

DECISION AND STATEMENT OF REASONS CONCERNING THE APPLICATIONS FOR DECLARATION OF SERVICES OF JET FUEL INFRASTRUCTURE SERVICING SYDNEY AIRPORT

Competition and Consumer Act 2010, s 44H

BACKGROUND

Section 44F of the *Competition and Consumer Act 2010* (CCA) provides that the designated Minister, or any other person, may make a written application to the National Competition Council (NCC), asking the NCC to recommend that a particular service be declared. After receiving the application, the NCC must, after having regard to the objects of Part IIIA of the CCA and the matters specified in section 44G, recommend to the designated Minister either that the service be declared or that the service not be declared.

On 27 September 2011, the NCC received two applications under Part IIIA of the CCA from the Board of Airline Representatives of Australia Inc (BARA) for declaration of services provided by jet fuel supply infrastructure servicing Sydney Airport.

The specific services for which BARA has sought declaration are:

- The Caltex Pipeline (the Pipeline) – the service provided by the Pipeline facility, which transports jet fuel from interconnection points with off-site jet fuel storage facilities at Port Botany to the Sydney Airport Joint User Hydrant Installation (the JUHI); and
- The Sydney JUHI Service – 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 JUHI at Sydney Airport.

The owner and operator of the facility that provides the Pipeline service is Caltex. The facilities that provide the Sydney JUHI service 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).

On 15 March 2012, I received the NCC's final recommendations. The NCC recommended that the Pipeline and the Sydney JUHI Service not be declared.

In making these recommendations, the NCC had regard to the objects of Part IIIA of the CCA. As specified in section 44AA of the CCA, these 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.

The NCC also had regard to the matters in subsection 44G(2) of the CCA, that is:

- a) that 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;
- b) that it would be uneconomical for anyone to develop another facility to provide the service;
- c) that 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;
- 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 designated Minister 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;
- f) that access (or increased access) to the service would not be contrary to the public interest.

The NCC considered that criterion (a) and (f) of subsection 44G(2) were not satisfied.

On 21 March 2012, I received written correspondence from BARA regarding its applications. However, BARA's correspondence did not raise any new or additional issues or arguments beyond that which was considered by the NCC in making its final recommendations, nor did it contain any new material.

DECISION

Subsection 44H(1) of the CCA provides that on receiving a declaration recommendation from the NCC, I (as the designated Minister) must either declare the service or decide not to declare it.

In deciding whether to declare the service or not, I must consider:

- the objects of Part IIIA of the CCA (subsection 44H(1A)); and
- whether it would be economical for anyone else to develop another facility that could provide part of the service (subsection 44H(2)).

Further, I cannot declare a service:

- that is subject to an access undertaking in operation under Division 6 of Part IIIA of the CCA (subsection 44H(3));
- while a decision of the Australian Competition and Consumer Commission (ACCC) is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process, provided by means of the facility that was specified under paragraph 44PA(2)(a) (subsection 44H(3A)); and
- unless I am satisfied of all matters specified under paragraphs 44H(4)(a) to (f), which mirror the criteria under subsection 44G(2) outlined above.

I have determined that criterion (a) and (f) under subsection 44H(4) are not satisfied by either application and have decided not to declare the Pipeline or the Sydney JUHI Service.

My consideration of the NCC's final recommendations, and my conclusions on those recommendations, are described below. In making my decision I have drawn on the evidence relied on by the NCC and the findings of the NCC.

REASONS

Matters specified under subsection 44H(4) of the CCA

a) Would access promote a material increase in competition in a dependent market?

Criterion (a) requires that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service.

In assessing this criterion, I first considered whether there are any separate but dependent markets in which competition may be promoted. Then, I determined whether access to the Pipeline and/or the Sydney JUHI Service would promote a more competitive environment in any of these markets, where the increase in competition would be material.

I have accepted arguments that there are two, functionally distinct, dependent markets relevant to access to the Pipeline and/or the Sydney JUHI Service:

- the market for the supply of jet fuel at Sydney Airport; and
- the market for into-plane fuelling services at Sydney Airport.

These markets are identified as separate from the markets of the services for which declaration is sought. There are no inter-relationships in supply between the services for which declaration is sought and the dependent markets such that they must necessarily be provided together.

