



CALTEX
Caltex Australia

**Application by BARA for
declaration of services provided
by jet fuel infrastructure**

**Service No 2: provided by the
Caltex Pipeline Facility**

Submission by Caltex Australia to the
National Competition Council

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1 Executive Summary

1.1 Introduction

- 1 The Board of Airline Representatives of Australia (**BARA**) is an Australian representative industry body for international airlines. BARA has applied under section 44F of Part IIIA of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) for declaration of the service provided by the Caltex¹ pipeline for transportation of jet fuel from interconnection points with off-site jet fuel storage facilities at Port Botany to the Joint User Hydrant Installation (**JUHI**) facility at Sydney Airport (**Sydney JUHI**). BARA provided supplementary submissions on 27 October 2011 (the **BARA Supplementary Submission**) and 4 November 2011 (the **BARA Further Supplementary Submission**) (the BARA initial application dated 26 September 2011 and supplementary submissions are collectively referred to in this submission as the **BARA Application**). In the BARA Further Supplementary Submission, BARA has now sought declaration for a period of 13 years, which would run, at the earliest, from 2012 to 2025.

Key points in this submission:

- Access to the Caltex Jet Fuel Pipeline is not essential to compete for the supply of jet fuel at Sydney Airport. A number of international jet fuel suppliers compete without such access. Other jet fuel suppliers do utilise the Caltex Jet Fuel Pipeline and Caltex has a long history of making third party access available.
- The premise of the BARA Application is that, without declaration, Caltex will not make available additional capacity, thereby precluding competition in the supply of jet fuel. That premise is not grounded in any factual circumstances; Caltex has not refused access where there has been available capacity, and has indicated that it anticipates making further capacity available to third parties on a non-discriminatory basis once it has completed its current expansion project.
- The Caltex Jet Fuel Pipeline is not capable of fulfilling all demand for the transportation of jet fuel to Sydney Airport. Several means of transporting jet fuel to Sydney Airport are currently employed by jet fuel suppliers, including the Caltex Jet Fuel Pipeline, the Shell Jet Fuel Pipeline and the use of road tanker trucks.
- Even if third party access were not available, jet fuel suppliers have a range of cost competitive options to transport jet fuel to Sydney Airport, including alternative pipeline infrastructure and increased use of trucking.
- As demand increases, further transportation options will be required. Capacity via existing means can be increased, but at some point in the future a further pipeline will be required.
- The fact that it would be economic for someone else to develop another facility is demonstrated by the fact that Shell has already done so. Further, another pipeline, or an increase in the capacity of the Shell Jet Fuel Pipeline, will necessarily be developed within the term of the declaration sought, in order to meet growing demand. This pipeline can be developed economically.

¹ As noted below, Caltex Australia Limited and its subsidiary companies are collectively referred to in this submission as Caltex.

- In the context of multiple transport options and competitive supply for jet fuel at Sydney Airport, there is no basis to consider that further access to the Caltex Jet Fuel Pipeline would promote competition by way of lower jet fuel prices or increased reliability of jet fuel supply at Sydney Airport.
- Further, regulated access would come at significant cost to investment incentives, reliability and efficiency.
- The BARA Application is misconceived. The supporting submissions do not provide sufficient basis to satisfy the criteria for declaration under Part IIIA.
- In these circumstances, the NCC should not recommend that the service be declared.

1.2 Overview

- 2 Declaration under Part IIIA of the CCA of a service provided by the facility of a service provider affords a mechanism whereby an access seeker can seek arbitration of access terms and conditions in the event that commercial negotiations are unsuccessful. Hence, a Part IIIA service declaration fundamentally interferes with the service provider's rights to determine its own access terms and conditions. It is well recognised that such an intervention should be an exceptional occurrence.²
- 3 The fundamental premise for such an intervention is that access to the particular service is essential to compete in another market. This consideration is reflected in three principal criteria which must be positively satisfied before a recommendation of, and decision for, declaration can be made. These are:
 - first, access (or increased access) to the service would promote a material increase in competition in at least one market (not being the market for the service);
 - secondly, it would be uneconomical for anyone to develop another facility to provide the service; and
 - thirdly, the costs of regulated access would not exceed any benefits, such that access would not be contrary to the public interest.
- 4 In order to sustain its application, it is necessary for BARA to establish that each of these relevant criteria in Part IIIA are met (and that the facility is nationally significant). In Caltex's view, they are not.
- 5 Caltex owns and operates a 17km jet fuel pipeline running from its refinery at Kurnell (the **Kurnell Refinery**) to the Sydney JUHI (the **Caltex Jet Fuel Pipeline**). The Caltex Jet Fuel Pipeline is one of three existing pipelines that connect to, or pass through, Sydney Airport. The Shell Company of Australia Limited (**Shell**) has a pipeline that transports jet fuel to the Sydney JUHI from its refinery at Clyde (the **Shell Jet Fuel Pipeline**). A further fuel pipeline (that can transport jet fuel) is the Sydney Metropolitan Pipeline (**SMP**), which is owned and operated by Sydney Metropolitan Pipeline Pty Ltd, an incorporated joint venture of ExxonMobil Corporation (**Mobil**) and Caltex. This pipeline enables the transport of a range of fuels, from Port Botany to the Silverwater Terminal and on to

² *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58, [87].

Newcastle. While there is no pipeline that ties in from the SMP to the Sydney JUHI and it is not used to transport jet fuel to the Sydney JUHI, the SMP runs alongside the Caltex Jet Fuel Pipeline, and past the Sydney JUHI.

- 6 The Caltex Jet Fuel Pipeline (part of which is the subject of the BARA Application) was originally built to efficiently transport jet fuel produced at Caltex's refinery at Kurnell (the **Kurnell Refinery**) to the Sydney JUHI. It was therefore developed by Caltex for the purpose of meeting its transport requirements.
- 7 However, consistent with competitive supply of jet fuel at Sydney Airport, Caltex provides access on commercial terms to third parties where there is additional capacity on the Caltex Jet Fuel Pipeline. In fact, Caltex has provided access to the Caltex Jet Fuel Pipeline for existing users over a long period of time. BP and Mobil were long standing users of the pipeline originally by way of a tie in from their own facilities at Port Botany (the **Mobil/BP Terminal**).³ Users of the storage and handling facilities at Port Botany owned by Vopak (the **Vopak Terminal**), have been able to pump jet fuel through the Caltex Jet Fuel Pipeline since 2005. Caltex has provided both jet fuel suppliers and customers (Qantas) with access to its pipeline on commercial terms.
- 8 There is no basis to consider that further access to the Caltex Jet Fuel Pipeline would promote competition by way of lower jet fuel prices or increased reliability of jet fuel supply at Sydney Airport. There is no reason to think, or evidence to support, that entrants would be capable of sourcing fuel from alternative sources to the existing producers and importers, such as to promote reliability in supply. Indeed, for the reasons given in section 8, regulated access will increase scheduling and coordination difficulties, increase inefficiencies caused by switching of pumps, and discourage investment in alternative transportation assets, all of which will undermine supply reliability at Sydney Airport rather than promote it.
- 9 In any case, increased access for third parties is currently constrained by a lack of spare capacity. Caltex has undertaken certain capital works to upgrade the capacity of the Caltex Jet Fuel Pipeline and has announced, and partially commenced, further expansion projects. Following the completion of the upgrades (and associated testing and commissioning), Caltex intends to provide additional capacity to third parties by tender. Any tender would be assessed on the basis of commercial terms such as price, quantity and duration, and on a non-discriminatory basis as to the identity of the access seeker(s).

1.3 Jet fuel supply at Sydney Airport

- 10 As noted in sections 2.2 and 4.2 below, most airlines purchase jet fuel through international tenders (many covering multiple airports around the world). The supply of jet fuel to BARA members at Sydney Airport is therefore part of an international market for the supply of jet fuel to international airlines, involving a range of international jet fuel producers, traders and marketers that compete to supply jet fuel at various locations around the world. In each case, the final supply of jet fuel "into-plane" involves various stages of a supply chain. These include product sourcing (either local or imported), shipping, wharfage, storage and terminalling, transportation to an on-airport JUHI and then into-plane fuelling.
- 11 Current suppliers of jet fuel to international airlines operating out of Sydney Airport include: BP Australia (**BP**), Shell, Q8 Aviation, World Fuel Services, Universal Aviation, United Aviation Services and Caltex. Of these suppliers, Q8 Aviation, World Fuel

³ While Caltex understands that the Mobil/BP Terminal is not currently used to store jet fuel, the terminal was used to store jet fuel in the past and such storage could recommence at any time.

Services, Universal Aviation and United Aviation do not currently have access to the Caltex Jet Fuel Pipeline.

- 12 While Caltex has not refused access to the Caltex Jet Fuel Pipeline, in the theoretical event that it did, competitive fuel supply to the Sydney JUHI would continue given the range of options for jet fuel suppliers, airlines or third parties to transport jet fuel to Sydney Airport, including via:⁴
- the Shell Jet Fuel Pipeline, which would continue to serve the Sydney JUHI and, from 2013 with the decommissioning of the Clyde refinery, will be available for transportation of imported jet fuel on an ongoing basis from the Gore Bay bulk liquids berth, with the option to expand capacity at relatively low cost;
 - a short connecting pipeline which could be built, at relatively low cost, from the Terminals Pty Ltd (**TPL**) Terminal, the Mobil/BP Terminal (less than 10 km long) or the Vopak Terminal (less than 10 km long) over public land to the Sydney JUHI, having particular regard to the price of jet fuel; and
 - trucking, which remains a low cost, competitive and efficient transport option. Jet fuel is currently competitively transported to the Sydney JUHI by truck (BP), as is the case at other Australian airports.
- 13 These transport alternatives are cost-competitive with the commercial terms of supply for the Caltex Jet Fuel Pipeline, which in turn are consistent with the competitive supply of jet fuel into Sydney Airport.
- 14 Given these conditions, assuming that the Caltex Jet Fuel Pipeline has spare capacity available, Caltex has no ability or incentive, either through withholding access or setting a high price of access to the Caltex Jet Fuel Pipeline, to impede third parties competing in the supply of jet fuel at Sydney Airport.
- 1.4 The BARA Application**
- 15 The BARA Application lacks considered analysis of the jet fuel supply conditions at Sydney Airport. The supporting submissions do not provide sufficient basis to satisfy the criteria for declaration under Part IIIA and are generally misconceived in several respects.
- 16 BARA has not sought access to the Caltex Jet Fuel Pipeline and nor has Caltex refused it. Additionally, the BARA Application is not grounded in any specific proposal to supply jet fuel at Sydney Airport. Consequently, the application lacks practical consideration of a number of relevant facts. For example, notwithstanding that BARA is an international airline representative organisation, the application wholly fails to reflect the nature of the international supply of jet fuel by way of competitive tenders. Further, the BARA Application misconstrues the nature of competition in jet fuel supply at Sydney Airport as largely comprising domestic competition between local Australian refiner/marketers.
- 17 To support a contention that supply of jet fuel to Sydney Airport is currently uncompetitive, the BARA Application contains a presentation of the price performance at Sydney Airport, compared to other airports internationally. This is entirely misleading, as those airports are not comparable to Sydney Airport given their different characteristics and input costs of supply. If the analysis shows anything, it is that the pricing of jet fuel at

⁴ There is also the possibility of connecting the SMP (which itself crosses Sydney Airport adjacent to the JUHI) to divert jet fuel into the Shell Jet Fuel Pipeline, as noted by the Sydney Jet Fuel Infrastructure Working Group in its 30 April 2010 report "Infrastructure for the Provision of Jet Fuel at Sydney Airport for the Period to 2029" (**SJFIWG Report**). However, Caltex considers the other options identified above are more likely transport alternatives, given the existing capacity and use of the SMP.

Sydney Airport is consistent with the pricing at many large overseas airports despite their having much lower overall transport costs and larger volumes.

- 18 The BARA Application lacks any practical consideration of the impact of transport costs over the Caltex Jet Fuel Pipeline, compared to available alternatives and relative to the overall price of jet fuel. Transport costs over the Caltex Jet Fuel Pipeline compare favourably with transport costs at other airports and those transport costs have proven to be no impediment to competition in the jet fuel market.
- 19 The BARA Application contains a number of other contentions which are incorrect or misconceived. BARA is not an access seeker and has no commercial dealings with Caltex. Its comments regarding the way in which Caltex conducts its business are therefore uninformed, inappropriate and prejudicial. Such comments have the potential to affect adversely Caltex's reputation. In particular:
 - BARA suggests that Caltex has refused third party requests for access to the Caltex Jet Fuel Pipeline. In fact, Caltex already offers third party access, and intends to make further access available following a planned upgrade; and
 - BARA states that the current arrangements result in poor reliability of jet fuel supply at Sydney Airport, but this claim is entirely unsubstantiated. In the past 10 years, there have only been two instances in which a pipeline-related supply issue has required demand management. Neither of those occasions resulted from lack of access to the Caltex Jet Fuel Pipeline, and even with demand management in place, on neither occasion was a single flight cancelled.
- 20 The BARA Application relies entirely on the Sydney Jet Fuel Infrastructure Working Group (**SJFIWG**) Report (**SJFIWG Report**) to assess both demand and supply conditions for jet fuel to Sydney Airport, but the report's analysis and conclusions are contrary to BARA's primary position.
- 21 The BARA Application states that there is no other facility available which could provide the same service as the service to which access is sought.⁵ The SJFIWG Report does not support that position. The SJFIWG Report identifies a number of options to meet projected jet fuel demand at Sydney Airport. Further, since the publication of the SJFIWG Report, Shell has announced the closure of its Clyde refinery (in 2013), thereby making the option of increased utilisation of the Shell Jet Fuel Pipeline more attractive.
- 22 In order to dismiss an alternative pipeline, BARA has contended that it would take five years to build. There is no reason to assume that such a potentially important source of jet fuel supply to Sydney Airport would take such a long period to build. The land over which it would run is public land. There are streamlined significant infrastructure approval processes. Other pipelines, including the 1.9km pipeline connecting the Vopak Terminal with the Caltex Jet Fuel Pipeline and the pipeline which connects the Vopak Terminal with the SMP, were built within much shorter periods.
- 23 Nonetheless, within a five year planning and construction period a number of viable transport options remain, including increased trucking, greater utilisation of the Shell Jet Fuel Pipeline and Vopak upgrading its pumping capacity. Beyond five years, it is accepted that the Caltex Jet Fuel Pipeline may be at its maximum capacity and, together with other transport options, will be insufficient to meet demand. This demonstrates that another facility is economic.

⁵ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, s10.1.

- 24 Overall, the BARA Application does not provide sufficient basis for the National Competition Council (**NCC**) to be satisfied that the relevant statutory criteria are met. The supporting submissions:
- contain no probative material from which to conclude that access (or increased access) would promote a material increase in competition in any relevant market;
 - provide no basis on which to conclude that it would be uneconomical to develop another facility to provide the services provided by the Caltex Jet Fuel Pipeline;
 - conflate the national significance of Sydney Airport with the question of the significance of approximately 10 km of 200 mm pipeline running from Port Botany to Sydney Airport; and
 - do not address the adverse public interest implications, relative to investment incentives for further capacity, of subjecting one pipeline asset to the risk of Part IIIA arbitration. This is all the more apparent in the context of both multiple jet fuel transport and investment options for increasing throughput on the Caltex Jet Fuel Pipeline.

1.5 The Part IIIA declaration criteria

(a) The relevant service

- 25 Caltex submits that the required statutory criteria cannot be satisfied in respect of the relevant service (or the service as defined by BARA).
- 26 Definition of the relevant service is not simply an academic exercise in which BARA is permitted to narrowly construct a service description by reference to the particular characteristics of the service provider's facility, so as to avoid proper scrutiny of each of the relevant statutory criteria. Service definition must properly reflect an appropriate consideration of the functional steps in the supply chain that relate to competition in the relevant downstream market. At Sydney Airport, supply of jet fuel is by way of local production or imports.
- 27 While BARA has sought to define the service by reference to Port Botany storage facilities, relevant storage facilities capable of receiving imports for the supply of jet fuel to the Sydney JUHI are not solely located at Port Botany. In particular, the Shell Clyde refinery can receive imports from the Gore Bay berth. The relevant service should not be narrowly specified by reference to particular storage facilities, where there are alternative storage options for the receipt of imports for supply to the Sydney JUHI.
- 28 Accordingly, Caltex submits that the relevant service is the transportation of jet fuel from import available storage facilities to the Sydney JUHI.

(b) Criterion (b)

- 29 As to criterion (b), in the event that Caltex was not to provide access to the Caltex Jet Fuel Pipeline, it would be economical to develop another facility to provide the service as appropriately defined, or as defined by BARA.
- 30 The Caltex Jet Fuel Pipeline is not capable at this time, or relevantly over time, of meeting all the requirements for jet fuel supply to Sydney Airport. It is an inherent feature of the jet fuel supply chain that alternative facilities must be (and have been) developed. This clearly recognised fact is the single most distinguishing or unique feature of the BARA Application. That is, the application relates to the services provided by means of a facility which itself is currently capacity constrained and is not able to meet the overall demand

for jet fuel at Sydney Airport, and where demand is also being met by means of an alternative and significant facility, as well as trucking.

- 31 The recognition of this fact fundamentally undermines BARA's case for declaration. The Caltex Jet Fuel Pipeline cannot meet the total demand for jet fuel at Sydney Airport and will not be able to in the future, even following Caltex's current proposed capacity upgrade. Declaration of such a facility would be unprecedented.
- 32 The clearest evidence that it is economical to develop another facility to provide the service is the fact there is already such a facility – the Shell Jet Fuel Pipeline. Furthermore, from mid-2013 this facility will be available to transport imported jet fuel on an ongoing basis.
- 33 Under BARA's service definition, the duplication of the Caltex Jet Fuel Pipeline by the Shell Jet Fuel Pipeline is not relevant. This points to the artificiality of the BARA definition. In any event, notwithstanding that Caltex has not refused access to the Caltex Jet Fuel Pipeline on commercial terms and has no incentive to do so, in the counterfactual scenario were Caltex to refuse such access to third parties, it would be economic to develop another facility to transport jet fuel. For example, this could be done by way of:⁶
- a connecting pipeline from the TPL Terminal, the Mobil/BP Terminal or the Vopak Terminal to the Sydney JUHI; and/or
 - investment to expand truck receipt facilities at the Sydney JUHI (noting that trucking already occurs).
- 34 There is no reason to consider that the cost of any of these duplication options would not be economic were other parties unable to gain access to the Caltex Jet Fuel Pipeline. This is particularly the case given the relevant recovery of the capital costs is not to be assessed on the basis of recovery in year one but, rather, over the life of the asset (being 40-50 years for a pipeline). On any measure of economical duplication, the Caltex Jet Fuel Pipeline has been, and could be, further duplicated in an economic fashion.
- 35 Even putting to one side options other than the construction of a new pipeline, the BARA Application fails to demonstrate that it would not be economic to build an additional pipeline. The assumptions underpinning BARA's analysis are flawed, including an assumption of pricing on short run marginal cost. Moreover, the long run marginal cost of expanding capacity would appear to be similar for a new pipeline and Caltex's upgrade, providing a strong indication that the Caltex Jet Fuel Pipeline would be economic to duplicate.
- 36 Caltex has already upgraded the capacity of the Caltex Jet Fuel Pipeline and is currently undertaking an additional upgrade, even though the upgrades will result in excess capacity for a period. Caltex would not be making such decisions if BARA's claims were correct, namely that competition in the presence of excess capacity implies pricing at short run marginal cost.
- 37 BARA represents 30 airlines, which require substantial volumes of jet fuel supplied at Sydney Airport. On Caltex's estimates, BARA's members acquire approximately 85% of the jet fuel supplied at Sydney Airport. Of that, Caltex estimates that Qantas acquires 40% and the other airlines 45% collectively. BARA already has collective bargaining authorisation in relation to the provision and pricing of international aeronautical services

⁶ In this notional world, interconnection of the SMP connecting the Vopak and Mobil/BP Terminals with the Shell Jet Fuel Pipeline would also be economic.

and facilities at major airports, including the provision of refuelling infrastructure. BARA would be in a position to seek a similar authorisation in order to negotiate collectively in relation to pipeline services, including in order to pool volumes to underpin the construction of a new pipeline. Even without Qantas, the volumes of jet fuel required by BARA's members would underpin such construction.

- 38 In the BARA Supplementary Submission, BARA concluded that a new pipeline would not be economical to develop. BARA reasoned that when firms are not capacity constrained, they will have an incentive to continue to expand the use of their facility (by reducing prices and increasing the quantity sold) provided the price is at least equal to the marginal cost of provision. Accordingly, if a "second [sic third]" pipeline was built, there would be excess capacity. This would in turn lead to competition that would reduce prices for jet fuel transport services towards marginal cost, making it difficult to recover the capital cost of the infrastructure.
- 39 In the BARA Further Supplementary Submission, BARA acknowledged that a second pipeline (the Shell Jet Fuel Pipeline) already exists. However, BARA concludes that even if Shell increases the utilisation of the Shell Jet Fuel Pipeline, Shell would not have the incentive to compete aggressively. BARA also concludes that Caltex would have the incentive to reduce third party access to the Caltex Jet Fuel Pipeline, notwithstanding the ability of jet fuel suppliers to use other options to transport jet fuel to Sydney Airport.
- 40 BARA therefore claims, on the one hand, that the market for jet fuel supply is uncompetitive because of the incentives of Caltex and Shell to withhold supply and not compete aggressively and, on the other hand, the market is not uncompetitive enough to warrant entry by other parties. Those claims are directly inconsistent with one another, and neither is substantiated. The facts do not support either contention. Rather, the logical explanation for why other parties have not invested in pipeline infrastructure is because they have access to a competitively priced pipeline to meet their demands, given that Caltex accommodates third party access.

(c) Criterion (a)

- 41 Compared to alternative transport options, access or increased access to the Caltex Jet Fuel Pipeline would not promote a material increase in competition in the supply of jet fuel. Access or increased access is unlikely to give any material cost advantage which would materially increase competition in the supply of jet fuel at Sydney Airport. This is particularly the case when it is considered that competition for the supply of jet fuel takes place by way of multi-locational tenders, in which a range of international jet fuel suppliers participate.
- 42 The costs of access to a new pipeline from the Vopak Terminal, the TPL Terminal or the Mobil/BP Terminal would be competitive with the access charges on the Caltex Jet Fuel Pipeline. If Shell were to upgrade its pipeline, then its marginal upgrade costs are likely to be highly competitive with the cost of transport through the Caltex Jet Fuel Pipeline. Assuming Shell did not upgrade its pipeline (as the original BARA Application does), a new pipeline would have available even greater volumes. Trucking is also a competitive option and has potentially lower costs for volumes consistent with meeting substantial airline requirements.
- 43 To suggest that at best marginal differences in transport costs between the Caltex Jet Fuel Pipeline and the alternatives would have any material bearing on competition in such tenders is simply not credible. The presence of alternatives at costs which are consistent with existing transport charges is such that withholding access has no prospect to undermine the competitiveness of jet fuel supplies using different transport options.

