBASu-017.pdf>.

³⁹ Frontier Report at [64].

that 'this seems to suggest that all parties must pay an equal contribution. However, if all parties pay an equal contribution, some parties may be excluded from using the asset at all – because the surplus over marginal cost that they gain from use will not cover their capital contributions.'⁴⁰

54. BARA identifies as a key benefit of regulated access the ability for suppliers of relatively small volumes of jet fuel to secure access to the JUHI Service.⁴¹ However, for those suppliers, a two-part tariff would lead to the problem identified above that the initial up-front capital-related expenditure for gaining access to the facility is likely to be too high relative to their likely use of the facilities. Hence, even if regulated access were available for those suppliers, the limited scale of their operations would preclude them from taking it up.
55. The Frontier Report canvasses a possible theoretical solution to this issue by allowing a regulator to set different two-part tariffs for different users, based on the willingness of each user to pay for access, such that each tariff would have marginal price equal to marginal cost, but the consumer with the lower willingness to pay would pay a lower lump sum capital contribution than the consumer with a higher willingness to pay.⁴²
56. The JV Participants consider that such an approach would create immense complexities for the ACCC to determine the individual 'willingness' or demand from each access seeker, and create incentives for access seekers to understate their demand in order to minimise the capital component of their tariff. It would also be impossible to calculate in advance the capital contributions that will be required of a prospective access seeker, creating budgeting difficulties for the operator, and decreasing the likelihood of any commercial agreement without the need to repeatedly resort to ACCC arbitration.
57. For these reasons, the JV Participants submitted that neither a 'pure' two-part tariff structure nor a 'case-by-case' tariff structure is a suitable or efficient way of pricing access to the JUHI Service, and the current equity participation model provides a far more efficient pricing structure which sets the right incentives for investment in, and the operation of, the jet fuel infrastructure.
58. The second problem that was identified with the two-part tariff structure is that, due to the unpredictable nature of future liabilities and commitments facing the owners and operators of airport JUHI infrastructure, it would be extremely difficult to set the capital and risk component of a two-part tariff at an appropriate and efficient level.⁴³
59. Many of the future liabilities and outlays required of the owners and operators of JUHI infrastructure are unpredictable, unavoidable and arise over a period of time. These include:

⁴⁰ Frontier Report at [71].

⁴¹ BARA Application, p17.

⁴² Stephen J Brown and David S Sibley, *The theory of public utility pricing*, Cambridge University Press (1986) p 67, as quoted on p15 of the Frontier Report.

⁴³ The JV Participants refer to the detailed explanation of this issue provided at [81]-[100] of the Original JUHI JV Submission.

- Environmental remediation costs. Environmental contamination can be discovered many years after it has occurred, creating liabilities which were not apparent at the time of the contamination. Additionally, regulatory environmental requirements have historically tightened over time, adding further uncertainty around future costs;
 - Regulatory compliance costs. Changes to operating practices are regularly required to bring the JUHI into line with industry standards; and
 - Capital expenditure required by SACL. Although some capital expenditure to maintain the JUHI can be predicted and planned for ahead of time, many outlays are unpredictable.
60. The JV Participants submit that these unpredictable future capital liabilities make it extremely difficult to set an appropriate contribution for a two-part tariff at any particular point in time.
61. The consequences of setting a two-part tariff too high or too low are that this distorts the efficient timing of investment of infrastructure. The Frontier Report addressed this risk in the context of development of new infrastructure:⁴⁴
- If the regulator sets prices of access too low, parties will have an incentive not to seek access until after the asset has been built; and these delays in seeking access will delay investment in the bottleneck infrastructure. On the other hand, if the regulator sets prices of access too high, parties will have an incentive to race to build the bottleneck asset in order to earn high rates of return on the bottleneck investment.
62. Accordingly, the JV Participants submit that a two-part tariff does not offer a better alternative for allocating costs and risks in a manner that facilitates greater access to the JUHI Service or sets better incentives for investment or the efficient operation of the infrastructure than the existing option of equity participation in the JUHI JV.
63. As the Frontier Report explained, the JUHI JV equity participation model involves a compromise between a pure two-part tariff and a 'linear' or throughput charge and is likely to:
- Lead to a level of usage of the JUHI facilities that is more allocatively efficient than that which would occur if prices were set simply on a linear through-put charging basis;
 - Provide better incentives with respect to the timing of capital investments as it goes some way towards mimicking the bargaining solution reached by the initial JV participants when determining the allocation of capital expenditure costs between them; and
 - Provide for the potential for a greater number of users of the JUHI facilities than would arise under a pure two-part tariff by seeking to recover some types of fixed cost via variable usage/throughput charges.⁴⁵

⁴⁴ Frontier Report at [69]-[70].

⁴⁵ Frontier Report at [85]. For a detailed analysis of the terms of the JV Agreement, see the Frontier Report at [82]-[84].