Market for the supply of jet fuel at Sydney Airport

In considering whether access to the Pipeline and/or the Sydney JUHI Service would promote a material increase in competition in the market for the supply of jet fuel at Sydney Airport, I found the following to be material:

- i) There are two pipelines that transport jet fuel to the Sydney JUHI Service, being the Pipeline and the Shell Pipeline.
- ii) There is currently very limited available capacity on the Pipeline, given that the incumbent suppliers currently utilise a significant share of the Pipeline's capacity.
- iii) Caltex is in the process of upgrading the Pipeline, which is expected to increase the capacity of the Pipeline. In addition, the decommissioning of Shell's Clyde refinery may lead to an increased utilisation of the Shell Pipeline.

Market for into-plane fuelling services at Sydney Airport

In considering whether access to the Pipeline and/or the Sydney JUHI Service would promote a material increase in competition in the market for into-plane fuelling services at Sydney Airport, I found the following to be material:

- i) That the barriers to entry into this market are relatively low, and that entry is not dependent on access to either the Pipeline or the Sydney JUHI Service.

On the basis of these findings, I have reasoned as follows:

- i) Given the degree of capacity constraints on the Pipeline, access (or increased access) to the Pipeline and/or the Sydney JUHI Service will not generate a material increase in competition in the market for the supply of jet fuel at Sydney Airport.
- ii) Given that the barriers to entry into the market for into-plane fuelling services are low and that entry into this market is not dependent on access to the Pipeline and/or the Sydney JUHI Service, access (or increased access) to the Pipeline and/or the Sydney JUHI Service will not generate a material increase in competition in this market.

Therefore, I am not satisfied in relation to the matter specified in paragraph 44H(4)(a).

b) Is it uneconomical to develop another facility?

Criterion (b) requires that it be uneconomical for anyone to develop another facility to provide the service.

Consistent with the approach of the NCC, I have construed 'uneconomical' in a private profitability sense. This approach considers the costs and benefits to private

and commercial interests, and looks at whether it is privately profitable for someone in the marketplace to develop an alternative to the facility to provide the service.

In considering whether it would be privately profitable for someone in the marketplace to develop an alternative to the Pipeline and/or the Sydney JUHI Service, I found the following to be material:

- i) While there is currently very limited available capacity on the Pipeline, Caltex's upgrade to the Pipeline and Shell's conversion of its Clyde refinery are expected to provide additional capacity to transport jet fuel to the Sydney JUHI Service.
 - a. Analysis from Qantas – that uses analysis from the Sydney Jet Fuel Infrastructure Working Group (SJFIWG) Report of April 2010 – indicates that taking into account these developments, pipeline capacity (from the Pipeline and the Shell Pipeline) is likely to exceed jet fuel demand at Sydney Airport until at least 2023.
 - b. The NCC notes that until the demand for jet fuel at Sydney Airport approaches the capacity for jet fuel to be delivered to the Sydney JUHI Service, an alternative facility to the Pipeline will face competition from existing capacity such that it is reasonable to expect that its business would be unprofitable.
- ii) In relation to the Sydney JUHI Service:
 - a. BARA submits that an alternative facility to provide the services of the Sydney JUHI Service would ensure excess capacity; such that it would lead to prices that would be too low to recover the sunk costs of building the alternative infrastructure.
 - b. The NCC notes that there are significant economies of scope in providing the jet fuel storage part and the jet fuel hydrant pipeline network part of the Sydney JUHI Service, such that it would likely render separate provision of the storage part unprofitable.

On the basis of these findings, I have reasoned as follows:

- i) At this point in time, an alternative facility to the Pipeline would face competition from existing capacity such that its business would be unprofitable and hence, uneconomical.
 - a. I agree with the NCC that it would be uneconomical to provide such a facility until at least 2023.
- ii) An alternative facility to the Sydney JUHI Service would face competition from existing capacity such that its business would be unprofitable and hence, uneconomical.

I am therefore satisfied in relation to the matter specified in paragraph 44H(4)(b).

c) Is the Pipeline and/or the Sydney JUHI Service of national significance?

Criterion (c) requires that the facility be 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.