44 BARA also alleges that market power is evident in the transport chain between the Vopak Terminal and the Sydney JUHI. If that contention were correct and access to two stages of that transport chain (the Caltex Jet Fuel Pipeline and the Sydney JUHI) were regulated, there is a risk that any market power would be shifted to the operators of the Vopak Terminal.

(d) **Criterion (c)**

45 The BARA Application wrongly conflates the significance of Sydney Airport with the significance of the pipeline facility. The Caltex Jet Fuel Pipeline is one of several pipelines in the vicinity of Sydney Airport, and the relevant part of the pipeline is approximately 10km long and 200mm wide. It cannot be said to be of national significance.

(e) **Criterion (f)**

46 The BARA Application fails to address the adverse public interest implications of subjecting one pipeline asset to the risk of Part IIIA arbitration in relation to investment incentives for further capacity including, relevantly, in the context of multiple jet fuel transport options and investment options for increasing throughput on the Caltex Jet Fuel Pipeline.

47 There is no presumption that access (or increased access) would not be contrary to the public interest. As with each criterion, criterion (f) requires a careful consideration of the factual with access compared to a counterfactual without access and, in its particular terms, whether in that case access would be contrary to the public interest. The analysis involves, at a minimum, a consideration of whether the costs of access outweigh the benefits.⁷ No cost benefit analysis has been undertaken. There are real and material adverse consequences of regulated access, with no evident off-setting benefit given the absence of any likely material increase in competition.

48 The lack of any analysis of clearly identifiable costs and assessment against identifiable benefits in the BARA Application provides no basis to satisfy the requirement that access is not contrary to the public interest.

1.6 Conclusion

49 There is no case for declaration of services provided by the Caltex Jet Fuel Pipeline. It is one of several options for the supply of jet fuel to Sydney Airport, operating in a competitive market. If access were to be denied, which it has not been, there is a sound business case for the construction of an additional pipeline, which will be required in any case given that the Caltex Jet Fuel Pipeline is insufficient to fulfil growing demand into the future.

⁷ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1161] (**Pilbara Tribunal Decision**).

2 Jet Fuel Supply

2.1 Background

- 50 Caltex Australia Limited (**CAL**) is an Australian-based refiner-marketer of transport fuels, including petrol, diesel and jet fuel, and is listed on the Australian Securities Exchange. CAL and its subsidiary companies (collectively referred to in this submission as **Caltex**) employ over 3,500 people across Australia.
- 51 Caltex owns and operates the Kurnell Refinery in Sydney and a similar refinery at Lytton in Brisbane (the **Lytton Refinery**). The Kurnell Refinery is located on the Kurnell Peninsula, within the Sutherland Shire, approximately 30 km south of the Sydney CBD. The Lytton Refinery is located approximately 25 km north east of Brisbane in Queensland. Caltex's refineries at Kurnell and Lytton are predominantly used to produce petrol (which accounts for approximately 50% of refinery output), diesel (approximately 30% of output), jet fuel (approximately 15% of output) and smaller amounts of fuel oil, bitumen, sulphur, LPG and other gases.
- 52 Caltex currently owns and operates a fuel storage terminal at Banksmeadow (the **Caltex Banksmeadow Terminal**), and a fuel storage terminal in Newcastle (the **Caltex Newcastle Terminal**). Caltex is also a joint owner (through its shareholding in SMP) of a terminal at Silverwater in western Sydney (**Silverwater Terminal**). That terminal is operated by Mobil. Further, Caltex has an interest in the Sydney JUHI which is used to store and distribute jet fuel at Sydney Airport.
- 53 Caltex owns and operates the Caltex Jet Fuel Pipeline. The pipeline is 17 km long and is used primarily to transport jet fuel from the Kurnell Refinery, as well as from other fuel storage terminals to Sydney Airport. The Caltex Jet Fuel Pipeline ranges from 150mm nominal bore (**nb**) to 300mm nb in diameter and runs from the Kurnell Refinery, under Botany Bay, to the Caltex Banksmeadow Terminal and then on to the Sydney JUHI.

2.2 The jet fuel industry

- 54 Most airlines purchase jet fuel through international tenders. Most major international airlines, such as Singapore Airlines, Delta Airlines and United Airlines, hold tenders that cover multiple airports around the world. Further information about the tender process is set out in section 4.2 below.
- 55 To participate effectively in international tenders, jet fuel suppliers must operate on a global scale. However, no jet fuel supplier in the world has a supply-chain solution that will enable jet fuel produced in its refineries to be transported to every airport in which it may wish to supply fuel. At airports where the jet fuel supplier does not have the necessary infrastructure to supply fuel produced in its own refinery, it may choose to supply jet fuel it has acquired from a wholesaler or under a "term purchase". For example, Q8 Aviation (a subsidiary of Kuwait Petroleum Corporation) currently supplies jet fuel at more than 60 airports in Europe, Africa, the Middle East, and the Far East.⁸ While Q8 Aviation's parent company – Kuwait Petroleum Corporation – produces large amounts of jet fuel at its refineries in the Middle East, this fuel is not currently supplied into Australia. Instead, Q8 Aviation chooses to purchase jet fuel from Shell (which Caltex presumes is manufactured in Singapore) and supplies it to Qantas.⁹

⁸ Q8 Aviation, *About us* <<http://www.q8aviation.com/Q1/About-us/76/24>>.

⁹ Q8 Aviation, *Our History* <http://www.q8aviation.com/Q1/Our-History/history/76/24> notes the beginning of Q8's Australian marketing in 2007 with a contract with Qantas.

- 56 World Fuel Services, United Aviation Services and Universal Aviation also supply jet fuel in Australia, which they acquire wholesale.
- 57 Further information on the various options for supplying jet fuel and the suppliers currently operating at Sydney Airport is provided in section 2.3 below.

2.3 Jet fuel supply in Australia

- 58 In the year ended 31 December 2010, approximately 6,937 megalitres (ML) of jet fuel was supplied in Australia. [C-I-C] [REDACTED]

[REDACTED] [C-I-C].¹⁰

- 59 The jet fuel used in Australia is sourced from local refineries and imported from off-shore producers. Shell, Caltex, Mobil and BP produce jet fuel at refineries within Australia and also import jet fuel. The other jet fuel suppliers operating in Australia also source jet fuel from both local refineries and overseas. For example, Caltex understands the jet fuel supplied by Q8 Aviation at Sydney Airport is sourced from Singapore.
- 60 All jet fuel supplied via the Sydney JUHI, whether produced domestically or imported, must meet the minimum quality standards set out in the Aviation Fuel Quality Requirements for Jointly Operated Systems (AFQRJOS). To this end, jet fuel is quality tested at various stages of the supply chain. This is generally done in “batches”. When jet fuel is produced at the refinery, it will be “batched” and tested to the full specification requirements of the AFQRJOS (and certified) prior to being released into the pipeline or other distribution system.
- 61 If the jet fuel is produced at a domestic refinery and released from that refinery directly into a dedicated jet fuel pipeline (such as the Caltex Jet Fuel Pipeline or the Shell Jet Fuel Pipeline), recertification is not required. However, at the JUHI or receiving terminal, product will be isolated and retested for key properties before being released into the JUHI hydrant system or loaded into tankers.
- 62 If jet fuel is delivered by ship from a local or overseas refinery, it must undergo recertification before being released into the distribution system. If imported jet fuel is mixed or blended at a refinery with refinery production, the blended product will be subject to the full range of tests to verify its quality.
- 63 Once the jet fuel is delivered to the Sydney JUHI, checks and quality confirmation will be undertaken on a regular basis. This includes checking the fuel for clarity (the absence of visual contaminants) and water content etc.
- 64 The following sections discuss the infrastructure required to supply domestically produced and imported jet fuel.

(a) Ports and import berths

- 65 Imported jet fuel and other petroleum products are transported to Australia in oil tankers. Several port facilities in Australia are capable of receiving oil tankers carrying petroleum products, including the Port Botany, Kurnell, Gore Bay, Newcastle and Port Kembla ports in New South Wales. Ports in other States include Cairns, Townsville, Brisbane, Gladstone and Mackay ports in Queensland, the Geelong and Newport ports in Victoria, the Kwinana Port in Western Australia and the Adelaide port in South Australia.

¹⁰ Department of Resources, Energy and Tourism, *Fuel Report*, 2011.

66 From the oil tanker, the fuel is discharged via the bulk liquids berth and transferred to a nearby storage terminal. In the Sydney metropolitan area, there are currently five berths that receive imports of jet fuel and a sixth berth is under construction:

- The Sydney Ports Corporation (**Sydney Ports**) owns and operates a bulk liquids berth at the south-western end of Brotherson Dock at Port Botany (the **Sydney Ports Berth**).¹¹ The berth is used to receive imports of petroleum products (eg petrol, diesel and jet fuel), chemicals (eg organic chemicals and solvents) and other hydrocarbons (eg LPG).¹² The berth can accommodate vessels with a "length overall" (**LOA**) of 230 m and a dead-weight tonnage of 90,000 tonnes.¹³ Although berth utilisation varies, an average utilisation rate of 65% is considered to be the berth's practical and economic limit (ie in order to minimise demurrage costs).¹⁴

In March 2008, Sydney Ports received planning approval to construct a second bulk liquids berth adjacent to the existing berth at Port Botany. Construction on the second berth began in early 2011 and is expected to be completed by mid-2013. The SJFIWG Report indicated that there is also space at Port Botany for a third berth.¹⁵

- There are also two berths capable of receiving imports of jet fuel at Gore Bay. These berths, which are owned and managed by Shell, are predominantly used to import crude oil for transfer to Shell's refinery at Clyde through a Shell-owned pipeline. However, the berths are also used to discharge finished products, including jet fuel.¹⁶
- Jet fuel is also imported via Kurnell, south of Sydney. Caltex currently operates three bulk liquids berths at its Kurnell Refinery, two of which handle finished products, including jet fuel.

(b) Storage terminals

67 Domestically produced and imported jet fuel is stored in tanks at terminals or refineries, before being transported to the airport.

68 As at December 2008, there were 64 fuel storage terminals in Australia, with a combined jet fuel storage capacity of 369 ML and annual throughput capacity of 7,003 ML.¹⁷ Thirty-four of these terminals were solely owned by refinery companies (ie Shell, Mobil, BP or

¹¹ Sinclair Knight Merz, *Environmental Assessment – Bulk Liquids Berth No. 2 – Port Botany*, 9 November 2007, 8.

¹² Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 23.

¹³ Sinclair Knight Merz, *Environmental Assessment – Bulk Liquids Berth No. 2 – Port Botany*, 9 November 2007, 10.

¹⁴ Sinclair Knight Merz, *Environmental Assessment – Bulk Liquids Berth No. 2 – Port Botany*, 9 November 2007, 10. See also Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 24.

¹⁵ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 37.

¹⁶ For further information on the berths available at Gore Bay, see Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 23. Currently, there is a cost associated with using the Gore Bay facility to import finished product. As the pipeline between Gore Bay and the Clyde Refinery is used to transport crude, it must be flushed before being able to be used by a "white fuel" (ie a refined, finished product). This produces a waste product, known as the "interface". The interface is re-processed to remove the intermingled crude and there is a cost associated with that process. However, as noted below (see paragraph 121), Shell plans to convert the Clyde refinery into an import terminal. This will free up capacity to import finished products (eg jet fuel) via Gore Bay.

¹⁷ ACIL Tasman, *Petroleum import infrastructure in Australia – Main Report*, August 2009, 22 – 25.

Caltex), 20 were solely owned by independent importers and the remaining 10 were joint ventures.¹⁸

- 69 In December 2008, there were 11 fuel storage terminals in New South Wales, located in the greater Sydney region, Newcastle and Port Kembla.¹⁹ Five of these terminals were subject to hosting arrangements under which the terminal owner allowed third party fuel suppliers (referred to as “guests”) to access and use a specified amount of space at the terminal to store its fuel.²⁰
- 70 There are fuel storage terminals at Shell’s refinery in Clyde and Caltex’s Kurnell Refinery. There are also three fuel storage terminals in the area surrounding Port Botany. The Vopak Terminal is comprised of two storage and handling facilities for liquid chemicals and petroleum products adjacent to Port Botany. Both sites are currently configured to receive and store petroleum products and have a combined storage capacity (for all liquid types) of approximately 380 ML.²¹ The Vopak Terminal is connected to Sydney Ports Berth via a number of underground pipelines.
- 71 The Vopak Terminal is currently used to store (amongst other products) jet fuel imported through the Sydney Ports Berth. From the Vopak Terminal, the jet fuel can be transported to Sydney Airport via the Caltex Jet Fuel Pipeline as well as by trucks.²²
- 72 The Mobil/BP Terminal is owned jointly by Mobil and BP and operated by Mobil.²³ The Mobil/BP Terminal has a total jet fuel storage capacity of approximately 18 ML and is connected to Sydney Ports Berth via a direct pipeline.²⁴ Caltex also understands that the Mobil/BP Terminal is not currently being used to store petroleum products. BP is using the Vopak Terminal to store jet fuel. While BARA states that Mobil has since withdrawn from the market,²⁵ Caltex notes that Mobil remains an active participant of both the Operating Committee of the Sydney JUHI and the Board of Airport Fuel Services Pty Limited (**AFS**) (an into-plane operator), and continues to contribute to the fixed costs of operating those joint ventures. **[C-I-C]** [REDACTED] **[C-I-C]**.
- 73 TPL also owns a fuel storage terminal at Port Botany (the **TPL Terminal**).²⁶ TPL describes itself as “Australia’s largest independent bulk liquid terminalling company”²⁷ and operates bulk liquid and gas storage facilities at, or nearby, the Sydney, Melbourne, Geelong and Adelaide Ports. The TPL Terminal at Port Botany is comprised of 65 tanks with a total storage capacity of 52,490 m³.²⁸ The terminal is connected to the Sydney Ports Berth via an underground pipeline and is used to store a range of products, including flammable and combustible liquids, fats and oils.

¹⁸ ACIL Tasman, *Petroleum import infrastructure in Australia – Main Report*, August 2009, 22 - 23.

¹⁹ ACIL Tasman, *Petroleum import infrastructure in Australia – Main Report*, August 2009, 22 – 25.

²⁰ ACIL Tasman, *Petroleum import infrastructure in Australia – Main Report*, August 2009, 22 - 23.

²¹ Vopak, *Vopak Terminal Sydney - Site A* <<http://www.vopak.com/australia/vopak-terminal-sydney-site-a-cbm.html>> and *Vopak Terminal Sydney - Site B* <<http://www.vopak.com/australia/vopak-terminal-sydney-site-b-cbm.html>>.

²² Commonly referred to as road tankers.

²³ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 24.

²⁴ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 24.

²⁵ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 1.

²⁶ Terminals Pty Limited, *Terminal Locations* <<http://www.terminalspl.com.au/locations/>>.

²⁷ Terminals Pty Limited, *Home Page* <<http://www.terminalspl.com.au/>>.

²⁸ Terminals Pty Limited, *Terminal Locations, Sydney* <<http://www.terminalspl.com.au/locations/sydney/>>.

- 74 The TPL Terminal is not currently used to store jet fuel. However, it may be possible to construct additional storage tanks at the site which could receive transfers of imported jet fuel from the Sydney Ports Berth.
- 75 The Caltex Banksmeadow Terminal is also used to store petroleum products, including jet fuel. The Caltex Banksmeadow Terminal receives jet fuel from the Kurnell Refinery via the Caltex Jet Fuel Pipeline. From the terminal, jet fuel is transported to Canberra, Richmond and other airports via trucks. The Caltex Banksmeadow Terminal currently has capacity to store approximately 560 kilolitres (**KL**) of jet fuel.
- 76 There are also fuel storage facilities at the Silverwater Terminal and in Parramatta (owned by Shell) (the **Parramatta Terminal**). In addition, Shell, Caltex and BP each own and operate fuel storage terminals in Newcastle. The Caltex Newcastle Terminal and, Caltex understands, the Parramatta Terminal, are currently, or have been in the past, used to store jet fuel.

(c) **Transport infrastructure**

- 77 Jet fuel is transported from off-airport storage facilities into an on-airport JUHI or other supply infrastructure via truck or pipeline.
- 78 There are currently two pipelines in Sydney which directly connect off-site fuel storage terminals with the Sydney JUHI. Shell owns and operates the Shell Jet Fuel Pipeline which runs from Shell's refinery at Clyde to the Sydney JUHI. The Shell Jet Fuel Pipeline is approximately 200mm nb in diameter and currently has capacity to transfer approximately 3.9 ML of jet fuel to the Sydney JUHI per day.²⁹
- 79 The Caltex Jet Fuel Pipeline also connects into the Sydney JUHI. As discussed in section 2.1 above, the Caltex Jet Fuel Pipeline is currently used to transport jet fuel from the Kurnell Refinery to the Sydney JUHI. The Vopak Terminal at Port Botany and the Mobil/BP Terminal both tie in to the Caltex Jet Fuel Pipeline by way of separate pipelines.
- 80 Several other pipelines also connect the various infrastructure assets. For example, the SMP (owned by Sydney Metropolitan Pipeline Pty Ltd) runs from the Caltex Banksmeadow Terminal alongside the Caltex Jet Fuel Pipeline, under Sydney Airport, to the Silverwater Terminal. There is also a pipeline (owned by Mobil) connecting the Vopak Terminal to the SMP at Banksmeadow.
- 81 Another pipeline (the **Silverwater-Newcastle Pipeline**), owned by Caltex, starts at the Silverwater Terminal and runs to Newcastle via a pumping station at Plumpton. Shell owns a pipeline that connects to the Silverwater-Newcastle Pipeline and SMP from Shell's Clyde refinery. These pipelines are currently used to transport a range of petroleum products, including unleaded petrol and diesel to Newcastle from Kurnell and Clyde refineries.
- 82 Jet fuel can also be transported using trucks. Caltex currently uses trucks to transport jet fuel from its fuel storage terminal in Newcastle to Williamstown and Canberra Airports, as well as from Port Melbourne to Melbourne Airport. Caltex understands that other suppliers also regularly use trucks to transport jet fuel to on-airport storage facilities. For example, BP currently transports jet fuel from the Vopak Terminal at Port Botany to the Sydney JUHI using trucks.

²⁹ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 24.

2.4 On-airport storage and supply infrastructure

(a) JUHI facility

83 At most major Australian airports, including all State Capital city airports, jet fuel is supplied through a JUHI. The JUHI are made up of fuel storage terminals and underground reticulation (hydrant) systems. Jet fuel is pumped from the JUHI storage facility, via the underground reticulation system, to apron hydrant outlets located adjacent to aircraft gates. From there, the into-plane movement of fuel takes place via specialist hydrant refuelling vehicles. Jet fuel can also be distributed to aircraft via tanker refuellers.

84 The Sydney JUHI is owned by an unincorporated joint venture (comprised of Shell, BP, Mobil, Caltex and Qantas) and operated by Shell. The Sydney JUHI has three 3 ML tanks and two 10ML tanks (ie five tanks in total). This gives a total of 30 ML nominal storage capacity, with approximately 29 ML working storage.³⁰ The tanks are connected to an under tarmac pressurised reticulation (pipeline) system that has connection pits located at the aircraft parking bays to facilitate refuelling. Ten hydrant pumps, each with a maximum pumping capacity of 3800 L per minute, facilitate the movement of fuel out of the storage tanks and through the under tarmac hydrant system to the connection pits.³¹

85 The lease for the Sydney JUHI in Sydney Airport is due to expire in 2024.³²

(b) Into-plane services

86 At major airports like Sydney Airport that have a hydrant system, most into-plane fuelling is done off the hydrant system utilising specialised hydrant servicing vehicles to connect to the hydrant and on to the aircraft. The hydrant is pressurised to allow the product to flow onto the aircraft. If there is no hydrant available, refuelling is able to be performed by tanker-fuelling, where fuel is pumped from a tanker truck directly into the aircraft.

87 There are currently three into-plane operators at Sydney Airport:

- AFS, an incorporated joint-venture between Caltex, BP, Mobil and Qantas;
- ZIP Airport Services Pty Limited (a Shell subsidiary) (**ZIP**); and
- AirRefuel Pty Limited (a BP subsidiary) (**AirRefuel**).

88 All three into-plane operators operate tanker trucks for re-fuelling aircraft when they are away from a hydrant. As far as Caltex is aware, only AFS and ZIP operate hydrant carts for re-fuelling aircraft from the JUHI. [C-I-C to AFS] [REDACTED]
[REDACTED] [C-I-C to AFS] Caltex is not aware of the number of vehicles operated by ZIP or AirRefuel.

89 The AFS joint-venture was formed by Caltex and Ampol in 1990. Qantas, Mobil and BP became members of the joint venture in 1992. It is currently managed by an independent Board of Directors, to which a representative of each of the joint venture participants is appointed. [C-I-C to AFS] [REDACTED]
[REDACTED]
[REDACTED]

³⁰ Working storage is, in effect, above the 2 ML of tank heels (across the five JUHI tanks) and below the safe fill level.

³¹ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 26.

³² Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 40.