64. The JV Participants therefore reiterate that the option of a two-part tariff is a poor alternative to the existing equity participation model.

A3.4 Jet fuel tenders

65. The JV Participants note that the while the NCC formed a preliminary view that any lack of response and availability of jet fuel supply to airlines' tenders at Sydney Airport is 'likely to reflect overall supply constraints [rather] than a lack of competition that could be rectified by access or increased access', the NCC believed it required further information on the parameters and requirements of the tenders in order to reach a firm conclusion.⁴⁶
66. The JV Participants submit that the NCC's conclusion is correct and that the limitations on the ability to tender which a small number of airlines complained of would not be ameliorated as a result of regulated access.
67. The JV Participants submit that capacity constraints are the most common factor in JV Participants' inability to supply an airline's requested volumes. Regulated access would do nothing to address these constraints, and may in fact exacerbate them (for all the reasons set out in the Original JUHI JV Submission).
68. Moreover, the JV Participants submit that the examples 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.
69. The JV Participants refer the NCC to further information to demonstrate the correctness of the NCC's conclusion, which is set out in an independent economic expert report prepared by RBB Economics. BP, Shell and Caltex provided data to RBB Economics for the purposes of the report. ExxonMobil and Qantas have not provided data.⁴⁷

A4. Appropriate duration of any declaration

A4.1 Factors to be taken into account in assessing the period of any declaration

70. The JV Participants refer to the NCC's preliminary view that if the JUHI Service were to be declared (contrary to its draft recommendation), declaration for a 13 year period would be appropriate i.e. until 30 June 2023.⁴⁸
71. The JV Participants consider that this period is inappropriate due to the lack of certainty regarding the ownership and the nature of the JUHI Service, and the competitive conditions relating to the Service, over this period.

⁴⁶ Draft Recommendation at [4.61].

⁴⁷ Data was provided by each of Caltex, BP and Shell through legal counsel. Individual supplier data has not been shared amongst the JV Participants. The Participants who contributed data have verified RBB's treatment of their own individual data only. ExxonMobil has not been provided with any of the aggregated data presented in this report.

⁴⁸ Draft Recommendation at [9.5].

72. In particular, the JV Participants note:

- The location and ownership of the jet fuel infrastructure may significantly change within this period. In its most recent Sydney Airport Master Plan, SACL indicated that whilst the JUHI storage facility can remain in its current location until the development of T1, such development will then require its relocation. SACL notes that 'For the longer term, offsite storage opportunities are possible.'⁴⁹ Further, the JUHI facility is located on land leased from SACL until 2018, with only a possibility of extension until 2024.
- The nature of supply of jet fuel at Sydney Airport is likely to significantly change in the short-term, given Caltex's proposed pipeline upgrade which the JV Participants understand is expected to be completed and commissioned around mid 2012 and the conversion of Shell's Clyde refinery into an import terminal from mid 2013.

73. It would therefore be inappropriate, and unworkable, to declare the JUHI Service for a period which extends beyond the period in which it is clear that the facility will be located at and servicing Sydney Airport, and over which the NCC can have some confidence that the declaration criteria will be met.

Annexure – Current guideline on clause 15.3(viii)

Clause No:	JV Agreement Clause	Guideline to assist Applicant in addressing clause 15.3(viii) and JUHI Operating Committee in assessing application
15.3	Admission of the Applicant shall be subject to the following criteria:-	
(viii)	the Applicant shall comply with any other entry criteria imposed by the Participants, and	<p>This clause is aimed at including criteria not identifiable at the time of execution of the JV Agreement which have arisen or have significantly changed since the JV Agreement was executed.</p> <p>The criteria which may be referenced in this clause may include items such as requirements on the Applicant to implement statutory/mandatory obligations (deemed to not be covered by the JV Agreement) as well as possible operational or commercial requirements. For example:</p> <ul style="list-style-type: none"> - If CASA imposed a new requirement that fuel suppliers had to provide fuel certifications or carry a certain licence to operate at Sydney Airport, Applicants would need to demonstrate their ability to provide the required certification or obtain the mandatory licence; - If the JUHI facility was restructured in the future from components A, B and C to some other configuration, specific requirements about levels of equity participation in different components may be required which would need to be embedded in the entry criteria; - If additional lease obligations were imposed on the JUHI JV but were not covered under the JV Agreement, agreement by each participant to fulfil these obligations would need to be included as a requirement to entry. <p>The Operating Committee shall ensure any criteria applied under this subclause is reasonable and relevant to the intent of Clause 15.3 and to ensure the criteria is not of an arbitrary or inappropriate nature.</p> <p>The Operating Committee shall determine any additional criteria under this subclause. This process shall occur as early as possible in the Applicant entry process and the criteria arising shall be communicated in writing to the Applicant.</p>