In considering whether the Pipeline and/or the Sydney JUHI Service are of national significance, I found the following to be material:

- i) The Pipeline and the Sydney JUHI Service work together to transport jet fuel to domestic and international jet aircraft operating to and from Sydney Airport. These aircraft generally provide passenger and freight services to major airports in Australia and also many overseas airports.
 - a. The section of the Pipeline which transports jet fuel from interconnection points with off-site jet fuel storage facilities at Port Botany to the JUHI is approximately 10 kilometres in length.
 - b. The Sydney JUHI Service occupies an area of approximately 2.5 hectares and distributes approximately 2.9 giganlitres of jet fuel per year with an estimated value of approximately \$2.9 billion.
- ii) BARA submits that the Pipeline and the Sydney JUHI Service represent essential infrastructure in enabling passenger and freight movements through Sydney Airport.
 - a. BARA estimates that the direct value of all trade through Sydney Airport is approximately \$8 billion per year.
- iii) The NCC notes that neither the Sydney JUHI Service nor the Pipeline could be removed from the range of facilities necessary to enable the provision of airport services at Sydney Airport without very significantly reducing the contribution made by Sydney Airport to both constitutional trade and commerce, and the national economy.

On the basis of these findings, I have reasoned that the Pipeline and the Sydney JUHI Service are of importance to constitutional trade and commerce and to the national economy due to their critical contribution to the operation of Sydney Airport. On this basis I have concluded that these facilities are of national significance.

I am therefore satisfied in relation to the matter specified in paragraph 44H(4)(c).

e) Is the Pipeline or Sydney JUHI Service already subject to an effective access regime?

Criterion (e) requires that access to the service is not already the subject of an effective access regime.

In considering this criterion, I found that the Pipeline and the Sydney JUHI Service are not subject to any certified access regimes.

On the basis of these findings, I have reasoned that there is no effective access regime in relation to the Pipeline and/or the Sydney JUHI Service.

I am therefore satisfied in relation to the matter specified in paragraph 44H(4)(e).

f) Is access contrary to the public interest?

Criterion (f) requires that access (or increased access) would not be contrary to the public interest.

In considering this criterion, I had regard to the potential costs and benefits that may arise from providing access to the Pipeline and/or the Sydney JUHI Service. I note that this criterion does not require that I be affirmatively satisfied that access be in the public interest.

The NCC noted the following, which I found to be material:

- i) BARA identifies no factors which would result in access being contrary to the public interest. Its position largely rests on the basis that it considers that access to the Pipeline and/or the Sydney JUHI Service will promote a material increase in competition in relevant dependent markets.
- ii) In situations where access to a service does not promote a material increase in competition in a relevant dependent market (that is, where the criterion in paragraph 44H(4)(a) is not satisfied), it is difficult to envisage how the costs of access would not exceed the benefits of access.

- a. I agree with the NCC's views.

For reasons that I have outlined above, I am not satisfied that access to the Pipeline and/or the Sydney JUHI Service is likely to promote a material increase in competition in the relevant dependent markets. On this basis, I consider that access to the Pipeline and/or the Sydney JUHI Service would be contrary to the public interest.

I am therefore not satisfied in relation to the matter specified in paragraph 44H(4)(f).

Objectives of Part IIIA of the CCA

In making my decision, I have had regard to the objects of Part IIIA (section 44AA) and I am of the opinion that access to the Pipeline and/or the Sydney JUHI Service is not consistent with its intent. In particular, I consider that:

- Access would not promote effective competition in upstream and downstream markets. Access would not promote a material increase in competition in the markets for the supply of jet fuel at Sydney Airport or into-plane fuelling services at Sydney Airport.

Economical to develop another facility that could provide part of the service

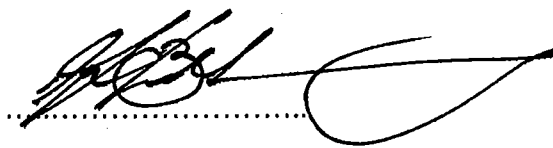
Subsection 44H(2) provides that, in deciding whether to declare a service, I must consider whether it would be economical for anyone to develop another facility that could provide part of the service.

I agree with and have accepted the NCC's conclusion that it is not economical for anyone to develop another facility to provide part of the Sydney JUHI Service.

In relation to the Pipeline, the NCC considers that no material issues arise under this section. I agree with and have accepted the NCC's conclusion.

Access undertaking and ACCC decision under subsection 44PA(3) of the CCA

I note that neither the Pipeline nor the Sydney JUHI Service is subject to an access undertaking under Division 6 of Part IIIA of the CCA. I also note that neither the Pipeline nor the Sydney JUHI Service is specified under paragraph 44PA(2)(a) of the CCA.

A handwritten signature in black ink, appearing to read 'D. Bradbury', is written over a horizontal dotted line. The signature is stylized and extends to the right of the line.

DAVID BRADBURY

Assistant Treasurer

Dated: 10/5/ 2012