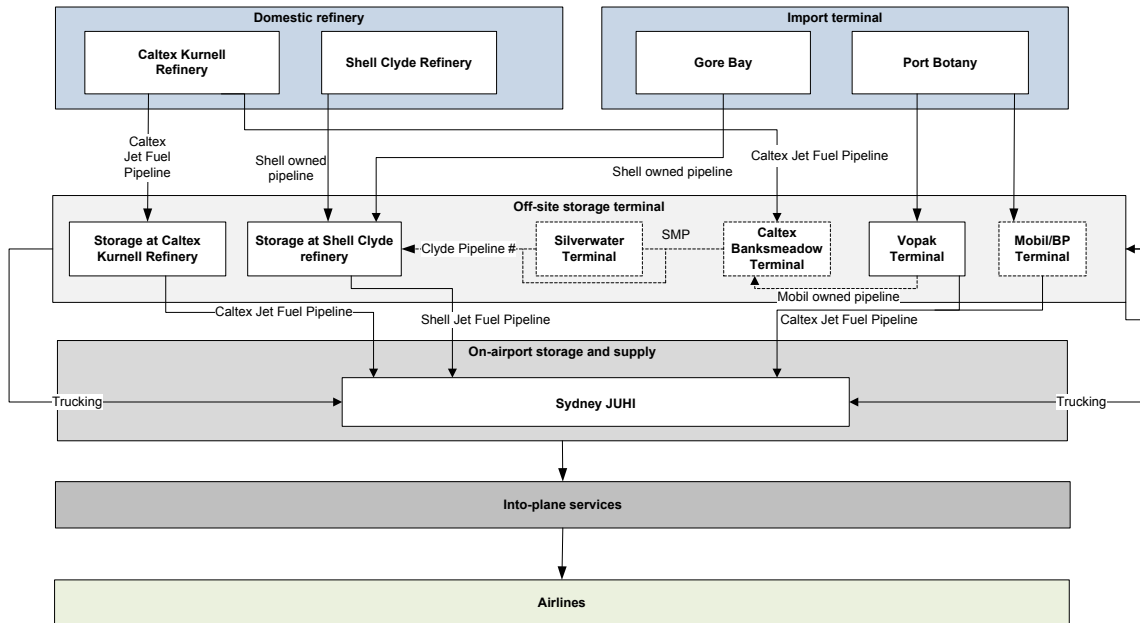
[REDACTED] [C-I-C to AFS]

90 [C-I-C to AFS] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [C-I-C to AFS]

2.5 Jet fuel supply at Sydney Airport

- 91 The SJFIWG Report estimates that annual demand for jet fuel at Sydney Airport was approximately 2,450 ML in 2009.³³ This is equivalent to an average daily demand of 6.7 ML.³⁴
- 92 The demand for jet fuel at Sydney Airport is currently met using a combination of domestically produced and imported jet fuel. Figure 1 below shows the various channels through which jet fuel can be supplied to Sydney Airport.

Figure 1: Transport of jet fuel to Sydney Airport



Clyde Pipeline ties in to the Silverwater-Newcastle Pipeline that goes through the Silverwater Terminal and becomes SMP. Jet fuel is not currently stored at Silverwater Terminal.

³³ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 30.

³⁴ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 31.

93 As indicated in Figure 1 above, the key methods by which jet fuel is transported to Sydney Airport are:

- jet fuel produced at Shell's refinery in Clyde is transported to the Sydney JUHI via the Shell Jet Fuel Pipeline;
- jet fuel produced at Caltex's Kurnell Refinery is transferred to the Sydney JUHI via the Caltex Jet Fuel Pipeline;
- jet fuel imported through the Sydney Ports Berth at Port Botany is transported to the Vopak Terminal for storage. From the Vopak Terminal jet fuel is transferred directly to the Sydney JUHI using the Caltex Jet Fuel Pipeline. Caltex understands that this arrangement is currently used by both Shell and BP. Q8 Aviation also purchases jet fuel for delivery into the Vopak Terminal, which it supplies to Qantas.

Jet fuel imported through Port Botany can also be (and has been in the past) stored in the Mobil/BP Terminal before being transferred to Sydney Airport. As noted above, the Mobil/BP Terminal is connected to the Sydney Ports Berth via an underground pipeline and to the Sydney JUHI via the Caltex Jet Fuel Pipeline;

- jet fuel imported through the Sydney Ports Berth at Port Botany is trucked to Sydney Airport. Infrastructure is currently available at the Vopak Terminal, Mobil/BP Terminal and Caltex Banksmeadow Terminal to enable jet fuel to be transferred from the storage tanks at those terminals directly into trucks. At Sydney Airport, jet fuel is offloaded from the truck directly into the Sydney JUHI. Caltex understands that BP regularly trucks jet fuel from the Vopak Terminal to the Sydney JUHI;
- jet fuel imported through the bulk liquids berth at Caltex's Kurnell Refinery can be stored on-site at the refinery and, from there, transferred to the Sydney JUHI via the Caltex Jet Fuel Pipeline; and
- jet fuel imported through Gore Bay is transferred, via an 18 km underground pipeline, to Shell's refinery at Clyde for storage. The products are then transferred, via the Shell Jet Fuel Pipeline, to the Sydney JUHI.

2.6 The Caltex Jet Fuel Pipeline

94 The Caltex Jet Fuel Pipeline is a dedicated jet fuel pipeline running from Caltex's Kurnell Refinery to Sydney Airport. A map showing the location of the Caltex Jet Fuel Pipeline is included at Schedule 1 to this submission.

(a) Location and characteristics of the Caltex Jet Fuel Pipeline

95 The Caltex Jet Fuel Pipeline is approximately 17 km in length and begins at the storage tanks in the north-west corner of the Kurnell Refinery site. The pipeline runs above ground for approximately 1.5 km to the end of the Kurnell Wharf and ranges from 150mm nb to 300mm nb in diameter.

96 From the Kurnell Wharf, the Caltex Jet Fuel Pipeline runs under Botany Bay to Bumborah Point. This part of the pipeline is approximately 250mm nb in diameter.

97 At Bumborah Point, the Caltex Jet Fuel Pipeline enters a valve pit. Approximately 200m after the valve pit, a pipeline running from the Vopak Terminal ties into the Caltex Jet Fuel Pipeline. The Caltex Jet Fuel Pipeline then runs underground to the Caltex Banksmeadow Terminal. The pipeline runs above ground for approximately 50m within the Caltex Banksmeadow Terminal and, at that point, another pipeline running from the Mobil/BP Terminal ties into it. The Caltex Jet Fuel Pipeline then runs under several roads

and parks to Sydney Airport. The pipeline enters Sydney Airport from the north-eastern side (ie near the east-west runway) and runs north adjacent to the north-south runway and then west to the Sydney JUHI.

- 98 From the valve pit at Bumborah Point to the Sydney JUHI, the Caltex Jet Fuel Pipeline is approximately 10.7 km in length and 200mm nb in diameter.
- 99 From the tie in to the pipeline from the Vopak Terminal to the Sydney JUHI, the Caltex Jet Fuel Pipeline is supported by the following property rights:

Table 1: Property rights supporting the Caltex Jet Fuel Pipeline

Property right	Section of the Caltex Jet Fuel Pipeline
Pipeline Licence Deed from Sydney Ports Corporation ³⁵	From Bumborah Point to Caltex Banksmeadow Terminal
Licence from Waterways Authority	Section of pipeline near the intersection of Foreshore Road and Penrhyn Road
Deed from Roads and Traffic Authority	Section of pipeline beneath General Holmes Drive and Foreshore Road
Deed from Sir Joseph Banks Reserve Trust and Banksmeadow Park Reserve Trust and The City of Botany Bay Council	Section of pipeline beneath Reserve Numbers R91288, R91289, R100087, R100088 (Sir Joseph Banks Park)
Licence from Sydney Airport Corporation Limited	Sydney Airport, from General Holmes Drive to the JUHI

(b) Use of the Caltex Jet Fuel Pipeline

- 100 Caltex currently uses the Caltex Jet Fuel Pipeline to transfer jet fuel produced at the Kurnell Refinery to the Sydney JUHI. Caltex also provides third parties with access to the Caltex Jet Fuel Pipeline to enable the transportation of jet fuel from the Vopak Terminal to the Sydney JUHI. Caltex currently contracts the equivalent of 5.5 days per month of capacity on the Caltex Jet Fuel Pipeline to third parties.³⁶
- 101 Caltex first provided third parties with access to its pipeline [C-I-C] [REDACTED]

³⁵ The Licence covers that part of the Special Uses Zone (shown on a plan attached to the Licence) on, over and under which the Pipe is located.

³⁶ This reflects the average number of days third parties use the pipeline per month. However, in practice, third parties will generally access the pipeline in full day blocks. This is because, in order for jet fuel to be pumped from the Vopak Terminal or the Mobil/BP Terminal to the Sydney JUHI, certain adjustments must be made to the Caltex Jet Fuel Pipeline, which generally take approximately half an hour. For example, certain valves at the valve pit at Bumborah Point must be closed off to prevent jet fuel flowing back down the pipeline to the Kurnell Refinery. Due to the time involved in making these adjustments, during which the pipeline cannot be used to transport jet fuel, Caltex generally allocates third party access to the pipeline in full day blocks (ie to minimise the number of times the adjustments have to be made). Day long blocks are also convenient because the Sydney JUHI accounts for fuel at midnight. While the allocation is done on this basis, Caltex allows third parties some flexibility as to the number of days they pump each month. As a result, some third parties may use the pipeline for a different number of days in different months [C-I-C] [REDACTED] [C-I-C]

[REDACTED] [C-I-C].³⁷

102 Caltex also consented to a connection from the Vopak Terminal to the Caltex Jet Fuel Pipeline in 2005. This allows jet fuel to be transported directly from the Vopak Terminal to the Sydney JUHI. Since the completion of that connection, Caltex has allowed third parties to access its pipeline to transfer jet fuel to the Sydney JUHI. For example, [C-I-C] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [C-I-C]

103 Caltex also allows Qantas and BP to use the Caltex Jet Fuel Pipeline to transport jet fuel to the Sydney JUHI. [C-I-C] [REDACTED] [REDACTED] [C-I-C]

(c) Pumping capacity on the Caltex Jet Fuel Pipeline

104 The capacity of a jet fuel pipeline is determined by four key factors: the diameter of the pipe, the pressure rating of the pipeline, the pumping capacity of the pumps connected to the pipeline and the length of the pipeline. The diameter and pressure rating of the pipeline affect the volume of jet fuel that can move through the pipeline at any time. The pumping capacity of the pumps determines the rate at which jet fuel is fed through the pipeline. As the jet fuel moves along the pipeline (ie away from the pumps), the speed or rate at which it travels falls and the pressure drops (commonly referred to as pressure drop-off). The longer the pipeline and the smaller the diameter of the pipe, the greater the extent to which it will be affected by pressure drop-off. As a result, on longer pipelines, it is common to install booster pumps part way along the pipeline to “boost” or raise the speed at which the fuel travels through the pipeline and thereby increase its overall capacity.

105 From the Kurnell Refinery, jet fuel is moved through the Caltex Jet Fuel Pipeline by pumps at Kurnell. The current maximum pumping capacity from Kurnell is 208 KL per hour. The pumps are operated for 23.5 hours per day, giving a maximum throughput capacity from Kurnell of approximately 5 ML per day.

106 Jet fuel is moved from the Vopak Terminal to Sydney Airport using pumps owned and operated by Vopak. These pumps currently operate at a maximum pumping capacity of approximately 330 KL per hour. Applying this pumping rate, a maximum of 7.9 ML per day of jet fuel can be transported from the Vopak Terminal to the Sydney JUHI. The maximum amount of fuel that was able to be transferred from the Mobil/BP Terminal was approximately 4.8 ML per day.

107 Jet fuel can only be pumped from one facility (ie the Kurnell Refinery, the Vopak Terminal or the Mobil/BP Terminal) at any time.

³⁷ [C-I-C] [REDACTED] [C-I-C]

³⁸ [C-I-C] [REDACTED] [C-I-C]

2.7 The expansion of the Caltex Jet Fuel Pipeline

- 108 With the current levels of use by Caltex and third parties, the Caltex Jet Fuel Pipeline is being used at its effective maximum capacity. Any increase in the volume of jet fuel transported via the pipeline will therefore require an upgrade in capacity.
- 109 As discussed in section 2.8 below, demand for jet fuel at Sydney Airport is expected to increase significantly in the short to medium term. In order to meet this increased demand, additional jet fuel transport infrastructure will be required. Given this, Caltex has made a commercial decision to invest in expanding the capacity of the Caltex Jet Fuel Pipeline.
- 110 In March 2010, Caltex completed a [C-I-C] [REDACTED] [C-I-C] upgrade to the Caltex Jet Fuel Pipeline (the **Stage 1 Upgrade**). The Stage 1 Upgrade involved replacing the coalescer filters and associated instruments at the point at which the Caltex Jet Fuel Pipeline enters the Sydney JUHI. Caltex also upgraded the isolation valves and associated instruments at the Kurnell Wharf and the valve pit at Bumborah Point. The combined effect of these upgrades was to increase the pumping rate from Caltex's Kurnell Refinery from 196 KL per hour to 208 KL per hour.
- 111 At the time of the Stage 1 Upgrade, Vopak also completed some minor upgrades and adjustments to the pumps the Vopak Terminal. This, combined with the Stage 1 Upgrade, increased the pumping rate from the Vopak Terminal from 215 KL per hour to 330 KL per hour.
- 112 On 5 May 2010, Caltex announced that it would invest an additional \$20 million on further upgrades to the pipeline infrastructure at Caltex's Kurnell Refinery and the Caltex Banksmeadow Terminal (the **Stage 2 Upgrade**). The upgrades at the refinery at Kurnell Refinery will include, among other things:
- the installation of 2 new transfer pumps;
 - the installation of a new pigging stations at the transfer pumps;
 - the installation of 2 coalescer filters and associated instruments;
 - the installation, modification and replacement of various valves, discharge piping and a flow control loop; and
 - the replacement of approximately 1.5 km of existing pipeline from the storage tanks at the Kurnell Refinery to the tie-in point at the end of Kurnell Wharf (ie, immediately before the pipeline enters Botany Bay).
- 113 The upgrades to the Caltex Banksmeadow Terminal will include, among other things:
- the installation of 2 booster pumps;
 - the installation of 2 new variable speed pump drives;
 - the installation of 1 coalescer filter and associated instruments; and
 - the installation of motorised and isolated valves.
- 114 Once completed, the Stage 2 Upgrade is expected to increase the pumping rate from the Kurnell Refinery to approximately 400 KL per hour. That is, following the upgrade, the Caltex Jet Fuel Pipeline will have capacity to transfer approximately 9.6 ML per day of jet fuel between Kurnell and Sydney Airport. Due to limits on the operating pressure of the

Caltex Jet Fuel Pipeline, this is the maximum capacity that can be achieved on the pipeline.

115 Table 2 below shows the pumping capacity from the Kurnell Refinery and the Vopak Terminal before and after the various upgrades.

Table 2: Capacity of the Caltex Jet Fuel Pipeline³⁹

	Pre-Stage 1 Upgrade	Post-Stage 1 Upgrade (and minor upgrades to the Vopak Terminal)	Post-Stage 2 Upgrade
Pumping capacity from Kurnell Refinery	4.7 ML per day	5.0 ML per day	9.6 ML per day
Pumping capacity from Vopak Terminal	5.2 ML per day	7.9 ML per day	7.9 ML per day
Pumping capacity from Mobil/BP Terminal	4.8 ML per day	4.8 ML per day	4.8 ML per day
Total average pipeline capacity*	4.8 ML per day	5.5 ML per day	9.3 ML per day

* Assuming jet fuel is pumped from the Kurnell Refinery for 24.5 days per month and from the Vopak Terminal for 5.5 days per month.

116 The Stage 2 Upgrade is expected to be completed and commissioned around mid 2012. Once the upgrade is complete and Caltex has had the opportunity to test the technical capacity of the expansion, Caltex intends to offer further third party access to the Caltex Jet Fuel Pipeline. The details are still being considered, having regard to commercial and technical factors, but it is anticipated that additional capacity will be made available via a tender process. Any tender would be assessed on the basis of commercial terms such as price, quantity and duration and on a non-discriminatory basis as to the identity of the access seeker or seekers.

2.8 Options to meet anticipated future demand

117 The SJFIWG Report forecasts that annual demand for jet fuel at Sydney Airport will increase to approximately 3472 ML by 2014.⁴⁰ Between 2014 and 2029, annual jet fuel demand is expected to increase by a further 62.5% to approximately 5644 ML in 2029.⁴¹ Table 3 below shows forecast demand for jet fuel at Sydney Airport in 2014, 2019, 2024 and 2029.

³⁹ Caltex estimates and Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 24.

⁴⁰ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 30.

⁴¹ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, p 30.

Table 3: Forecast jet fuel demand at Sydney Airport 2014-2029⁴²

Metric	2014	2019	2024	2029
Estimated annual demand (ML)	3,472	3,926	4,864	5,644
Estimated daily demand (ML per day)	9.51	10.76	13.33	15.46
Estimated “busy” day demand (ML per day)	10.45	11.82	14.25	16.30
Typical daily demand (ML per day)	10.08	11.40	13.87	15.97
Required minimum replenishment rate (ML per day)	12.10	13.68	16.64	19.16

118 The current capacity of the Shell Jet Fuel Pipeline is understood to be approximately 3.9 ML per day.⁴³ As the average capacity of the Caltex Jet Fuel Pipeline will be approximately 9.3 ML per day following the Stage 2 Upgrade,⁴⁴ the combined capacity of the Shell and Caltex Jet Fuel Pipelines will be approximately 13.2 ML per day. This combined capacity will not be sufficient to achieve the required minimum replenishment rate from 2019. As a result, further investment will be required in the jet fuel supply infrastructure to Sydney Airport in the near future. In this regard, the SJFIWG Report noted that given the forecast demand and the capacity of the existing supply infrastructure,:

“...[I]nvestment in jet fuel infrastructure will need to occur in the short and medium term to meet the forecast growth projections included in the 2009 Sydney Airport Master Plan.”⁴⁵

119 There are several options for increasing the supply of jet fuel to Sydney Airport in the short to medium term. These include increasing the utilisation of existing pipelines and/or investing in new pumping infrastructure to increase the capacity of existing pipelines, constructing a new pipeline and/or increasing the use of trucking. These options are discussed in greater detail below.

(a) Increasing utilisation of the existing Shell Jet Fuel Pipeline to transport jet fuel to the Sydney JUHI

120 The Shell Jet Fuel Pipeline is currently being utilised at a rate of 56% (ie to transport an average of approximately 2.2 ML per day of jet fuel). Increasing the utilisation of this pipeline to its current maximum capacity (ie 3.9 ML per day) would allow an additional 1.7 ML of jet fuel to be transported to Sydney Airport per day without the need for any significant investment in new pipeline infrastructure.

⁴²Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 30-31, 34. The required minimum replenishment is calculated as 1.2 times typical daily demand (see Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 35-36).

⁴³Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 24.

⁴⁴ See Table 2 above.

⁴⁵ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 37.

121 The current low utilisation of the Shell Jet Fuel Pipeline is likely to be the result of Shell having insufficient supplies of jet fuel to transport via the Shell Jet Fuel Pipeline.⁴⁶ In July 2011, Shell announced plans to close its refinery at Clyde and convert the site into an import terminal.⁴⁷ This will eliminate the need for crude oil to be imported through Gore Bay and thereby free-up capacity to import finished products, including jet fuel, which can then be transported directly to the Sydney JUHI via the Shell Jet Fuel Pipeline. This was noted by BARA in its Application, which stated:

“Shell can...increase the use of the Shell Pipeline through converting its Clyde Refinery into an import terminal. This means that the effective capacity of the Shell Pipeline can be increased at little or no marginal cost.”⁴⁸

122 The SJFIWG Report also indicates that it may be possible to use an existing link from the SMP to transfer jet fuel to Shell’s refinery in Clyde.⁴⁹ As noted at section 2.3(c) above, the SMP, which runs from the Caltex Banksmeadow Terminal to the Silverwater Terminal, has tie-ins from the Vopak Terminal and the Clyde refinery. From Shell’s Clyde refinery, the Shell Jet Fuel Pipeline runs to the Sydney JUHI.

123 The Shell Jet Fuel Pipeline’s capacity could also be increased by upgrading the pumps and infrastructure on the pipeline. Caltex is not aware of any restrictions that would prevent the Shell Jet Fuel Pipeline being upgraded or otherwise limit the capacity it could achieve. In this regard, Caltex notes that the Shell Jet Fuel Pipeline has similar physical attributes to the Caltex Jet Fuel Pipeline.

(b) Increasing the pumping rate for jet fuel transported from the Vopak Terminal

124 The current pumping rate from the Vopak Terminal is below the maximum rated capacity of the Caltex Jet Fuel Pipeline. As a result, throughput rates on the pipeline could be increased by upgrading the pumps at the Vopak Terminal. In this regard, the SJFIWG Report notes that:

“To maximise throughput over the entire [Caltex] pipeline, an upgrade to the Vopak pumps would need to be considered by Vopak...Vopak advised the Working Group that it is in a position to further upgrade its pipeline subject to customer approval. The Vopak upgrade could result in an increased pumping capacity of 10ML per day from the Vopak storage facility to Sydney Airport, within the next six to twelve months.”⁵⁰

⁴⁶ Due to its refinery operations at Clyde, Shell primarily uses its import terminal at Gore Bay to import supplies of crude oil, rather than finished products. In addition, due to the relatively small production capacity of Shell’s refinery, the volume of jet fuel produced at the refinery tends to be low. As a result, only a small volume of jet fuel is available for transfer to the Sydney JUHI via the Shell Jet Fuel Pipeline.

⁴⁷ Shell Media Releases, *Proposal on future of Clyde refinery* (12 April 2011) <http://www.shell.com.au/home/content/aus/aboutshell/media_centre/news_and_media_releases/2011/proposal_on_future_of_clyde_12042011.html>; *Shell to cease refining at Clyde* (27 July 2011) <http://www.shell.com.au/home/content/aus/aboutshell/media_centre/news_and_media_releases/2011/clyde_cease_refining_27072011.html>.

⁴⁸ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 27, s10.4(b). Caltex notes that in the BARA Further Supplementary Submission, BARA questions the capacity to transport jet fuel from Gore Bay to the Clyde refinery given the need to transport fuel for road transport. Caltex notes that this alternative is being considered in the context of a theoretical situation in which access to the Caltex Jet Fuel Pipeline is not available. It would not be unreasonable to consider that if that were to occur, it would be a viable option to transfer jet fuel from Gore Bay and via the Shell Jet Fuel Pipeline to the Sydney JUHI. In any case, the use of the pipeline to transport other fuels does not preclude the ability to transport jet fuel.

⁴⁹ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 39.

⁵⁰ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 25.

(c) **Increasing the use of trucking to the Sydney JUHI**

- 125 Trucking is a viable option for transporting jet fuel to Sydney Airport. (Caltex understands that BP regularly trucks jet fuel to Sydney Airport.) As discussed in section 2.3(c) above, Caltex currently undertakes trucking at a number of other Australian airports, including in Melbourne where it trucks all the jet fuel it markets, approximately [C-I-C] [REDACTED] [C-I-C]. The trucking distance in Melbourne is significantly further than would be the case from Botany to Sydney Airport, so there is no reason to think that trucking would be any more expensive in Sydney.
- 126 Caltex is also investing in further trucking infrastructure at Melbourne Airport. [C-I-C] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [C-I-C] Rather than trucking being infeasible, Caltex is willing to invest a larger sum to obtain a smaller capacity than the SJFIWG Report estimated could be achieved at Sydney Airport.⁵¹
- 127 Trucking capacity to Sydney Airport could be expanded relatively quickly and with only a modest investment in new infrastructure. Additional truck loading facilities could be installed at the various fuel storage facilities at Port Botany to enable additional jet fuel to be loaded into trucks. In addition, a new bridger facility could be installed at the Sydney JUHI to allow the receipt of additional jet fuel via trucking. The SJFIWG Report estimates that installing such a facility would cost approximately \$460,000.⁵²
- 128 BARA claims that, by installing this additional infrastructure, an additional 180 ML of jet fuel could be trucked to the Sydney JUHI per year.⁵³ Caltex's preliminary calculations estimate that rather than 180 ML, an additional 500 ML of jet fuel can be trucked per year. In any case, the transport costs incurred in doing this are likely to be similar to (and possibly lower than) the cost of using the Caltex Jet Fuel Pipeline. In this regard, Caltex notes that it currently trucks jet fuel to Melbourne Airport for [C-I-C] [REDACTED] [REDACTED] [C-I-C]. Caltex understands that the rates charged by third parties for trucking jet fuel depend on the volume transported and the distance. Therefore, as the trucking distance in Melbourne (approximately 33 km from Port Melbourne to the Melbourne Airport JUHI) is significantly longer than would be the case from Botany to Sydney Airport, there is no reason to think that trucking would be any more expensive in Sydney.

⁵¹ The higher costs for trucking at Melbourne include terminal works that would be unnecessary at Sydney Airport.

⁵² Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 39.

⁵³ Based on 0.5ML per day: Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 28, s10.5(a).

(d) **Constructing a new pipeline to transport jet fuel to the Sydney JUHI**

- 129 A further option to increase the supply of jet fuel to Sydney Airport is to construct a new pipeline to transport jet fuel from an existing or new off-site storage facility to Sydney Airport. The SJFIWG Report indicates that, in addition to facilitating an increase in the volume of jet fuel that can be transported to Sydney Airport, constructing a new pipeline would also:

“...increase the security of supply of jet fuel to Sydney Airport on an ongoing basis, reduce the risk of supply shortages as a result of breakdowns and increase supply flexibility.”⁵⁴

- 130 As an example, a new pipeline could be constructed from the existing Vopak Terminal at Port Botany or the Mobil/BP Terminal to the Sydney JUHI. The Sydney Ports Berth is currently connected, via separate underground pipelines, to both the Vopak Terminal and the Mobil/BP Terminal. As a result, jet fuel imported through Port Botany could be easily transferred to either of these facilities. The newly constructed pipeline could then be used to transport the fuel from the relevant storage facility directly to Sydney Airport.
- 131 Similarly, with some investment at the TPL Terminal, a new pipeline could be built from that terminal, or trucks could be used, to transport jet fuel to the Sydney Airport.

⁵⁴ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 41.

3 Declaration test and overview of Part IIIA

3.1 Background

132 Part IIIA of the CCA provides for the declaration of a service provided by a service provider's facility. If the service is declared, an access seeker can seek arbitration of access terms and conditions in the event that commercial negotiations are unsuccessful.

133 Declaration is a significant intervention and should not be undertaken lightly. As the Full Federal Court stated in *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58 (**Pilbara Federal Court Decision**), declaration under Part IIIA is to be a:

*"...distinctly exceptional occurrence which is simply not justified by an evaluation by a regulator that economic efficiency from the point of view of society as a whole would be served by a declaration of access".*⁵⁵

134 The Full Federal Court particularly emphasised the importance of the legitimate interests of incumbent owners. The Full Court cited the Hilmer Committee:

"As a general rule, the law imposes no duty on one firm to do business with another. The efficient operation of a market economy relies on the general freedom of an owner of property and/or supplier of services to choose when and with whom to conduct business dealings and on what terms and conditions. This is an important and fundamental principle based on notions of private property and freedom to contract, and one not to be disturbed lightly.

...

*The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment."*⁵⁶

135 The legislative regime reflects the intention that declaration should be exceptional, in that it sets a high bar for its recommendation. It requires that in order to recommend a service be declared, the NCC must be positively satisfied of all of the matters set out in section 44G(2) of the CCA.

136 Relevantly, the NCC cannot recommend declaration of a service unless it is satisfied that:

- access (or increased access) to the service would promote a material increase in competition in at least one market, other than the market for the service;
- it would be uneconomical for anyone to develop another facility to provide the service;
- the facility is of national significance; and
- access (or increased access) to the service would not be contrary to the public interest.

⁵⁵ *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58, [87].

⁵⁶ *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58, [90]-[91].

137 In the current circumstances and as set out in further detail in sections 5-8 below, the BARA Application does not provide a sufficient probative basis upon which the NCC can satisfy itself of the relevant criteria.

3.2 Promotion of competition

138 The NCC cannot recommend that services provided by means of the Caltex Jet Fuel Pipeline be declared unless it is positively satisfied that access (or increased access) to the service would promote a material increase in competition in at least one market, other than the market for the service. What is contemplated by Part IIIA is that access would enable a third party to compete in an upstream or downstream market.

139 The relevant inquiry involves forward looking analysis comparing the competitive conditions and environment likely to arise in the future with and without access.

140 The BARA Application provides little substantiation for the claim that providing access to the Caltex Jet Fuel Pipeline will promote competition in upstream and downstream markets.

141 As a preliminary point, BARA has failed to define properly the markets in which it claims competition will be promoted. This is discussed further in section 4.7 below. In addition, BARA's arguments do not reflect commercial realities.

142 In summary:

- There are already several suppliers of jet fuel at Sydney Airport. In addition to the suppliers referred to in the BARA Application (BP, Shell, Caltex and Q8 Aviation), Caltex is aware through its commercial arrangements that international suppliers such as World Fuel Services, Universal Fuels and United Aviation Services also operate at Sydney Airport, and it is possible that there are others (see paragraph 178 below). There is no evidence that further entry would be likely or would materially increase competition.
- BARA itself is not an access seeker, nor is the BARA Application informed by a refusal of access. In that context, BARA has not provided any data about the identity of likely new entrants, other than to list the names of five international suppliers of jet fuel, at least two of which (Q8 Aviation⁵⁷ and World Fuel Services), already supply jet fuel at Sydney Airport. Nor does BARA provide any information about the likely timeframe or scope of entry, how any entrants would compete, the price competitiveness of any new supplier, or information about any new supplier's history of reliable supply and ability to deliver on-specification product.
- Not only is there no evidence that entry would occur, it is unlikely that any such access would lead to an increase in competition beyond the current level. Certainly BARA has not provided any credible analysis to show that additional sources of supply would materially increase competition. Caltex has not refused access to the Caltex Jet Fuel Pipeline, there is already third party access, and a number of local and international suppliers compete to fulfil airlines' fuel requirements.
- Further, even if it were simply accepted that an increased number of suppliers would result in increased competition, it is not clear why, if access were unavailable any potential new suppliers would not enter using infrastructure other than the

⁵⁷ Referred to in the BARA Application by the name of its subsidiary Kuwait Petroleum Aviation (Australia) Limited: Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 23, s10.2(c).

Caltex Jet Fuel Pipeline, given the range of options available, including competing pipeline infrastructure and trucking.

- The BARA Application does not contain credible data and its arguments are unsupported. There is no commercial or reasonable rationale for Caltex to withhold access to third parties competing in the supply of jet fuel at Sydney Airport, and Caltex has not sought to do so. It follows that access (or increased access) would not promote a material increase in competition.

3.3 Uneconomical to develop another facility to provide the service

- 143 The NCC cannot recommend that services provided by means of the Caltex Jet Fuel Pipeline be declared unless it is positively satisfied that it would be uneconomical for anyone to develop another facility to provide the service.
- 144 In the Pilbara Federal Court Decision, the Full Federal Court held that, for the purposes of determining whether it would be “uneconomical” to develop another facility, the private profitability test should be applied. This test requires an assessment, based on evidence on actual market conditions, as to whether it is “economically feasible” for any market participant other than the incumbent, whoever that might be and whatever that person’s circumstances, to develop another means to provide the relevant service.
- 145 In applying this test, in the event that access was unavailable, the NCC is required to evaluate whether the development of another means would be in the economic and commercial interest of a market participant. If it would not be in such interests, criterion (b) will be satisfied.
- 146 It should be noted that, irrespective of the test to be applied, an asset that is not a natural monopoly and which does not display natural monopoly characteristics must necessarily imply that it can be economically (whether in terms of private profitability or socially) duplicated. As set out in section 5.7, the Caltex Jet Fuel Pipeline is manifestly not a natural monopoly. As such, criterion (b) cannot be satisfied on any test.
- 147 The Full Federal Court has indicated that criterion (b) was not intended to “*broaden the gateway to access based on an imagined state of affairs rather than the facts of the market place in which access is sought*”.⁵⁸ Thus, in resolving whether or not it would be economically feasible for another facility to be developed, the NCC must go beyond examining whether it would be profitable to invest (i) in new facilities (in addition to those existing); and (ii) as a standalone business. It may be that the alternative facility would be in the interests of a person due to some other downstream interest (eg in order to compete in the downstream market or obtain surety of supply).
- 148 It would be contrary to the expressed view of the Full Federal Court for a pipeline to be declared when:
- it has already been duplicated; and
 - there are a number of different competitive options through which a jet fuel supplier could develop or otherwise use to provide the same service.

⁵⁸ *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58, [56].

149 In summary,

- given the alternative facilities available, the Caltex Jet Fuel Pipeline cannot be characterised as a facility that is “essential” to downstream competition or that cannot be duplicated;
- further, BARA has not provided any credible analysis to support a finding that it would be uneconomic to develop another facility to provide the relevant service. BARA asserts that the “*Caltex [Jet Fuel] Pipeline represents an essential element of the jet fuel infrastructure supply chain. The least cost way transporting jet fuel from the off-site storage facilities at Port Botany to the Sydney JUHI is via the Caltex [Jet Fuel] Pipeline. This situation will not change until the jet fuel transport requirements reach (or approach) the maximum capacity of the Caltex Pipeline. Once this occurs, and only at such time, would it be socially and privately profitable for an additional pipeline(s) to be constructed*”.⁵⁹ BARA also asserts that “*the Caltex [Jet Fuel] Pipeline can meet all foreseeable demand out to about 2020*”.⁶⁰ These assertions are incorrect, including because the Caltex Jet Fuel Pipeline by itself does not and cannot meet all demand today. The Caltex Jet Fuel Pipeline is at capacity, Shell uses the Shell Jet Fuel Pipeline and BP uses trucking.

150 In any case, criterion (b) does not involve an assessment as to whether the Caltex Jet Fuel Pipeline would be (or is) the lowest cost option, the question is whether, if access to the Caltex Jet Fuel Pipeline was unavailable, another party (or parties) would still be able to compete in the downstream market by means of another facility. Given the various options and alternatives, the answer is clearly yes, and therefore criterion (b) cannot be satisfied.

3.4 National significance

151 The NCC cannot recommend that services provided by means of the Caltex Jet Fuel Pipeline be declared unless it is positively satisfied that the facility is of national significance, having regard to:

- the size of the facility;
- the importance of the facility to constitutional trade or commerce; or
- the importance of the facility to the national economy.

152 This criterion ensures that only those facilities that play a *significant* role in the national economy fall within the scope of a Part IIIA declaration.

153 In summary, the BARA Application conflates the national significance of Sydney Airport with the question of the significance of the Caltex Jet Fuel Pipeline, the relevant part of which is approximately 10km of 200mm pipeline running from Port Botany to Sydney Airport, and which operates as one of a number of fuel pipelines in the area.

⁵⁹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 4.

⁶⁰ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b)- uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 4.

3.5 Contrary to public interest

- 154 The NCC cannot recommend that services provided by means of the Caltex Jet Fuel Pipeline be declared unless it is positively satisfied that access (or increased access) to the facility would not be contrary to the public interest.
- 155 To be “positively satisfied”, the NCC cannot presume, as a starting point, that access (or increased access) would not be contrary to the public interest. Rather, criterion (f) requires the NCC to engage in a detailed analysis of quantitative as well as qualitative aspects and careful consideration as to the welfare, particularly the economic welfare, of the Australian community as a whole.
- 156 In *Fortescue Metals Group Limited*⁶¹ (**Pilbara Tribunal Decision**), the Australian Competition Tribunal (**Tribunal**) broadly agreed that it should consider whether the costs of access outweigh the benefits in determining criterion (f), but noted that where access will be manifestly unjust to a section of the community but at the same time benefit the community as a whole, access may nevertheless be contrary to the public interest.⁶² In particular, the Tribunal noted that: “*there will be some consequences [of access] which, while not certain, are likely to occur. It is inappropriate to simply ignore those consequences... the Tribunal should consider consequences that are likely to arise as a result of access, giving them a weight that pays regard to their degree of likelihood*”.⁶³
- 157 The Tribunal considered the relevant factors include not only a cost-benefit analysis (with quantitative as well as significant qualitative aspects), but also broader issues concerning social welfare and equity, and the interests of consumers.⁶⁴ The Tribunal also recognised that “[t]he mere fact that multiple parties are involved creates complexities which take time to resolve”.⁶⁵
- 158 Further, criterion (f) is often considered alongside the discretion whether or not to declare a service.⁶⁶ This discretion is a very broad one;⁶⁷ such that even if there was a finding that access *simpliciter* is in the public interest (or that access is not contrary to the public interest), taking into account the effects of both a declaration and access under Part IIIA, a different conclusion might be reached⁶⁸ (ie declaration should not be made).
- 159 In line with the approach taken by the Tribunal in the Pilbara Tribunal Decision, there are various aspects that would make declaration and regulated access of the Caltex Jet Fuel Pipeline contrary to the public interest, in summary:
- the ability and likelihood of regulated access to undermine and distort investment incentives of the asset owner and service provider, and erode the value of any investments;
 - the ability and likelihood of regulated access to undermine and distort investment incentives of third parties (such as Shell in relation to the Shell Jet Fuel Pipeline, or third parties in building a new pipeline);

⁶¹ [2010] ACompT 2.

⁶² *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1161].

⁶³ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1172].

⁶⁴ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1168]-[1169].

⁶⁵ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1257].

⁶⁶ In the Pilbara Tribunal Decision, the Tribunal recognised the integral relationship between criterion (f) and discretion; while the two are separate considerations, the distinction is not always easy to draw: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1168].

⁶⁷ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1163].

⁶⁸ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1167].

- the ability and likelihood of regulated access to affect and distort access seekers' opportunities in relation to transport options in a competitive market;
- the potential for regulated access to interfere with the reliability and efficient operation of the Caltex Jet Fuel Pipeline; and
- the social benefits that may arise from non-regulated access and resultant construction of a new pipeline.

160 In the timeframe given, Caltex has identified various factors that point to declaration and access being contrary to the public interest. These submissions are made in more detail in section 8 below. However, it must be stressed that there has been inadequate time to fully engage and investigate the likely consequences of access and the implications of such access, and it would be an unsafe basis for the NCC to be positively satisfied that access would not be contrary to the public interest. Mere assertions in the BARA Application in relation to the declaration criteria, including as to criterion (f), cannot form a sufficient basis for criterion (f) to be satisfied.

4 The BARA Application

4.1 Scope of the application

- 161 BARA identifies the service of which declaration is sought as “[t]he 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”.⁶⁹
- 162 At section 5.3 of the BARA Application, it is stated that the minimum bundle of assets that must be declared to provide the service is “the entirety of the Caltex Pipeline”.
- 163 The “Caltex Pipeline” is defined in the BARA Application as “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 to the Sydney JUHI, shown on [particular maps]”.⁷⁰ That includes the part of the Caltex Jet Fuel Pipeline that runs from Kurnell to Port Botany.
- 164 Caltex notes the BARA Further Supplementary Submission in which it seeks to add the following to paragraph 4.1 of the BARA Application:
- “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 the 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.”*
- 165 Although BARA has not sought to amend the parts of the BARA Application that create the uncertainty, Caltex assumes that the BARA Further Supplementary Submission is intended to limit the minimum bundle of assets that must be declared to provide the service.
- 166 It follows that the service of which BARA seeks declaration is the transportation of jet fuel from the Vopak Terminal to the Sydney JUHI. However, the appropriate service definition needs to be considered in the context of the jet fuel supply chain. 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. As long as imported jet fuel is able to be stored at an appropriate facility from which it can be transported to Sydney Airport, its location is not relevant.
- 167 For that reason, a more appropriate service definition is the service of transporting jet fuel from an import available storage facility to the Sydney JUHI. That definition more accurately reflects the existing infrastructure and competition dynamics of jet fuel supply to Sydney Airport, and is consistent with what is sought in the BARA Application, being for “new suppliers (importers) to gain access to the jet fuel supply infrastructure on reasonable terms and conditions”.⁷¹

⁶⁹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 9, s4.1.

⁷⁰ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 7, s2.1.

⁷¹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 2.

168 Caltex notes that the service definition 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.

4.2 Characterisation of competition in supply of jet fuel

169 The BARA Application depicts very limited competition in the provision of jet fuel at Sydney Airport. BARA identifies four existing suppliers of jet fuel: Caltex, Shell, BP and the supplier servicing Qantas's self-supply arrangements.⁷² Despite acknowledging Q8 Aviation's supply to Qantas, BARA focuses on the oil company jet fuel suppliers, stating, for example, that provision of jet fuel at Sydney Airport is characterised by "[l]imited competition between incumbent oil company fuel suppliers"⁷³ and referring to Qantas's purchase arrangements as "limited" self-supply.⁷⁴

170 However, this description misunderstands the competitive dynamics, both in the international supply of jet fuel generally, and more specifically at Sydney Airport. BARA also fails to recognise the significant role already played by international jet fuel suppliers at Sydney Airport.

171 Caltex understands that BARA's members, with the exception of Qantas and Virgin Blue, generally obtain their jet fuel through international tenders. Qantas and Virgin Blue obtain their domestic supply through national tenders.

172 International airlines operating services at Sydney Airport, like Singapore Airlines, Delta Airlines, or United Airlines, run international tenders that can cover over 100 airports worldwide. It is generally not the strategy of the airlines to obtain a single supplier for all airports. Airlines' sophisticated international tender processes allow them to:

- concentrate their purchasing power by entering into a small number of agreements with jet fuel suppliers (thus covering airports where the airline is both a major and a minor customer);
- create a competitive auction environment; and
- leverage their purchasing power with respect to one airport (eg where they are a major customer), which in turn gives them transparency in relation to prices at different airports.

173 Response to these tenders is coordinated on a global scale by jet fuel suppliers. In Caltex's case, Chevron (which owns 50% of CAL) has been appointed as Caltex's agent for this purpose, and assembles a global bid for presentation to the airlines that incorporate supply to all Australian airports that Caltex is able to supply.

⁷² Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 9, s4.3.

⁷³ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 1.

⁷⁴ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 9, s4.3.

- 174 An airline will generally conclude a number of agreements with different suppliers, running a competitive process to achieve the lowest prices across all airports.
- 175 The tender process is highly competitive. By way of example, [C-I-C] [REDACTED]
[REDACTED]
[REDACTED]
[C-I-C]
- 176 Within this context, various parties compete for the supply of jet fuel at Sydney Airport. Caltex is aware that in addition to Shell, BP and Caltex, international jet fuel suppliers supplying airlines at Sydney Airport include Q8 Aviation, World Fuel Services, Universal Aviation and United Aviation Services. These suppliers adopt a variety of different business models not considered by BARA, and are discussed further below.
- 177 As shown in Figure 1 above, there are several steps in the jet fuel supply chain. Jet fuel can be sold at a number of stages along the supply chain, whether by a physical supplier or a reseller of wholesale services:
- **on a delivered (into terminal) basis:** A jet fuel supplier can supply jet fuel on a wholesale basis into an off-airport storage terminal. For example, Shell currently sells jet fuel to Q8 Aviation for delivery into the Vopak Terminal;
 - **on an ex terminal basis:** This is currently the arrangement Qantas has with Q8 Aviation at the Vopak Terminal, where Qantas purchases a volume of jet fuel from Q8 Aviation which it then transports using the access it has negotiated on the Caltex Jet Fuel Pipeline;
 - **on an –into-JUHI” basis:** Jet fuel suppliers that have arranged for transport to the JUHI can sell their jet fuel on an “into-JUHI” or “into-airport” basis. The airline then arranges for throughput to the aircraft and the into-plane transfer. This is currently how Shell and Caltex meet some of Qantas’s demand, with Qantas responsible for Sydney JUHI throughput and into-plane delivery;
 - **on an –ex-JUHI” basis:** Where a jet fuel supplier has storage rights at the JUHI, it can sell its product at the aircraft and allow the airline or another party to arrange into-plane services. This is not generally the practice in Australia; and
 - **on an into-plane basis:** Lastly, a jet fuel supplier can sell its product on an into-plane basis (ie a full end-to-end service). This requires that supplier to have its own infrastructure facilities or trucking capability, be able to purchase or access the facilities or trucks, including into-plane trucks, or to take supply from another jet fuel supplier at the point of into-plane transfer. By way of example, Caltex supplies jet fuel to other global jet fuel suppliers who on-supply fuel to airlines. [C-I-C] [REDACTED]
[REDACTED] [C-I-C] Caltex understands that these participants supply airlines at Sydney Airport as part of international fuel supply businesses.
- 178 In addition to the international jet fuel suppliers of which Caltex is aware through its commercial arrangements (Universal Fuel Aviation, World Fuel Services and United Aviation Services), it is possible that other international suppliers of jet fuel operate at Sydney Airport, supplied by parties other than Caltex. For example, Aster Jet Fuel indicates on its website that it operates at Sydney Airport.⁷⁵

⁷⁵ Aster Jet Fuel, *Global Locations* <<http://www.jetfuel.biz/pages/index.php?cat=7>>.

- 179 Qantas's and Q8 Aviation's roles are also important in the context of competition at Sydney Airport. It is inaccurate to describe the arrangements between them as "self-supply". Caltex understands that Qantas sources jet fuel from Q8 Aviation at the Vopak Terminal and then transports the jet fuel using its existing entitlements on the Caltex Jet Fuel Pipeline.
- 180 Caltex understands that Qantas sources approximately 200 ML per annum from Q8 Aviation, which is a substantial quantity of fuel and should not be dismissed as "limited". Qantas's arrangement is not only an example of, effectively, an additional supplier of jet fuel at Sydney Airport, it also demonstrates the feasibility of sourcing fuel from a supplier other than Caltex, Shell and BP. It is evidence that other fuel suppliers are exerting a competitive constraint by competing for the right to supply airlines' needs.
- 181 The diversity of supply at Sydney Airport, as well as preparedness of vertically integrated suppliers such as Caltex to sell jet fuel at a wholesale level, is indicative of a workably competitive market, and is inconsistent with the competitive landscape depicted by BARA.

4.3 Allegations that Caltex has refused access to the Caltex Jet Fuel Pipeline

- 182 BARA suggests that Caltex has refused third party requests for access to the Caltex Jet Fuel Pipeline.⁷⁶ This claim is unsubstantiated and incorrect. Without any details, it is difficult for Caltex to respond to the allegation that it has refused access to a supplier seeking to tender to an airline. However, BARA's characterisation of Caltex's conduct does not accord with Caltex's management of capacity on the Caltex Jet Fuel Pipeline.
- 183 Caltex already offers third party access to the Caltex Jet Fuel Pipeline on a throughput basis (where no buy in is required). Caltex contracts the equivalent of 5.5 days per month of capacity on the Caltex Jet Fuel Pipeline to third parties.
- 184 Caltex charges third parties the equivalent of between [C-I-C] [REDACTED] [REDACTED] [C-I-C], which reflects Caltex's investment in the Caltex Jet Fuel Pipeline, including the current upgrade.⁷⁸ Caltex pricing is consistent with the price of storage terminal to airport transport at other airports. Further examples of these prices are set out in Schedule 2.
- 185 Details regarding third party requests for access are set out in confidential Schedule 3.
- 186 Caltex intends to provide further third party access following the Stage 2 Upgrade of the Caltex Jet Fuel Pipeline. Caltex's plans to increase capacity demonstrate that Caltex lacks monopoly power. A monopolist would have the incentive and ability to withhold capacity in order to drive prices up. Caltex's actions are inconsistent with BARA's allegation of monopoly power.
- 187 In addition to the prospect of future capacity on the Caltex Jet Fuel Pipeline, parties seeking to transport jet fuel in to Sydney Airport already have other viable options, set out in section 2.5 above.

⁷⁶ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 49, s11.10(a).

⁷⁷ [C-I-C] [REDACTED] [C-I-C]

⁷⁸ [C-I-C] [REDACTED]
[REDACTED] [C-I-C]

188 It follows that BARA's assertion that "*declaration would override the ability of Caltex to simply refuse without negotiation, access to jet fuel suppliers to its Pipeline for the purposes of reducing competition between suppliers of jet fuel at Sydney Airport*"⁷⁹ is spurious. It is inconsistent with Caltex's actions in making access available to third parties over many years and with Caltex's decision to invest to create additional capacity on the pipeline. BARA has provided no evidence for the assertion, and there is no basis on which to find that this claimed benefit would eventuate if the services were declared.

4.4 Alternative means of supplying jet fuel at Sydney Airport

189 BARA asserts that the Caltex Jet Fuel Pipeline is an essential element of the jet fuel infrastructure supply chain to Sydney Airport.⁸⁰ BARA does not accept that any other option is viable.

190 There are a number of options, both those currently being used, and potential alternatives. Those alternatives are described in detail in section 2.8 above and include:

- alternative pipeline infrastructure (existing and future, including increased usage of the Shell Jet Fuel Pipeline);
- investment in pumping infrastructure to increase flow rates on the Caltex Jet Fuel Pipeline; and
- increased use of trucking.

191 However, there are some parts of BARA's assertions in relation to jet fuel supply options that require specific attention.

192 BARA states that the Shell Jet Fuel Pipeline is inadequate to fulfil needs at Sydney Airport.⁸¹ However, it has the potential to provide additional capacity to transport jet fuel to Sydney Airport both in the short and longer term. It also has similar physical attributes to the Caltex Jet Fuel Pipeline. The Shell Jet Fuel Pipeline's capacity and potential as an alternative source of jet fuel for Sydney Airport are discussed further in section 2.8 above.

193 BARA dismisses non-pipeline forms of jet fuel transportation, largely on the basis of cost and, in the case of trucking, increased traffic congestion.⁸² However, BARA provides no substantive analysis as to the viability of other options. Pipeline transportation is not the only feasible option for transporting fuel into Sydney Airport.

194 Caltex disagrees with BARA's contention that the relatively small proportion of total needs that could be fulfilled through trucking renders it unfeasible. The potential for increased use of trucking at Sydney Airport is discussed in section 2.8.

195 Caltex's own experience in Melbourne, set out in section 2.8(c) illustrates the viability of trucking.

⁷⁹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 45, s11.9(a).

⁸⁰ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 54, s11.16(a).

⁸¹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 11, s4.6.

⁸² Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 11, s4.6 and 28, s10.5(a).

196 Additionally, BARA dismisses the economics of building a further pipeline without any supporting economic analysis. Caltex's position on the feasibility of constructing a further pipeline is set out in section 5.6.

4.5 There are no reliability issues associated with access to the Caltex Jet Fuel Pipeline

197 BARA characterises access to the Caltex Jet Fuel Pipeline as a reliability issue.⁸³

198 However, according to the SJFIWG Report, in the last 10 years, there have only been three occasions on which the National Operating Committee, which is responsible for monitoring, advising on and managing potential jet fuel disruptions, has issued a "black light" warning.⁸⁴ Black light warnings mean that an unavoidable problem has been identified, requiring demand management. During that time, Caltex is aware of an additional supply issue that occurred in 2003, before the traffic light system was introduced, which was equivalent to a black light.

199 Two of the four black light equivalent occasions were related to pipeline issues:

- in 2008, upgrade works were being undertaken on the Caltex Jet Fuel Pipeline in order to allow users of the Vopak Terminal to increase the transfer rate into the Sydney JUHI, temporarily reducing capacity on the Caltex Jet Fuel Pipeline. During the works, stock levels dropped below two days forecast usage. A cautious approach was taken and the upgrade was deferred and completed without incident in April 2009; and
- in 2009, the demand for jet fuel outstripped the ability of the Caltex Jet Fuel Pipeline to supply during the Christmas peak period. At that time, a project was underway to improve capacity on the Caltex Jet Fuel Pipeline, and an upgrade was commissioned three months later. There have been no black light issues since.

200 During each of these incidents, the demand management allocation was 100% and no flights were curtailed⁸⁵. As the SJFIWG Report notes⁸⁶, 100% allocation black lights have little impact on airlines. There is no basis on which to suggest that an inability to access the Caltex Jet Fuel Pipeline (which does in any case allow for third party access) leads to reliability issues.

201 The more users pumping on the Caltex Jet Fuel Pipeline, the more potential there is for technical issues to arise. For practical purposes, pumping allocations are typically made in blocks (day long blocks being the simplest and most efficient to manage), as it is important to ensure that technical procedures have been complied with prior to a switch in the source of jet fuel coming into the pipeline. At change over, the pipeline is shut off to allow for appropriate procedures and checks to maintain pipeline integrity. The more often this must be done, the higher the possibility of technical issues arising. In addition, shut offs involve time during which the Caltex Jet Fuel Pipeline cannot be used for pumping.

⁸³ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 11, s4.6.

⁸⁴ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 15.

⁸⁵ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 15.

⁸⁶ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 17.

202 It is currently the case that when a user is not ready to use an existing allocation, Caltex will attempt to reschedule to maximise usage on the Caltex Jet Fuel Pipeline. The more users on the Caltex Jet Fuel Pipeline, the more difficult it would be to accommodate rescheduling while maintaining safety and reliability.

4.6 Comparison with other airports

203 The BARA Application makes a number of comparisons between the situation at Sydney Airport and at other airports worldwide. The comparisons relate to both the number of jet fuel suppliers at the airports, and the component of the jet fuel price over an underlying benchmark, referred to as the price “differential”. There are a number of flaws in the comparisons presented.

204 BARA’s analysis of the comparisons it presents concludes that comparable international airports have more jet fuel suppliers, which in turn shows that there is the potential to increase the number of jet fuel suppliers at Sydney Airport, the result being a substantial increase in the level of competition. Further, BARA claims that it is not unreasonable to expect that the comparatively high differential at Sydney Airport is due to the fact “*that Caltex takes advantage of its monopoly supply in setting charges in providing the Service*” or that at the least “*Caltex can earn monopoly rents through higher prices for the provision of jet fuel to airlines given the lack of competition*”.⁸⁷ That is, BARA asserts that the relatively high price differential at Sydney Airport is indicative of a lack of competition.

205 In fact, the data presented by BARA does not support its conclusions.

206 In Table 2 of the BARA Application, BARA indicates that there are four jet fuel suppliers at Sydney Airport, and lists the 2010 fuel volumes and supplier numbers at other airports, purportedly to show that all airports with greater volumes than Sydney Airport have more than five suppliers.⁸⁸ The data in the table is flawed for a number of reasons:

- the number of suppliers indicated at Sydney Airport excludes international suppliers supplying on a resale basis, which have an important role from a competition perspective, as discussed above (and it is not clear how such suppliers have been dealt with at comparison airports);
- for the year indicated in the table, 2010, even excluding international suppliers, Sydney Airport had at least five suppliers: Shell, Caltex, BP, Mobil and Q8 Aviation. BARA states that Mobil has since withdrawn from the market for supply of jet fuel.⁸⁹ However, even if Mobil has ceased to actively market the supply of jet fuel, it could easily do so if it chose to. This potential was recognised and acknowledged by BARA⁹⁰;
- it is not clear on what basis the listed airports have been selected. No other Australian airports have been included. Sydney Airport has the highest number of suppliers of any airport in Australia. More information about the situation at other Australian airports is set out below.

⁸⁷ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 51, s11.10(b).

⁸⁸ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 46, s11.9(b), Table 2.

⁸⁹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 1.

⁹⁰ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 39, s11.4.

207 Even putting aside the data issues, the comparison does not support BARA's assertions. Table 2 is said to be evidence that there is the potential to increase the number of jet fuel suppliers at Sydney Airport, and as a result to substantially increase the level of competition. However:

- the table does not show that Sydney Airport has an unusually low number of suppliers in comparison to the volumes of jet fuel used at the airport. Nor is there any correlation between the number of suppliers and the number of transportation options. For example:
 - at Sydney Airport, there are two jet fuel pipelines, trucking and at least five jet fuel suppliers;
 - at Brisbane Airport, there are two jet fuel pipeline systems and four jet fuel suppliers;
 - at Melbourne Airport, there is one jet fuel pipeline, as well as trucking operations and four jet fuel suppliers; and
 - at Perth Airport, there is one jet fuel pipeline, with no trucking currently possible due to a fence constructed by Board of Perth Airport Pty Limited (**BPA**) (formerly Westralia Airports Corporation Pty Limited), and two jet fuel suppliers **[C-I-C]** [REDACTED] **[C-I-C]**;
- in addition to the comparison with other Australian airports, Frankfurt, Paris and Dubai airports have supply volumes around double that of Sydney Airport, and have a comparable number of suppliers; and
- more importantly, when Table 2 is read in conjunction with BARA's analysis of fuel differentials, there is no correlation between the number of jet fuel suppliers and the size of the differential, as discussed further below.

208 BARA uses Sydney Airport's jet fuel differential figure, compared to those at other airports, to support its argument that there is a lack of competition in jet fuel supply at Sydney Airport, suggesting that high access prices result from Caltex's ability to earn monopoly rents on the Caltex Jet Fuel Pipeline. This claim is made even though BARA acknowledges that it does not have information on the costs of providing the service.⁹¹

209 BARA's simplistic analysis ignores the components that make up the differentials. In fact, pipeline access contributes only a small proportion of the fuel price differential.

210 Fuels are traded internationally, including in Australia, on the basis of import parity. The "differential" is the premium paid above the relevant benchmark for the place in question.

211 The benchmark underlying the differentials shown has not been specified. There is no Platts jet fuel benchmark actively traded specifically for Australian ports. Hence the Mean of Platts Singapore (**MOPS**) is used as proxy benchmark. MOPS is a function of MOPAG (Arab Gulf) prices plus the freight from Arab Gulf to Singapore. However when MOPS is used for Australian jet fuel pricing, the benchmark does not include the cost of transporting jet fuel from Singapore to Sydney.

⁹¹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 55, s11.16(b).

- 212 By way of background, it is helpful to understand how Caltex calculates its jet fuel prices at Australian airports. Caltex's pricing generally comprises a floating benchmark plus differential. The differential is a function of costs above MOPS.
- 213 Caltex's differentials hence typically include the sea freight costs from Singapore to Australia and consequently comparing differentials in the absence of a level benchmark is misleading. For example:
- differentials in Singapore do not include any freight;
 - differentials in Dubai are over MOPAG and since the region is a net exporter of jet fuel, shipping costs would be minimal when compared to Australian differentials, as Australia is a net importer of jet fuel; and
 - differentials for Frankfurt, Amsterdam and Paris are over a European benchmark and include no sea freight.
- 214 The table below calculates that part of the differential that relates to the cost of transporting jet fuel from Singapore to Sydney including sea freight, insurance and loss, and wharfage fees. In order to provide a direct comparison to the BARA figures, Caltex has performed its calculations using data from July 2010. Caltex notes it has converted those parts of the differential given in Australian dollars to US dollars at the then prevailing exchange rate to calculate a US dollar figure.

Table 4: Components of jet fuel differential for July 2010

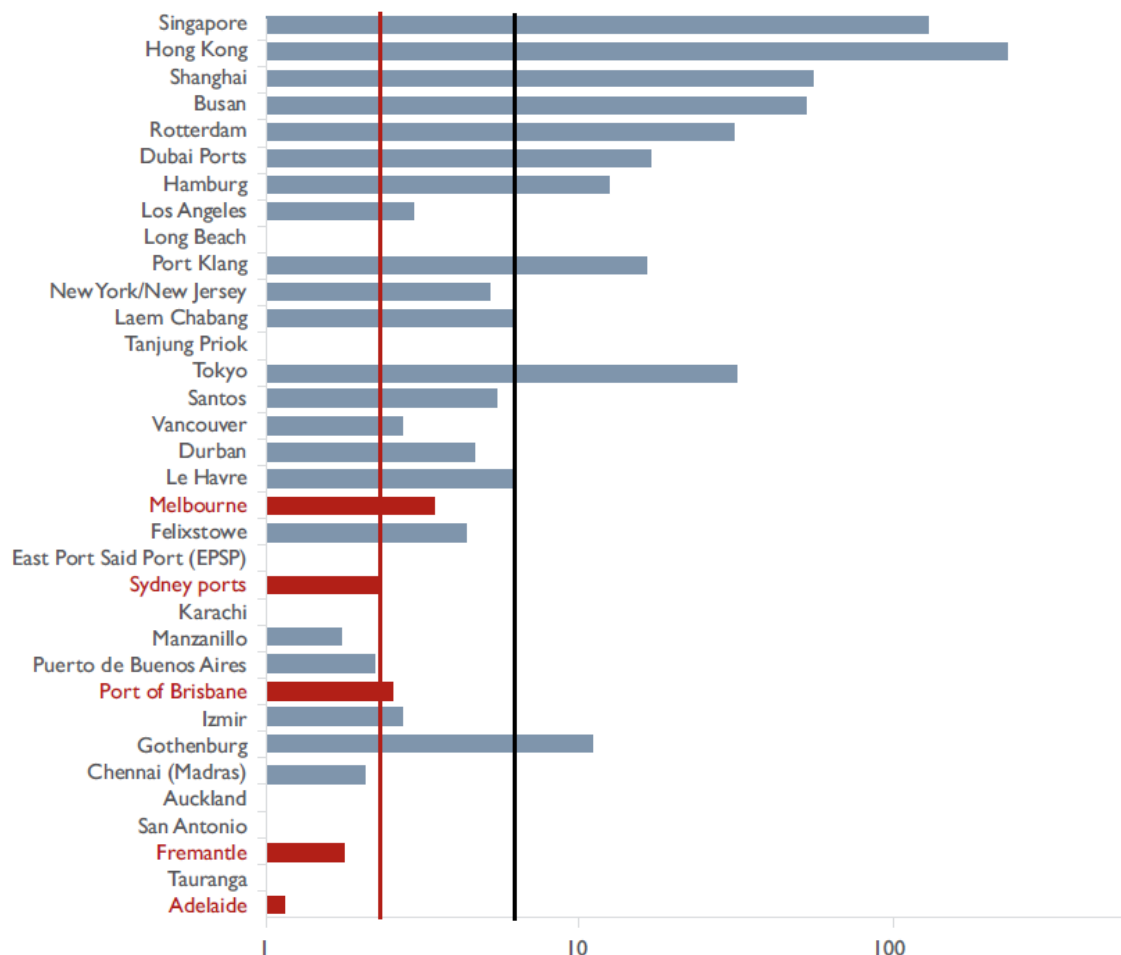
Component	Figure	Source and calculations
Freight	\$3.68 US/barrel	Platts assessments are a % of the annual Worldscale flat rate agreed upon in open market transactions to charter a ship. ⁹² This figure is based on a Worldscale figure of 13.15 USD/mt and a Platts factor of 222.82: $13.15 \times 222.82\% = 29.30083 \text{ USD/mt}$ $29.30083 \times 0.1256 = 3.68 \text{ USD/barrel}$
Insurance and loss	\$0.32 US/barrel	Generally calculated at 0.35% of MOPS + freight $(86.6368 + 3.68) \times 0.35\% = 0.32 \text{ USD/barrel}$
Freight, insurance and loss subtotal = \$4.00 US/barrel = 2.95 Acpl		
Wharfage	0.16 Acpl	Figure provided by Sydney Ports
Freight, insurance & loss, wharfage subtotal = 3.11 Acpl = 10.03 USc/g		
<p>Notes: Figures based on:</p> <p>MOPS price of \$86.6368 USD/barrel (Platts prior month average)</p> <p>Conversion rate of 158.9870 L/barrel or 42.00 US gallons/barrel or 0.1256 mt/barrel</p> <p>Exchange rate of 0.8532 (prior month average hedge settlement rate (HSRA))</p>		

⁹² For example, if the Worldscale annual flat rate is set at \$10.00 per metric tonne for a specified route, a Platts' assessment of 50 for that route would mean that the class of ship being assessed is being chartered for \$5.00 per metric tonne of freight on that voyage. See Platts, *Methodology and Specifications Guide: Shipping* (August 2011) 2 <<http://www.platts.com/MethodologyAndSpecifications/Shipping>> .

215 The figures in the above table show that of the identified differential of approximately 18.9 USc/g, over half is made up of the cost of moving the fuel from Singapore to Sydney, an external cost over which Caltex has no control. It is to be expected that freight costs to Sydney are relatively high, including because:

- the distance over which fuel is transported is relatively long;
- there are substantial diseconomies of scale at Australian ports. For example, the average number of commercial ships arriving at overseas ports is two and a half times that in Australia, and many multiples for the largest and most efficient ports, as shown in the table below; and
- unlike other routes (eg Taiwan, Hong Kong, Thailand and Malaysia), ship owners do not find return cargoes from Australia and hence the freight costs to Australia include vessel repositioning costs. The latter costs are high as Australia is a long way from Singapore.

Figure 2: The number of commercial ships (thousands) arriving at a port, 2005–06

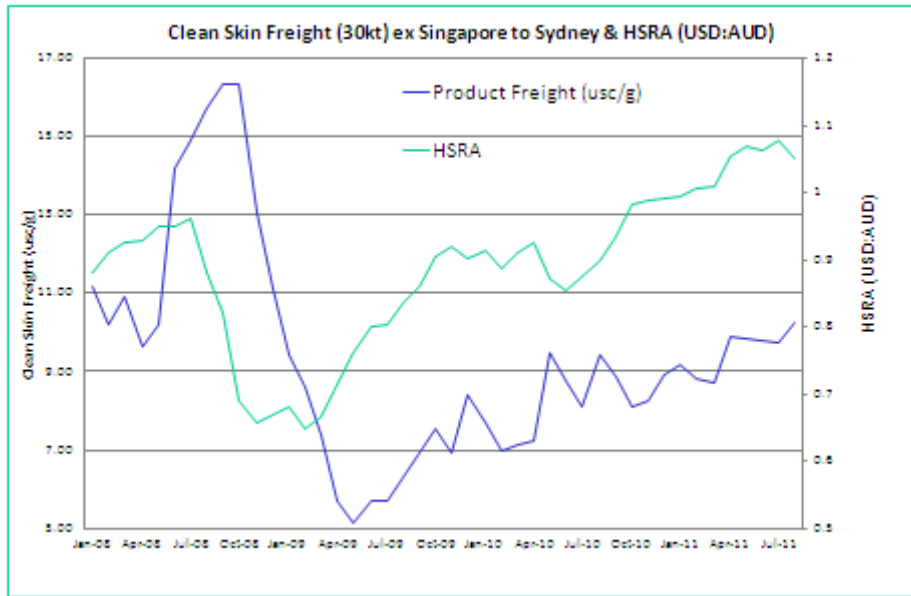


- Overseas ports median = 6.2 thousands ships
- Australian five ports median = 2.5 thousands ships
- The horizontal axis is on a logarithmic scale so that the data for smaller ports can be visible on the chart.
- The black line represents the median for overseas ports while the red line is the median for Australian five ports.
- The most recent year for which data was available for this indicator was 2005–06.
- Blank entries in the figure indicate data is not available.
- Data source: Institute of Shipping Economics and Logistics 2007. Data for Dubai Ports is from Dubai Ports World-United Arab Emirates Region.

- 216 Removing the freight costs leaves a differential of approximately 8.87 USc/g. That component of the differential must include.⁹³
- terminal fees for storage and throughput at either refinery or terminal;
 - transportation fees, whether by road tanker wagon or pipeline;
 - fees for use of the Sydney JUHI;
 - into-plane fees;
 - the cost of credit, representing the credit cost based on the time difference between supply and payment by the airlines; and
 - a risk premium to cover exchange rate and shipping volatility.
- 217 Caltex is not in a position to know how those costs are broken down in the figures presented in the BARA Application. However, even if an assumption were made for transportation fees of [C-I-C] [REDACTED] [C-I-C], broadly in line with the transportation costs from terminal to airport at a range of airports including Sydney Airport, that is a small proportion of the total differential identified by BARA.
- 218 It should also be noted that differentials will typically factor in an allowance for exchange rate risk, because:
- while the freight and related components within the differential are determined in US Dollar units, local supply chain costs such as port, storage, quality inspection, infrastructure, transportation to airport (pipeline or trucks), estimated Sydney JUHI costs and estimated into-plane costs are in Australian currency; and
 - inventory holding and credit costs can be determined in either currency. International airlines generally insist on contracting jet fuel on US Dollar denominated currency. The currency exposure risk is consequently borne by the supplier.
- 219 The currency risk can be illustrated by looking at recent volatility in freight costs, reflecting the volatility of the Australian dollar, as shown in Figure 3 below. Recent rises in the jet fuel differential are largely attributable to the strength of the Australian currency.

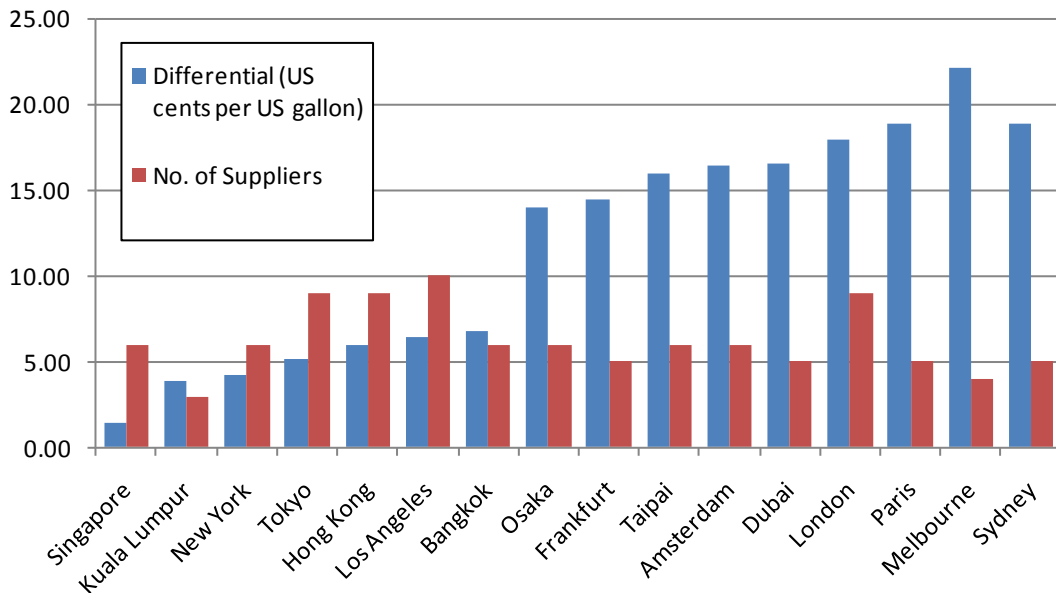
⁹³From October 2011, any differential would also include Sydney Airports Corporation Limited throughput fees.

Figure 3: Freight costs, January 2008 to July 2011



220 In addition to the flaws in each of the differential and supplier number data sets, the inconsistency in BARA's argument is illustrated by looking at the analyses together, as in the graph below.

Figure 4: BARA data regarding jet fuel differentials and number of suppliers⁹⁴



⁹⁴ A comparison has been done for all airports included in both Table 2 and Figure 3 of the BARA Application, plus Melbourne Airport, for which Caltex has provided a figure of four suppliers. Caltex has also recorded the number of suppliers at Sydney Airport as five, adding Mobil for the reasons set out in this Submission.

221 For BARA's argument to hold, there should be an inverse correlation between the number of suppliers at an airport and the jet fuel differential at that airport. That correlation is not present.

222 For example, Kuala Lumpur has only three suppliers, but the second lowest differential. Consistent with the importance of freight costs as a component in the differential, Caltex understands that the low differential reflects the low cost of freight from Singapore to Kuala Lumpur, given their proximity. Conversely, London has nearly double the number of suppliers, but a similar differential.

4.7 No material increase in competition as a result of declaration

223 The relevant inquiry as to whether access would promote a material increase in competition involves forward looking analysis comparing the competitive conditions and environment likely to arise in the future with and without access.

224 Market definition is an important part of that analysis. Without first defining the relevant markets, the claims made by an applicant for declaration cannot readily be measured.

225 BARA has purported to define three markets for the purposes of its competition analysis:

- the market for the supply of jet fuel at Sydney Airport, whether from imports or local production;
- the market for into-plane services at Sydney Airport; and
- the international and domestic markets for the carriage of passengers and freight into and out of Sydney Airport.

226 Caltex does not agree that any of these three markets are properly defined markets.

227 The markets BARA claims do not accord with the reality of jet fuel supply at Sydney Airport. Nor does BARA provide any evidence for its purported market definition. Caltex notes that if it is expected that Caltex should commission primary evidence to fill these gaps in BARA's analysis, then it would require more time to do so. In the circumstances, the flaws in BARA's approach to the market definition exercise are set out below.

(a) Market for the supply of jet fuel at Sydney Airport

228 Caltex does not accept BARA's contention that there is a market for the supply of jet fuel at Sydney Airport. BARA's market analysis is not capable of satisfying the NCC that there is a geographically limited market for the supply of jet fuel at Sydney Airport. Caltex submits that jet fuel is supplied as part of a global market.

229 BARA's submission is notable in having failed to provide the NCC with any information on how jet fuel is actually acquired by the airlines it represents. In particular:

- BARA's market definition analysis fails to reflect the international context in which jet fuel is bought and sold; and
- BARA fails to recognise that jet fuel is sold at various points in the supply chain.

Product dimension

- 230 The jet fuel supplied at Sydney Airport is Jet A1, which is the international standard for use by wide-body jet aircraft. It is certified according to international standards and is not substitutable with any other product supplied in Australia.⁹⁵ There are a number of other aviation fuels supplied to Sydney Airport, including Avgas, which is used in piston aircraft and rotary-wing aircraft. It is not suggested that the current application could have any impact on those product markets. Caltex therefore agrees with BARA that there is a product market for the supply of jet fuel.

Geographic dimension

- 231 Given the international context in which jet fuel is supplied at Sydney Airport, while there is limited ability for the airlines to geographically switch consumption between airports, any small but significant and non-transitory increase in price (**SSNIP**) in one geographic location is necessarily constrained by the ability of the airline to switch its *global* consumption to one of a number of competing suppliers. 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. Thus, a hypothetical monopolist at Sydney Airport would be unable to profitably impose a SSNIP due to retaliatory loss of volume at other airports worldwide. The BARA Supplementary Submission seems to acknowledge that oil companies are constrained in their conduct in the supply of jet fuel to Sydney by the effect of the conduct at other airports, where it says:

“... jet fuel suppliers (often oil companies) compete with each other in many different markets around the world. When constructing a second [sic: third] pipeline to Sydney Airport, an oil company will consider the potential ramifications in other markets and not just the market for jet fuel in Sydney.”⁹⁶

Supply side: Jet fuel suppliers operate on a global scale

- 232 For a jet fuel supplier to compete effectively in international tenders, it must likewise operate on a global scale. However, no jet fuel supplier in the world has a supply-chain solution that will transport fuel from its refineries to every airport in which it may wish to supply fuel. It is therefore necessary for fuel suppliers across various airports to negotiate transport and storage arrangements, invest in supply-chain infrastructure, or take supply out of the JUHI or at the point of transfer into-plane under a supply agreement with another jet fuel supplier.

(b) Market for "into-plane services" at Sydney Airport

- 233 BARA has submitted that declaration will promote competition in a market for into-plane services.
- 234 BARA has not undertaken a substantive market definition exercise with respect to its proposed market for into-plane services. It has provided scant analysis as to why it considers that there is a distinct market for into-plane services,⁹⁷ and in these circumstances, it cannot reasonably expect the NCC to substantively analyse its

⁹⁵ It is substitutable with Jet A, however, that product is only supplied in North American Airports. Jet A has a higher freezing point than Jet A1. There are a number of other highly specialised fuels (ie for use in extreme cold weather) or experimental fuels (ie bio-fuels and synthetic fuels), that are not routinely supplied in Australian Airports.

⁹⁶ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) - uneconomic for anyone to develop another facility to provide the service*, 28 October 2011, 7.

⁹⁷ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 36-37.

proposed market. Likewise, it is not possible for Caltex to provide a comprehensive response to what is, in effect, a failure by BARA to provide a complete application.

- 235 It is not clear from the BARA Application whether the proposed “into-plane market” is a distinct functional market from the market for the supply of jet fuel.
- 236 Into-plane services are integral to the final transfer of jet fuel from the supplier to the customer. The market definition is the same irrespective of whether the activity is undertaken internally or outsourced to a joint venture or third party. To separate into-plane services as a distinct market is akin to separating the legal sale of a product as a separate market from its physical transfer. Compare the sale of petrol at a petrol station. By way of analogy, the transfer of petrol from the bowser into a car is an integral part of the supply of petrol.
- 237 In any case, even if the provision of into-plane services takes place within a separate market, it is not dependent on access to the Caltex Jet Fuel Pipeline.
- 238 BARA articulates no clear reason why increased access to the Caltex Jet Fuel Pipeline would lead to a promotion of competition in into-plane services. Indeed, it is not only acknowledged that barriers to entry into an into-plane market are low, but BARA itself does not identify access to the Caltex Jet Fuel Pipeline as presenting a barrier to entry into into-plane services.

(c) **Market for international and domestic passenger and freight services**

- 239 BARA has not attempted to define this market. It submits that for the purposes of this declaration “*it is not necessary to undertake a detailed analysis of the potential improvement in competitive conditions*”.⁹⁸ It indicates that this approach is consistent with the approach taken by the Australian Competition and Consumer Commission (ACCC) in an application for collective negotiation.⁹⁹ BARA further submits that criterion (a) can be satisfied by “*simply considering the international and domestic passenger and freight services markets to and from Sydney Airport*”.¹⁰⁰ BARA further indicates that these “markets” are not “*one ,bundled’ market in any functional sense*” but instead “*represent one of three dependent markets in which competitive conditions will be improved through declaration*”.¹⁰¹
- 240 In this respect, the BARA Application ignores the statutory requirements. It is without merit for BARA to argue that it is not required to “*undertake a detailed analysis of the potential improvement in competitive conditions*”, as this is what the terms of the statute require. It is a requirement for the NCC to not only identify a particular market, but then be satisfied that access would materially promote competition in that market.
- 241 In any case, Caltex does not consider it necessary to consider what the appropriately defined market might be, given that it is evidently not a market dependent on access to the Caltex Jet Fuel Pipeline.

⁹⁸ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 37.

⁹⁹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 37.

¹⁰⁰ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 37.

¹⁰¹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 38.

242 In short, BARA provides no basis on which to conclude that competition would be promoted. The premise of the BARA Application is false. The supply of jet fuel to Sydney Airport occurs in a competitive market. There are a number of options for supply at various points in the supply chain, both now and into the future. Even if it could be said that third parties require access to the Caltex Jet Fuel Pipeline, such access has been granted and it is Caltex's intention to grant increased access in the future. Based as it is on false assumptions about competitive dynamics, and flawed interpretation of limited data, it provides no basis on which the NCC can be satisfied that declaration would promote competition in any market. Further analysis in relation to criterion (a) is set out in section 6 below.

4.8 BARA provides no basis to conclude that the facility is uneconomic to duplicate

243 The BARA Application fails to provide sufficient analysis and data demonstrating that it would be uneconomic for anyone to develop another facility. BARA subsequently sought to address that deficiency by lodging the BARA Supplementary Submission which provides no better basis than the original BARA Application for a finding that criterion (b) is satisfied.

244 In the original BARA Application, BARA claimed that the central reason why the Caltex Jet Fuel Pipeline could not be duplicated was the capital cost and delay associated with alternatives. In particular, BARA claimed that:

- a new pipeline facility would cost in the order of \$50-\$60 million and take five years to complete;
- upgrading the Sydney JUHI to permit additional trucking (noting that BP is currently trucking jet fuel to Sydney Airport) would cost \$460,000.

245 Explication of the practical and commercial viability of alternative facilities to the Caltex Jet Fuel Pipeline is set out below in section 5, including an analysis of how BARA has significantly overstated the time it would take to run a comparatively short 200mm nb pipeline over public land. However, in brief, the deficiency in BARA's analysis is glaring: where the supply of jet fuel to Sydney Airport alone is worth \$3 billion a year (and is growing), and the inability of jet fuel providers to compete at Sydney Airport would compromise their capacity to compete in multi-airport tenders worth significantly more than \$3 billion, a capital cost of \$50-\$60 million (let alone \$460,000) can hardly be said to amount to an insurmountable commercial obstacle to duplication.

(a) BARA's Supplementary Submission

246 Central to the BARA Supplementary Submission is its analysis as to whether a person would construct a new pipeline in order to compete with the Caltex Jet Fuel Pipeline in the transport of third party jet fuel. BARA claims that under certain conjectured market conditions, such an investment would not be undertaken because competition between the new pipeline and the existing Caltex Jet Fuel Pipeline would result in the entrant and, indeed, Caltex, being unable to recover their fixed costs. The remainder of BARA's analysis is then framed through that conclusion, in that BARA assumes that all other potential builders of a new pipeline (including jet fuel suppliers and airlines) would also be unable to recover their fixed costs, and would thus need to subsidise the pipeline with other revenues.

BARA's approach to independent entry

247 There are three significant flaws in BARA's approach to independent entry, which then carry through to BARA's consideration of entry by persons already present in the jet fuel supply chain. Each of these flaws is discussed below.

- 248 First, BARA's analysis asks the wrong question. The key question, and the one to which BARA's analysis is not directed, is whether, in the conjectured event of access to the Caltex Jet Fuel Pipeline no longer being available to existing and prospective users, those persons wishing to supply downstream of the pipeline would be able to do so by economically duplicating the facility. BARA asks a different question, namely, whether it would be commercially feasible for a person to enter a market for access in which all market demand for access was capable of being satisfied by the relevant facility (even though this is not such a market, given multiple existing facilities). That analysis, which appears to be a variation on the now overruled natural monopoly approach,¹⁰² provides no meaningful insight on the commercial viability of duplicating the Caltex Jet Fuel Pipeline were access not available.
- 249 The difficulty with framing criterion (b) analysis in such a way is that the more competitive the market for the relevant service, the more muted the commercial case for entering in order to provide that service. For example, in a perfectly competitive pipeline access market, the prospect of duplication would be low, but in one where monopoly rents were available, the prospect of duplication would be materially improved. This suggests that, as the commercial opportunities for profitable entry into a highly competitive market are poor, criterion (b) would be satisfied more easily in such a case than it would were an entrant able to share monopolistic profits. Such a result is clearly perverse; it cannot be right that the privately profitable test leads to a conclusion that a market in which access is competitively supplied is more liable to declaration than one in which access is supplied monopolistically or not at all.
- 250 Second, BARA's approach to criterion (b) does not reflect a realistic view of the marketplace in which the duplication of the Caltex Jet Fuel Pipeline would occur, but rather proceeds on the basis of a number of assumptions and conjectures that are factually questionable. In short, BARA envisages a world where:
- the Caltex Jet Fuel Pipeline is independently able to meet all market demand out until 2020 (an assumption which excludes not only the Shell Jet Fuel Pipeline and BP's current trucking operation, but also the incremental investments that will be required to sustain supply rates up to 2020 without a third pipeline or the substantial upgrade of the Shell Jet Fuel Pipeline);
 - a "second [sic: third]" pipeline that is also capable of meeting all market demand will be built, when any further pipeline would likely be calibrated to incrementally increase capacity overtime (ie by installing lower capacity pumps and upgrading them incrementally as both Shell and Caltex have done);
 - given that excess capacity, those "two" pipelines will compete to short run marginal cost, implying that the Caltex Jet Fuel Pipeline will go from anti-competitively denying access (in BARA's view) to providing it at short run marginal cost, a view that is difficult to reconcile with Caltex's supposed incentive to refuse access in order to mute downstream competition;
 - access prices will never increase above short run marginal cost such as to enable fixed cost recovery over time, even though the capacity of any one pipeline to meet market demand would be exhausted by 2020; and
 - despite a strategy of short run marginal cost pricing to grow share and making available excess capacity, Caltex's "dominant" position would prevent entry from occurring such as to enable the new pipeline operator to increase its prices above marginal cost over time.

¹⁰² *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58.

- 251 In adopting assumptions such as these, BARA has re-cast criterion (b) as an analysis of an *“imagined state of affairs rather than the facts of the market place”* – precisely the sort of analysis that the Full Federal Court eschewed from in the Pilbara Federal Court Decision.¹⁰³ The problematic nature of BARA’s assumptions is perhaps best illustrated by the obvious inconsistencies between this aspect of the BARA Supplementary Submission and other key aspects of BARA’s factual case. In particular:
- In the BARA Further Supplementary Submission, BARA acknowledges that Shell is not presently utilising the Shell Jet Fuel Pipeline to its full capacity, and claims that it has an incentive to withhold that capacity in order to avoid *“dissipat[ing] the profits currently earned on the sale of jet fuel through aggressive price competition”*.¹⁰⁴ The incongruity between this claim and its hypothesis under criterion (b) is striking: on the one hand, BARA sees spare capacity between two pipelines as being the basis for indefinite marginal cost pricing, yet on the other, claims that the two existing pipelines, each with spare capacity (following the Stage 2 Upgrade), withhold it in order to maintain profitability.
 - Under its criterion (a) case, BARA claims that increased access to the Caltex Jet Fuel Pipeline will encourage entry such as to enable a material increase in competition. However, in the BARA Supplementary Submission, BARA says that the *“current dominant position of Caltex raises ... questions as to where ... [new entrant] market share would come from”*.¹⁰⁵ Thus, on the one hand, BARA sees regulated access to the Caltex Jet Fuel Pipeline as encouraging entry, yet on the other, advances a criterion (b) case where a new pipeline, priced at marginal cost and with ample capacity, would not attract entry.
- 252 Third, the central logic of BARA’s analysis is flawed, given that it fails to account for the fact that total fixed costs are recovered over the life of an asset. BARA claims, given an assumption that the Caltex Jet Fuel Pipeline *“can meet all foreseeable demand out to about 2020”*¹⁰⁶ and a further assumption that any new pipeline would have the same capacity as the Caltex Jet Fuel Pipeline, that there will be a period in which both pipelines would be capable of meeting total market demand individually.¹⁰⁷ This, it claims, will give rise to short run marginal cost pricing, thereby preventing fixed cost recovery and discouraging duplication of the Caltex Jet Fuel Pipeline.
- 253 Putting aside the factually erroneous assumptions underpinning this logic, it is clear that BARA has mischaracterised the nature of fixed cost recovery in an infrastructure asset.
- 254 Most investments in infrastructure capacity are “lumpy”, that is, incremental capacity increases run ahead of market demand, sometimes by a very significant extent. This is because infrastructure assets cannot be perfectly calibrated to equal changes in market demand. For example, it is not possible to build 10% of a pipeline in response to a 10% increase in the demand for jet fuel. The result is that investors in infrastructure assets face an upfront (usually sunk) fixed cost that cannot be recovered in a period that is contemporaneous with that in which the cost is incurred.

¹⁰³ *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58, [56].

¹⁰⁴ Board of Airline Representatives of Australia, *Supplementary submission in relation to Commercial developments in the marketplace*, 4 November 2011, 2.

¹⁰⁵ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 5.

¹⁰⁶ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 4.

¹⁰⁷ BARA accepts that capacity constraints permit recovery of fixed costs: Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 4.

- 255 Despite this, investments in “lumpy” assets are made, including in jet fuel pipelines. This is because the value of a “lumpy” investment is not measured by reference to the cash flow that the asset generates in Year 1, but rather the sum of the expected cash flows that the asset will generate in each year of its real life, discounted to take into account the increased risk of future earnings. In the case of a jet fuel pipeline, which will generate revenues for in excess of 40-50 years, the fact that the pipeline may be under-utilised for a period of time, or fixed costs remain unrecovered for a period of time, is not fatal to the investment decision. What matters is whether the total cost of the investment, plus a commercial return, can be recovered over the life of the asset.
- 256 It follows that any investor in a pipeline at Sydney Airport would necessarily expect to recover the fixed costs of construction over a considerable period of time. No person, including Caltex, would make an investment in jet fuel transportation infrastructure and expect to be able to recover average total costs in the short run. Rather, any investment would be made in the expectation that demand for jet fuel at Sydney Airport is growing, capacity constraints are increasingly acute, and that the commercial return on the asset will improve over time.
- 257 Given this, BARA’s contention that there would be a period of time where intense price competition would make fixed cost recovery difficult – even if correct – is largely immaterial to the investment calculus. This is especially so given that, on BARA’s own facts, the period in which fixed cost recovery would be difficult would be extremely short. In BARA’s view, a new pipeline could not be built any earlier than 2016/2017, given a five year construction and planning time. If one assumes that BARA’s analysis in the BARA Supplementary Submission is correct, and that excess capacity would result in short run marginal cost pricing on any new pipeline until 2020, BARA’s claim amounts to no more than a contention that a new pipeline would find it difficult to recover its average total costs in its first three years of operation (or somewhat more, given that five years is demonstrably too long a construction period).
- 258 It follows that BARA’s characterisation of a period of excess capacity as being fatal to any decision to increase capacity in the jet-fuel supply-chain does not accord with reality. The prospect that an investor would be deterred from entering a growing market due to some uncertainty over cost recovery in the initial start-up phase (which would be the case regardless of whether or not short run marginal cost pricing prevailed) lacks credibility. The key issue, which BARA has not addressed, is whether total costs could be recovered over the life of the asset.
- 259 That BARA’s analysis is not convincing is evident in the current investment program being undertaken in the Sydney Airport jet fuel transport infrastructure, all of which will result in excess capacity for a period of time. For example, once Caltex completes the Stage 2 Upgrade, there will be a period in which capacity on the Caltex Jet Fuel Pipeline exceeds demand. Likewise, Shell is likely to be increasing its supply capability by converting its refinery at Clyde into an import terminal. These businesses would not be making such investments if BARA’s claims were correct, that is, that competition between alternative facilities in the presence of excess capacity always implies pricing at short run marginal cost.

The other investors identified by BARA

- 260 As noted above, BARA framed its central analysis in terms of an entrant with no upstream or downstream interests building a new pipeline in order to compete with the Caltex Jet Fuel Pipeline. On the basis of that analysis, which it claims indicates that a new pipeline would not be commercially viable on a stand-alone basis, BARA goes on to examine

whether any other person could generate sufficient profits in an adjacent market to “subsidise the losses sustained on the ... pipeline”.¹⁰⁸

- 261 Caltex agrees with BARA that the private profitability test allows for the cost of duplicating a facility to be recovered through revenue generated in an upstream or downstream market. The prospect of this occurring was expressly noted by the Full Federal Court in the Pilbara Federal Court Decision.¹⁰⁹
- 262 Caltex does not agree however with the way in which BARA has framed this question. While Caltex agrees with BARA that it would be irrational for any business to forego profits in order to make a loss-making investment, it does not accept that any investment in pipeline infrastructure would necessarily be “loss making” or require “subsidies”. In particular, the assumption that it would be loss making is carried forward through the entire BARA Supplementary Submission from an analysis where a new pipeline competes with the Caltex Jet Fuel Pipeline to marginal cost. As described above, that analysis is flawed. Further, there is no reason to think, nor does BARA explain why, an airline or a jet fuel supplier that built a pipeline in order to meet their own jet fuel transportation requirements would find it necessary to engage in intense price competition over the transport price with Caltex.
- 263 As noted above, the key question under criterion (b) is whether, in the conjectured event of access to the Caltex Jet Fuel Pipeline no longer being available to existing and prospective users, that those persons wishing to supply downstream of the pipeline would be able to do so by economically duplicating the facility. It follows that, rather than envisaging a world in which a loss-making pipeline require subsidies, BARA ought to have queried (though has not) whether the Caltex Jet Fuel Pipeline could be duplicated at a cost which allowed an investor to compete effectively with Caltex in the downstream market. For the reasons given by Caltex in section 5 below, such duplication can occur, has occurred (both through existing trucking and the Shell Jet Fuel Pipeline), and will need to occur in the near future (in BARA’s view, by 2020).
- 264 It is worth noting here that BARA claims at a number of junctures in the BARA Supplementary Submission that the reason why an additional pipeline has not already been constructed is because it would be loss making.¹¹⁰ There are a number of explanations as to why an additional pipeline has not already been constructed, including that Caltex already provides competitively priced access to the Caltex Jet Fuel Pipeline, and that airlines are already able to obtain a competitively priced jet fuel from one of several jet fuel suppliers and do not see a need to bypass suppliers further.

The involvement of airlines

- 265 BARA claims in the BARA Supplementary Submission that airlines do not have the “*requisite skills and know-how to profitably enter the jet-fuel transport market*”.¹¹¹ Caltex considers it important to specifically address this claim, which is demonstrably erroneous.
- 266 In this regard, Caltex notes that Qantas is already heavily involved in the jet fuel supply chain, including as a member of the Sydney JUHI, a shareholder in AFS and as a so-called “self supplier”, which includes managing supplies of jet fuel through the Vopak Terminal and the Caltex Jet Fuel Pipeline. In addition, other airlines tend to be very

¹⁰⁸ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 6.

¹⁰⁹ *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58, [56].

¹¹⁰ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 7-8.

¹¹¹ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 7.

sophisticated purchasers of jet fuel and many have experience in jet fuel supply at other airports around the world. Moreover, there are numerous examples of airlines operating jet fuel pipelines and other supply infrastructure at other airports. For example:

- At all major Canadian airports, all fuel storage and distribution facilities are owned by consortia of airlines. At those airports, the airlines operate advanced jet fuel infrastructure, including pipelines, tank farms and hydrant installations. At Toronto International Airport, the airlines operate a connection to a rail-receiving station, from which jet fuel is supplied. At Vancouver International Airport, the Vancouver Airport Fuel Facilities Corporation (a joint venture between airlines) is currently planning to construct an entire jet-fuel supply chain, including a marine berth, off-site storage and a 15 km long pipeline.¹¹²
- The fuel consortium model is also widespread in the United States. Since the 1980s, fuel storage and distribution at major airports across the country have been controlled by airline consortia. The largest of these, LAX Fuel Corp., comprises 56 national and international carriers and is based at Los Angeles International Airport (**LAX**). LAX Fuel Corp. is currently awaiting environmental approval for the construction of a 40 km underground jet fuel pipeline for transporting fuel for aircraft at LAX and other airports in the south-western United States from off-site fuel storage facilities.¹¹³
- In 1990, Thai Airways launched a company called Fuel Pipeline Transportation Ltd in partnership with Thailand's state-owned oil companies to construct a 68 km pipeline from the oil refinery and depot at Bangchak to Don Maung Airport. Thai Airways is also a joint venture partner in Bangkok Aviation Fuel Services Plc, a major jet fuel supplier in Thailand that has diverse supply-chain interests at Thailand airports.¹¹⁴

(b) **Planning would not be a bar to developing another pipeline**

267 It is noted that the BARA Application relies on the SJFIWG Report for the regulatory requirements and to conclude that the planning and construction timeframe could take up to five years, and does not identify any other basis upon which the regulations could affect the construction of an additional pipeline.

268 The BARA Application does not provide a sufficient basis to support the above timeframes for a number of reasons, as follows:

- the SJFIWG Report pre-dates the BARA Application by about 18 months and does not consider the new State significant assessment system inserted into the *Environmental Planning and Assessment Act 1979 (EPAA)* on 1 October 2011.¹¹⁵ This has important ramifications as the SJFIWG Report relies, for example, on the additional pipeline being declared to be a Part 3A Major Project under the EPAA. However, the Part 3A approval pathway was formally repealed on 1 October 2011. Despite the NSW Government announcing in April 2011 that Part 3A would be repealed and replaced with new State Significant Infrastructure (**SSI**) and State Significant Development approval pathways, the BARA Application does not consider the application of these pathways at all to the additional pipeline. The BARA Application's consideration of this issue is limited to listing the titles of legislation at a State and Commonwealth level that may be relevant; and

¹¹² Vancouver Airport Fuel Facilities Corporation Fuel Delivery Project, *Pipeline* <http://www.vancouverairportfuel.ca/projectOverview_pipeline>.

¹¹³ WesPac Energy Group, *Project Description* <<http://safeenergy.com/project-description.html>>.

¹¹⁴ Funding Universe, *Thai Airways Company History* <<http://www.fundinguniverse.com/company-histories/Thai-Airways-International-Public-company-Limited-company-History.html>>.

¹¹⁵ The State significant assessment system is described in more detail in section 5.6(a) below.

- the SJFIWG Report estimates that the time required to complete an environmental impact assessment process could be in the order of 12 to 18 months, with a likely 30 months required for approvals and construction. The SJFIWG Report does not contain any comparative analysis with similar projects to verify the accuracy of these timeframes or explain the basis upon which these timeframes were reached. In addition, the BARA Application simply adopts the timeframe estimates in the SJFIWG Report without any proper consideration or verification of the accuracy of these timeframes.

269 The BARA Application also fails to identify any issues which indicate that there is a material risk that any of these approvals will not be granted.

270 In reality, pipelines can, and have been, constructed in shorter timeframes. For example, the Vopak tie-ins to the Caltex Jet Fuel Pipeline and the SMP have both been constructed in less than five years. Particularly, the construction period for the pipeline connecting the Vopak Terminal to the SMP Pipeline was 16 months.¹¹⁶

4.9 Further issues

271 It is worth drawing attention to some other errors in the BARA Application:

- BARA states that its members do not negotiate access to the Caltex Jet Fuel Pipeline.¹¹⁷ However, Qantas has entered into a contract directly with Caltex;
- BARA claims that the only common user bulk liquids berth available is at Port Botany. All imported jet fuel for Sydney Airport (other than that imported by Shell, which has its own fuel import terminal) is, therefore, limited to the current supply infrastructure chain available from Port Botany to the Vopak Terminal to Sydney Airport.¹¹⁸ In fact, potential suppliers could import jet fuel into Sydney in the following ways:
 - jet fuel could be received via Shell's Gore Bay import terminal and transported (via Shell's existing pipeline) to Clyde for storage;
 - jet fuel could be received via the Kurnell Wharf and stored at Caltex's Kurnell Refinery; and
 - jet fuel could be received via the Sydney Ports Berth and transferred into one of several storage terminals at Port Botany;
- BARA claims that if access is granted, total jet fuel demand at Sydney Airport will be higher, increasing the demands on the Caltex Jet Fuel Pipeline. This is because of the claimed improved commercial conditions for airlines. BARA asserts that if prices for jet fuel are lower and supply is more reliable as a result of declaration (which, as set out elsewhere in this submission, would not in any event occur), the demand for jet fuel will be higher. This would occur through previously abandoned loss-making or marginal routes becoming profitable and, generally, airlines and other jet aircraft service providers expanding business at Sydney Airport through additional services.¹¹⁹ Low jet fuel prices would not necessarily lead to an increase in the number of air services operating from Sydney Airport and

¹¹⁶ Regulatory approvals had been obtained as part of an earlier project to expand the storage capacity at the Vopak Terminal.

¹¹⁷ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 9, s4.2.

¹¹⁸ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 4, 20-22, ss10.1-10.2(b).

¹¹⁹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 22-23, s10.2(c).

therefore an increase in demand for jet fuel. The number of air services that can operate from Sydney Airport is constrained by several factors, including the limited number of runways and restrictions on the times at which runways can be used. As such, even if access materially increased the commercial viability of air services (eg by leading to lower jet fuel prices), there is unlikely to be any increase in the total number of services operating from Sydney Airport;

- BARA claims that the Caltex Jet Fuel Pipeline currently has excess capacity.¹²⁰ However, the pipeline is currently being used at full capacity;
- BARA claims that Caltex has a market share of 55%.¹²¹ In fact, [C-I-C] ██████████
██████████
██████████
[C-I-C].¹²² On the basis of its incorrect figures, BARA calculates a Herfindahl-Hirschman Index (HHI). Caltex does not know the shares of its competitors and is therefore unable to calculate an HHI. However, the HHI calculated by BARA cannot be correct;
- similarly, in the BARA Supplementary Submission,¹²³ BARA calculates a “market share” for Caltex of 76%, but this is based on a “market” that is limited to the Caltex Jet Fuel Pipeline. It also refers to a further “two providers”, when in fact there are three third parties with access. The 76% figure is meaningless; and
- on a third measure of Caltex’s “share” of demand, BARA states that Caltex uses about 84% of available capacity on the Caltex Jet Fuel Pipeline. BARA’s reasoning is that Caltex makes available 5 days per month to other parties, leaving 305/365 days or 84% for Caltex. However:
 - third parties actually use on average 5.5 days per month;
 - at times Caltex must perform maintenance; and
 - at times Caltex uses the Caltex Jet Fuel Pipeline to transport jet fuel from Kurnell to Banksmeadow, for trucking to other locations.

On that basis, the 84% figure is wrong and in any case it is irrelevant. Caltex has invested in the Caltex Jet Fuel Pipeline in order to meet its own commercial requirements of transporting jet fuel manufactured at the Kurnell Refinery to various locations, including the Sydney JUHI. Shell has done so in relation to the Shell Jet Fuel Pipeline. It is open to Vopak Terminal users to do the same. It should be expected that infrastructure owners meet their own requirements, and the CCA makes it clear that they are entitled to do so.

¹²⁰ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 30, s10.7(a).

¹²¹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 44, s11.8(a).

¹²² Department of Resources, Energy and Tourism, *Fuel Report*, 2011. Sydney Airport account for over 95% of the jet fuel supplies in New South Wales and the Australian Capital Territory. This figure includes Caltex sales to international jet fuel suppliers that operate at the airports, and therefore potentially overstates Caltex’s share.

¹²³ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 3.

5 Criterion (b) – Uneconomical to develop another facility to provide the service

5.1 Introduction

- 272 Before the NCC can recommend that services provided by means of the Caltex Jet Fuel Pipeline be declared, it must be positively satisfied that it would be uneconomical for anyone to develop another facility to provide the service. As noted above in section 4.1, the relevant service is the service of transportation of jet fuel from an import available storage facility to the Sydney JUHI.
- 273 The starting point for determining criterion (b) is to consider the options of an access seeker that does not have access to the relevant facility. The question in this case is, if access to the Caltex Jet Fuel Pipeline was not available, whether it would be economically feasible for an access seeker to develop another means that would provide the service required, so that it could compete in the downstream market.
- 274 The relevant inquiry does not involve any predictions as to whether and when another facility would be built; rather, it involves considering whether or not the economic and commercial interests and opportunities would be sufficient to justify an investment to develop an alternative means.
- 275 For the reasons set out below, the Caltex Jet Fuel Pipeline is not a natural monopoly and does not display natural monopoly characteristics. It follows that the facility must be able to be economically (both privately profitably and socially) duplicated. As such, criterion (b) cannot be satisfied. Even if the Caltex Jet Fuel Pipeline did display natural monopoly characteristics (which is not the case), Caltex submits that it is privately profitable and economical to develop another means to provide the service. The economic feasibility of developing the alternative means can be demonstrated by the fact that alternative means have in fact already been developed and can be developed. The Shell Jet Fuel Pipeline, existing interconnected pipelines, trucking facilities and new pipelines are all examples of alternative and feasible means of providing the services provided by the Caltex Jet Fuel Pipeline.

5.2 It is economical to develop another facility to provide the service

- 276 Caltex submits that if access to the Caltex Jet Fuel Pipeline is not available for third parties, it would be economical to develop another facility to provide the same service. In fact, other means have already been economically developed. In *Re Duke Eastern Gas Pipeline Pty Ltd*¹²⁴ (**Duke Eastern**), the Tribunal accepted that there was no logic in excluding existing pipelines from consideration in the determination of whether criterion (b) is satisfied.¹²⁵ The existence of an alternative pipeline (such as the Shell Jet Fuel Pipeline) in itself demonstrates that it is economical to develop another facility to transport jet fuel from an import available storage facility to the Sydney JUHI. There are also other options as set out in section 2.8 above.
- 277 A summary table of the available transport options to the Sydney JUHI is set out below.

¹²⁴ [2001] ACompT 2.

¹²⁵ *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2, [57].

Table 5: Summary table of the available options

Options	Scenarios / Examples	Increase capacity by:	Capacity increase to:	Capital costs
Existing infrastructure	Shell Jet Fuel Pipeline ¹²⁶	Increasing utilisation. Currently, the pipeline has a 56% utilisation rate (giving 2.2ML/day).	3.9ML/day (100% utilisation)	At "little or no marginal cost". ¹²⁷
	Alternative pipelines - Many of the Sydney petroleum pipelines and storage facilities are interconnected.	Diverting jet fuel from other areas via the interconnected pipelines and storage facilities to the Sydney Airport.	Limit unknown	Not anticipated to be material.
Expanding existing infrastructure	Shell Jet Fuel Pipeline	Expanding / upgrading the pipeline.	Limit unknown	Dependent on capacity increase.
	Caltex Jet Fuel Pipeline	Upgrading the pumps and the pipeline at Kurnell and the Caltex Banksmeadow Terminal. This is currently in progress.	9.6ML/day (from 5ML/day)	\$20 million.
		Upgrading the pumps at the Vopak Terminal.	10ML/day (from 7.9ML/day)	Unknown.
		Recommencing storage at the Mobil/BP Terminal and upgrading the pumps there.	10ML/day (from 4.8ML/day)	Unknown.
	Trucking from various terminals - Jet fuel is trucked to the Sydney JUHI.	Increasing trucking from various storage terminals. This can also be facilitated by building a permanent bridger facility at the Sydney Airport.	180 ML per year ¹²⁸ to 500+ ML per year ¹²⁹	\$460,000.
New infrastructure	New pipeline from the Vopak Terminal	Building a new pipeline from the Vopak Terminal. The existing pumps and any upgrades can be transferred for use on the new pipeline.	Limit unknown	Approx. \$50-60 million (or less given pumps).
	New pipeline from the TPL Terminal	Building a new pipeline from the TPL Terminal.	Limit unknown	Approx. \$50-60 million.
	New pipeline from the Mobil/BP Terminal	Building a new pipeline from the Mobil/BP Terminal.	Limit unknown	Approx. \$50-60 million (or less given distance).
	New tie-ins to / from existing pipelines	Building new tie-ins to / from existing pipelines are other potential options.	Limit unknown	Unknown. Dependent on tie-in.

¹²⁶ Shell has a pipeline that runs from its berth at Gore Bay to its refinery at Clyde. The Clyde refinery is then connected to the Sydney JUHI by the Shell Jet Fuel Pipeline.

¹²⁷ Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 27, s10.4(b).

¹²⁸ Based on 0.5ML per day as estimated by BARA in the BARA Application: Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 28, s10.5(a).

¹²⁹ Based on Caltex's preliminary estimates.

278 In particular, it is noted that the options of trucking and building a new pipeline from the Vopak Terminal are available options for the transportation of jet fuel from the Vopak Terminal to the Sydney Airport.

279 The options set out in the table above are explored in more detail below.

5.3 Existing infrastructure

(a) Shell Jet Fuel Pipeline

280 The Shell Jet Fuel Pipeline currently supplies jet fuel to the Sydney JUHI and its existence in and of itself demonstrates the economic feasibility of developing an alternative means to the Caltex Jet Fuel Pipeline to transport jet fuel from an import available storage facility (in this case, the Shell Clyde storage) to the Sydney JUHI.

281 As discussed above in section 2.8, Shell can increase its utilisation of the Shell Jet Fuel Pipeline, which has a current capacity of 3.9 ML.

282 If Shell was unable to obtain access to the Caltex Jet Fuel Pipeline, it would increase the transport of jet fuel through the Shell Jet Fuel Pipeline. The transportation of jet fuel via the Shell Jet Fuel Pipeline will be further facilitated by the closure of the Clyde refinery, freeing up the Gore Bay and Clyde terminals to import finished petroleum product, including jet fuel.

283 In the BARA Supplementary Submission, BARA disregarded Shell as a potential provider of a second pipeline, instead, identifying relevantly the potential provider to be "*a jet fuel supplier or group of jet fuel suppliers, other than Caltex or Shell*".¹³⁰ There is no basis for BARA to exclude Shell as a potential provider as it is not the incumbent provider of the Caltex Jet Fuel Pipeline, and BARA's decision not to address the potential for Shell to be a provider is a failure to deal with an important alternative means.

284 In the BARA Further Supplementary Submission, BARA states that despite not having a detailed understanding of Shell's operational requirements in transporting jet fuel to the Sydney JUHI, "*it would understand that the pipeline from Shell's Gore Bay Terminal to Clyde Refinery will primarily transport fuel for road transport*".¹³¹

285 While that may or may not be Shell's preference, the simple point is that, in the event that third parties could not access the Caltex Jet Fuel Pipeline, there is another facility that could meet the requirement to transport imported jet fuel to the Sydney JUHI. Following the closure of the Shell refinery in 2013, the Shell Jet Fuel Pipeline could accommodate the volumes currently transported by third parties on the Caltex Jet Fuel Pipeline

286 There is no reason to consider that Shell would not seek to use the spare capacity on the Shell Jet Fuel Pipeline that it can utilise at "*little or no marginal cost*"¹³² if access was not available on the Caltex Jet Fuel Pipeline. Given the increase in demand forecast in the SJFIWG Report, it is expected that Shell will compete for that demand. This is also supported by BARA's submissions. In the BARA Supplementary Submission, BARA stated that:

¹³⁰ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 2.

¹³¹ Board of Airline Representatives of Australia, *Supplementary submission in relation to Commercial developments in the marketplace*, 4 November 2011, 1.

¹³² Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 27, s10.4(b).

“When firms are not capacity constrained, they will have an incentive to continue to expand the use of their facility (by reducing prices and increasing the quantity sold) provided the price is at least equal to the marginal cost of provision. Given both firms are in the same position, competition between them will reduce prices for the jet fuel transport service towards marginal cost...”¹³³

BARA’s submissions in the BARA Further Supplementary Submission in relation to Shell’s incentives and utilisation (or lack thereof) of the Shell Jet Fuel Pipeline are therefore in direct contradiction with its submissions in the BARA Supplementary Submission.

- 287 In any case, criterion (b) does not involve an assessment or prediction as to whether and when another facility may be developed; rather, it considers whether it would be economical to develop another facility in the context where access to the facility subject to the application is not available. What Shell will ultimately do is to some extent irrelevant, what is important is that Shell has another facility for the transportation of jet fuel from an import available storage facility to the Sydney JUHI.
- 288 Any increase in the utilisation of the Shell Jet Fuel Pipeline may be for Shell and/or third parties. As noted in the SJFIWG Report, infrastructure owners have an economic interest in maximising the utilisation of infrastructure by making it available to other users.¹³⁴
- 289 However, it should be noted that it is irrelevant to criterion (b) whether Shell would make its pipeline available to third parties and/or whether the Shell Jet Fuel Pipeline would be capacity constrained such as to make third party access difficult (although according to the SJFIWG Report, it is not).¹³⁵ The relevant question is simply whether the service can be provided by means of an economically feasible alternative facility.

(b) Alternative pipelines

- 290 As noted above, many of the Sydney petroleum pipelines and storage facilities are interconnected. For example, the SJFIWG Report indicates that it may be possible to use an existing link from the SMP to transfer jet fuel to the Shell refinery in Clyde.¹³⁶ The Clyde refinery is also connected to other pipelines from which jet fuel may be received from other areas if necessary. Jet fuel can therefore be transported to the Sydney JUHI via other pipeline routes.
- 291 The existence of other interconnected pipelines and storage facilities demonstrates that alternative facilities can be, and have been, developed economically.

5.4 Expanding existing infrastructure – pipelines and pumps

(a) Shell Jet Fuel Pipeline

- 292 As discussed above in section 2.8, Shell can further expand and upgrade its pipeline.
- 293 While the capital costs involved in upgrading the pipeline are unknown, there is no reason to consider that an upgrade of the Shell Jet Fuel Pipeline is not economically feasible on

¹³³ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) – uneconomic for anyone to develop another facility to provide the service*, 28 October 2011, 4.

¹³⁴ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 44.

¹³⁵ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 39.

¹³⁶ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 39.

commercial terms in the same way as upgrades to the Caltex Jet Fuel Pipeline. Any expansions or upgrades may also be made available to third parties given the incentive for infrastructure owners to maximise utilisation of their assets, especially when capital has been invested in expansion.

(b) **Caltex Jet Fuel Pipeline**

294 As noted above, capacity can also be expanded on the Caltex Jet Fuel Pipeline by upgrading the pumps currently used on the Caltex Jet Fuel Pipeline by Caltex (currently in progress), Vopak at the Vopak Terminal, and at the Mobil/BP Terminal. In particular, Vopak has indicated that:

“investment (subject to its customer’s [sic] consent) to upgrade its pumping capacity to 10ML per day could be the quickest and cheapest option to help meet short to medium term demand”.¹³⁷

5.5 Expanding existing infrastructure – trucking jet fuel to Sydney Airport

295 Trucking is another viable and widely-used transport alternative to pipelines for jet fuel transportation. The cost of trucking is in the same order (or even lower) than the cost of using the Caltex Jet Fuel Pipeline.¹³⁸ Trucking therefore provides a competitive constraint on Caltex if Caltex does not make access to its pipeline available.

296 As noted in sections 2.3(c) and 2.8(c), the Sydney JUHI currently receives jet fuel via trucks on a regular basis, including from the Vopak Terminal.

297 It is also economically feasible to increase trucking capacity by expanding the trucking facilities. Given BARA’s estimate of \$3 billion (and growing) per annum for jet fuel sales at Sydney Airport, an investment of \$460,000 (as estimated by SJFIWG) for a permanent bridger facility to increase truck capability to the Sydney JUHI represents a very small investment.

5.6 New infrastructure

(a) **Building a new pipeline**

Current capacities

298 In addition to existing alternatives to the Caltex Jet Fuel Pipeline, it is also economically feasible to develop a new pipeline to transport jet fuel from an import available storage facility to the Sydney JUHI. BARA submits that a new pipeline will be required by 2020.¹³⁹

299 The diagram below compares the daily demand and busy day demand for jet fuel and the minimum replenishment rates as set out in the SJFIWG Report¹⁴⁰ against the respective capacities of the Caltex Jet Fuel Pipeline (including the respective upgrades)¹⁴¹ and the Shell Jet Fuel Pipeline. In particular, capacities of potential investments have been

¹³⁷ Sydney Jet Fuel Infrastructure Working Group, *Final Report – Infrastructure for the provision of jet fuel at Sydney Airport for the period to 2029*, 30 April 2010, 38.

¹³⁸ See Schedule 2.

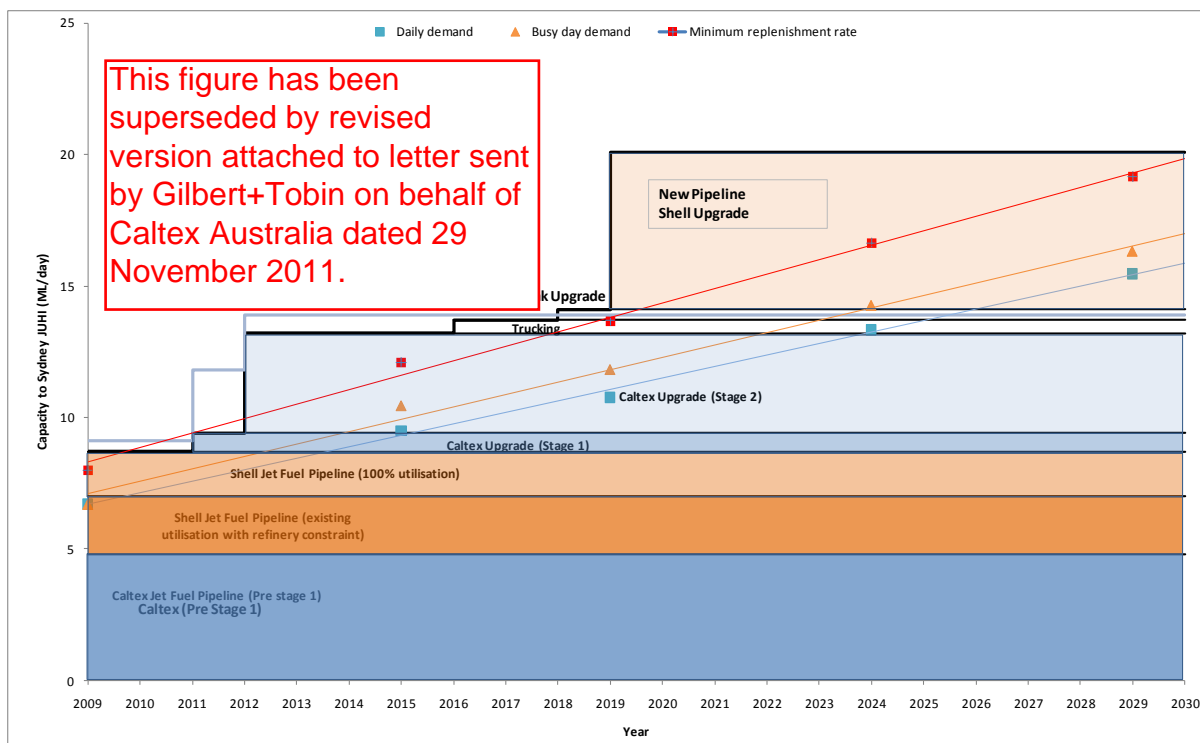
¹³⁹ Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 27, s10.4(a).

¹⁴⁰ And the BARA Application: Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 26, s10.4.

¹⁴¹ The average capacities calculated in Table 2 in Section 2 have been used.

included such as trucking (0.5ML per day)¹⁴², upgrades to the Vopak pumps to 10ML per day (giving an average of 9.7ML per day), Shell upgrades to its pipeline and/or a new pipeline. It also excludes the volume currently trucked by BP to the Sydney JUHI as that volume is unknown. These potential investments will not necessarily be made or made in the order as suggested by the diagram. Nor are the magnitudes definite.

Figure 5 – Demand and infrastructure capacity¹⁴³



The 'Sprint rate' is the theoretical maximum capability of the available infrastructure.¹⁴⁴ This capability may be used to ensure daily and busy day demands are met.

300 The diagram demonstrates that the Sydney Airport requirements are met via a variety of transportation operations and as demand increases, further transportation capacity will be required. The diagram suggests that, even assuming trucking facilities and Vopak pumps have been expanded and upgraded, a new pipeline or upgrade to the Shell Jet Fuel Pipeline (or both) will likely be required to be on line by around 2019.

Planning requirements

301 In order to construct a new pipeline to transport jet fuel from an existing or new off-site storage facility to the Sydney Airport, property rights¹⁴⁵ and approvals and consents from relevant authorities may be required.

¹⁴² As a conservative measure, BARA's estimate of the additional capacity provided by trucking has been used (being 0.5ML per day) rather than the 500 ML per year (or 1.4 ML per day) capacity as estimated by Caltex.

¹⁴³ For the sake of simplicity, the Caltex Stage 2 Upgrade is indicated to come on at the beginning of 2012, although it will likely be available later that year. In addition, while 100% utilisation of the Shell Jet Fuel Pipeline is available now (as shown in the diagram), that capacity is likely to be there on an ongoing basis following the closure of the Clyde refinery in mid-2013.

¹⁴⁴ For example, prior to the Caltex Stage 2 Upgrade, the sprint rate would be the sum of 7.9 ML per day (using Vopak's pumps) and 3.9 ML per day (being the maximum capacity of the Shell Jet Fuel Pipeline).

¹⁴⁵ The property rights to permit the installation and use of a pipeline, either above ground or underground, may take the form of a lease, licence, easement or other property right. The relevant property right would need to be secured from the owner of each parcel of land across which the pipeline traverses.

- 302 At a State level, a proponent could rely on the new SSI pathway inserted into Part 5.1 of the EPAA on 1 October 2011 to obtain approval from the Minister for Planning and Infrastructure for an additional pipeline. The SSI approval pathway is available if the proponent obtains a licence under the *Pipelines Act 1967* and by operation of the *State Environmental Planning Policy (State and Regional Development) 2011* and *State Environmental Planning Policy (Infrastructure) 2007*.
- 303 The Minister for Energy administers the *Pipeline Act 1967* (NSW). The Act aims to:
- implement a timely and efficient approvals system to facilitate the construction of cross-country pipelines;
 - ensure the effect of a pipeline project on the environment and landowners is properly considered and managed; and
 - ensure pipeline licensees protect the environment, pipeline employees and the public from dangers arising from both pipeline construction and the transmission of potentially hazardous substances.
- 304 Certain pipelines are required to be licensed under the *Pipelines Act 1967* and, in addition, a party may apply for a pipeline to be licensed under the *Pipelines Act 1967*. The licensing of a pipeline would, amongst other things, enable the Minister to grant easements for the purposes of the pipeline by way of compulsory acquisition.¹⁴⁶
- 305 The benefit of the SSI approval pathway is that it is designed to be a streamlined pathway for the efficient assessment and determination of significant infrastructure projects – such as, for example, infrastructure to maintain adequate supplies of jet fuel to Sydney Airport.
- 306 To achieve a streamlined approval pathway, the EPAA excludes the requirement to obtain approvals under a broad range of environmental legislation in NSW. Although some environmental approvals may be required, these are likely to be limited to a licence under the *Protection of the Environment Operations Act 1997* and/or an approval under the *Roads Act 1993*.
- 307 At a Commonwealth level, any on-site development at Sydney Airport would require approval under the *Airports Act 1996 (Cth)*. Consideration would also have to be given to whether the pipeline required referral or approval under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.
- 308 These approvals are standard approvals issued by the relevant Government Agency on a regular basis for projects on a much larger scale and complexity than an additional pipeline to Sydney Airport. Given the nature and purpose of the pipeline, it is reasonable to expect that a whole of government approach will be adopted to assess and grant approvals in a relatively expedited manner.
- (b) **Constructing a new pipeline from the Vopak Terminal**
- 309 A new pipeline could be constructed from the Vopak Terminal (**Vopak-Airport Pipeline**). Less than 10 km of pipe would need to be built to connect the Vopak Terminal to the Sydney Airport.

¹⁴⁶ *Pipelines Act 1967*, s 22(1)(d).

Approvals

- 310 As the Caltex Jet Fuel Pipeline does not traverse privately owned land, the property rights which support the Caltex Jet Fuel Pipeline have been obtained from government entities and Sydney Airport Corporation Limited (**SACL**). It is reasonable to expect that a third party such as Vopak could obtain equivalent property rights from the appropriate government entities and SACL.
- 311 Even if a new Vopak-Airport Pipeline were to follow a different route, it is likely that a route could be designed that only traversed land controlled by government entities. Given the desirability of an alternative jet fuel pipeline project, the relevant government entities are likely to act favourably in granting equivalent rights along a same or similar route as the Caltex Jet Fuel Pipeline.

Economic feasibility

- 312 It would likely be economically feasible for Vopak, another fuel supplier storing fuel in the Vopak Terminal, or an airline or consortium of airlines to construct a new Vopak-Airport Pipeline.
- 313 Based on BARA's application, the supply of jet fuel at the Sydney Airport is worth approximately \$3 billion per year (and growing); and the cost of an additional pipeline is approximately \$50 million to \$60 million. Accordingly, the capital cost is only approximately 2% of the total annual revenue derived from the jet fuel market. It is therefore not material, particularly if the investor believes that the costs of fuel delivery to Sydney Airport are not competitive. Moreover, a new pipeline is a 40-50 year asset and therefore the owner of the new pipeline has 40-50 years to recover that capital cost.
- 314 In addition, Vopak's existing pumps (and any upgrades to those pumps) that are currently used to pump product via the Caltex Jet Fuel Pipeline can also be transferred for use on the new pipeline. This may further decrease the costs of building a new pipeline, and may also mean that the relative cost for Vopak to build a new pipeline with a relatively high capacity is low.
- 315 A Vopak-Airport Pipeline is also likely to be economic when compared with other expansion options. BARA anticipates that \$50-\$60 million would be required to build a new pipeline with 10 ML per day capacity (although Caltex notes that Vopak's existing pumps may mean the overall capital cost is less). However, Caltex is spending around \$20 million for its Stage 2 Upgrade to increase the capacity from Kurnell by around 4.6 ML per day and spent around [C-I-C] [REDACTED] [C-I-C] for its Stage 1 Upgrade to increase the capacity from Kurnell by around 0.3 ML per day.
- 316 The actual capital costs for increases in capacity between a new pipeline and Caltex's upgrades are therefore comparable and not consistent with the assertions of Caltex Jet Fuel Pipeline being a natural monopoly or that a new pipeline would be uneconomical to develop. Furthermore, these upgrades will have a shorter lifespan than any new pipeline.
- 317 In the case of Vopak, Vopak also already has a significant volume of jet fuel (that it currently pumps down the Caltex Jet Fuel Pipeline). This volume will likely maintain a reasonable utilisation rate of any new pipeline and further justify the investment.

(c) **Constructing a new pipeline from other terminals**

- 318 Similarly to the Vopak Terminal, the TPL Terminal and the Mobil/BP Terminal are connected to Port Botany by pipeline.
- 319 Caltex understands that the TPL Terminal and the Mobil/BP Terminal are not currently used to store jet fuel. However, the TPL Terminal could easily store and distribute jet fuel by building or converting tanks, and storage at the Mobil/BP Terminal could recommence at any time.
- 320 A new pipeline could be built from the TPL Terminal and/or the Mobil/BP Terminal directly to Sydney Airport. The planning requirements for constructing such a pipeline are likely to be similar to that set out above for a Vopak-Airport Pipeline, although the distance from the Mobil/BP Terminal to Sydney Airport is even shorter.
- 321 For similar reasons to those set out above for the Vopak Terminal, Caltex submits that it would be financially viable for another market participant to construct a new pipeline from the TPL Terminal or the Mobil/BP Terminal to Sydney Airport.
- 322 It should be noted that, similarly to the Shell Jet Fuel Pipeline, it is irrelevant to criterion (b) whether that market participant would make its facilities available to third parties and/or whether the facility would be capacity constrained such as to make third party access difficult. The relevant question is simply whether the service can be provided by means of an economically feasible alternative facility.

New tie-ins from / to existing pipelines

- 323 Given the multiple and existing interconnected pipelines, there are also options to build new pipeline tie-ins to existing pipelines to transport jet fuel to the Sydney JUHI. For example, pipelines can theoretically be built to tie in to the Shell Jet Fuel Pipeline or tie in from / to the SMP, although the other options set out above are more likely.

5.7 Natural Monopoly Test

- 324 Following the Pilbara Federal Court Decision, the private profitability test is used for determining the meaning of “uneconomic”. However, special leave to the High Court on this issue was granted on 28 October 2011. Accordingly, this submission also deals with the “natural monopoly” test that was preferred by the Tribunal in the Pilbara Tribunal Decision, which was rejected in the Pilbara Federal Court Decision.
- 325 The natural monopoly test asks whether a single facility can meet the entire market demand at less total cost than two or more facilities. The question is therefore whether the Caltex Jet Fuel Pipeline can provide society’s reasonably foreseeable demand for jet fuel at the Sydney Airport at a lower total cost than if provided by two or more pipelines. If so, criterion (b) is satisfied.
- 326 The natural monopoly test cannot be satisfied given there is no single facility that can meet the entire market demand, both currently and in the future. The market demand at the Sydney JUHI is currently being met by the Caltex Jet Fuel Pipeline, the Shell Jet Fuel Pipeline and trucking. Indeed, the BARA Application estimates that the Shell Jet Fuel Pipeline services about one quarter of Sydney Airport’s jet fuel requirements.¹⁴⁷ Based on the forecast demand and theoretical maximum transfer rates set out in the SJFIWG Report, the Caltex Jet Fuel Pipeline (as a single facility and excluding the Shell Jet Fuel

¹⁴⁷ Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 20, s10.1

Pipeline) cannot meet the entire market demand today. The mere existence of the Shell Jet Fuel Pipeline is therefore inconsistent with the Caltex Jet Fuel Pipeline being a natural monopoly.

327 In the BARA Application, BARA also notes that:

*“given the commitments by Caltex to increase the capacity of the Caltex Jet Fuel Pipeline, no increases in capacity are required until about 2020. When additional capacity is required, this will result in the need for an additional pipeline from the off-site storage facilities to the Sydney JUHI”.*¹⁴⁸

328 In addition, given BARA’s claim that building a pipeline takes approximately five years,¹⁴⁹ BARA has acknowledged that in the medium term, a third pipeline (after the Caltex Jet Fuel Pipeline and the Shell Jet Fuel Pipeline) would need to be built.

329 As noted above, trucks have also previously been used (and continue to be used) as an alternative to transporting fuel by pipeline. In addition, there are interconnected pipelines and storage facilities other than the Shell Jet Fuel Pipeline and Caltex Jet Fuel Pipeline which could be used to deliver jet fuel to the Sydney JUHI.

330 Therefore, in a situation where:

- there are currently two pipelines supplying the Sydney Airport;
- a third pipeline will be built in the medium term; and
- there are viable alternatives such as use of trucks and existing interconnected pipelines and storage facilities,

it is difficult to conceive how the Caltex Jet Fuel Pipeline could be considered to be a monopoly and how the natural monopoly test can be satisfied. This is particularly the case given the cost of using the Caltex Jet Fuel Pipeline is comparable to the costs of transporting jet fuel by other means (such as trucks) and the cost of pipeline operations in other states.

331 Therefore, irrespective of the factors used to determine natural monopoly characteristics, the NCC cannot be satisfied of criterion (b) based on the natural monopoly test.

¹⁴⁸ Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 27, s10.4(a).

¹⁴⁹ Board of Airline Representatives of Australia *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 4.

6 Criterion (a) – Material increase in competition

- 332 The NCC cannot recommend that the service provided by means of the Caltex Jet Fuel Pipeline be declared unless it is positively satisfied that access (or increased access) to the service would promote a material increase in competition in at least one market other than the market for the service.
- 333 In this respect, it is necessary to compare the state of competition in a relevant market with and without third party access (or increased access) to the service. Third party access (or increased access) must promote a material increase in competition compared to the position without such access. The time frame for this analysis must necessarily equate to the period for which declaration is sought.
- 334 In order to assess whether access (or increased access) is likely to promote competition under the factual, the Tribunal has held that “*mere access of itself*” cannot be sufficient to meet the legislative test.¹⁵⁰ What matters for the purposes of criterion (a) is an assessment as to whether the likelihood, sufficiency and timing of any access under a probable factual would be such as to promote a material increase in competition, compared to the counterfactual.¹⁵¹
- 335 As discussed in section 4.7 above, BARA identifies three markets in which it claims access (or increased access) would increase competition:
- the supply of jet fuel at Sydney Airport;
 - into-plane services at Sydney Airport; and
 - international and domestic freight and passenger services.
- 336 BARA generally has provided no evidence capable of satisfying the NCC as to any material increase in competition in any of the above markets. Further, as set out below, third party access (or increased access) to transportation via the Caltex Jet Fuel Pipeline is unlikely to promote a material increase in competition over the period for which declaration is sought when compared to the notional world in which such access (or increased access above that currently provided) is not available.

6.1 Supply of jet fuel at Sydney Airport

- 337 As noted above, the supply of jet fuel at Sydney Airport takes place within a broader international jet fuel supply market in which a range of jet fuel producers, marketers and traders compete to meet the jet fuel requirements of international airlines across various airports.
- 338 In that market, no jet fuel supplier has the capacity in its own right to store and transport jet fuel to meet contracted requirements across all airports. Consequently, international jet fuel suppliers adopt a range of options to meet airline requirements. In some cases, this will involve investment in storage and transport infrastructure at an airport (whether alone or in joint venture), in others it will involve contracting for such services, and in others it will involve taking delivery of jet fuel at different points in the supply chain so as to avoid meeting storage and transport requirements in their own right.

¹⁵⁰ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1066].

¹⁵¹ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1066].

339 The essential question that BARA ought to have addressed in its application was how the unavailability of the Caltex Jet Fuel Pipeline for third party access to transport jet fuel to the Sydney JUHI would, over the relevant period of time for which declaration is sought, practically impede competition for the supply of jet fuel in international tenders, including for supply in Sydney Airport. This is particularly the case in light of the options available to such jet fuel suppliers to compete for the supply of jet fuel at Sydney Airport.

(a) **The relevant time period**

340 It is noted that the Caltex Jet Fuel Pipeline is currently at capacity and will not have additional spare capacity much before the end of 2012 given the need to commission and test the Stage 2 Upgrade. Hence the relevant period of time to undertake the competition assessment is from, say, the start of 2013. The relevant end period for the competition analysis must be that period in which it is recognised that a third jet fuel pipeline (or an upgrade to the Shell Jet Fuel Pipeline) will be needed to meet demand. It appears that this is relevantly no later than 2020, and potentially earlier.

(b) **There are multiple alternative supply options available to jet fuel suppliers**

341 Within the period from 2013 to 2020, in the event that access to the Caltex Jet Fuel Pipeline was not available, the options available to other international jet fuel suppliers to supply jet fuel at Sydney Airport include procuring transport through commercial alternatives (trucking, transport via existing pipeline infrastructure, or constructing a new pipeline) or otherwise taking fuel supply at the Sydney JUHI or at the point of transfer into-plane.

342 These are not theoretical options. Shell currently transports jet fuel to the Sydney JUHI by its own pipeline; BP currently trucks jet fuel to Sydney Airport, Q8 Aviation supplies jet fuel into the Vopak Terminal; and the option remains of constructing another pipeline of less than 10km to connect existing Port Botany terminals. Further, from mid 2013, the Shell Jet Fuel Pipeline will become available on a continual basis for imported jet fuel.

343 [C-I-C] [REDACTED]

344 [REDACTED]

345 [REDACTED]

¹⁵² Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 24, s10.2(d).

346 Given these considerations, it is not credible to suggest, in face of the various transport options, that Caltex could leverage the withholding of access to the Caltex Jet Fuel pipeline so as to preclude competition in an international jet fuel supply tender. The conduct of Caltex to date in both providing third party access to the Caltex Jet Fuel Pipeline and investing to increase capacity (including capacity available to third parties) is not consistent with the contention that Caltex has the power to impede competition in the supply of jet fuel by withholding access.

(c) **There is a competing facility to the Caltex Jet Fuel Pipeline**

347 BARA has contended that, in the counterfactual, “*there are no other facilities [other than the Caltex Jet Fuel Pipeline] providing the same services*”.¹⁵⁴ This contention is wrong in substance, given the range of existing and potential options. Presumably it is only correct if it is interpreted narrowly to mean no other existing pipeline to which the Vopak Terminal currently has a tie in connecting directly into the Sydney JUHI. In the latter sense, it is not relevant to any substantive analysis of the competitive conditions of jet fuel supply at Sydney Airport in the period from 2013 to 2020.

348 Most strikingly, any reasonable counterfactual must clearly take into account that not only is the Shell Jet Fuel Pipeline under-utilised (on the SJFIWG Report figure, it is at 56% of capacity), but that from mid-2013 it will be able to transport imported jet fuel on a continual basis, including transporting jet fuel that is currently imported by Shell into the Vopak Terminal (and transported via the Caltex Jet Fuel Pipeline).¹⁵⁵

349 The presence of an existing competing pipeline in the Shell Jet Fuel Pipeline reflects the situation considered by the Tribunal in *Duke Eastern*, where it concluded that access would not promote competition.¹⁵⁶ In that case, coverage was sought of the Eastern Gas Pipeline (EGP). Duke, which operated the pipeline, provided access to the pipeline on commercial terms, as is the case with respect to Caltex Jet Fuel Pipeline. The EGP was used to supply Sydney and Canberra with natural gas. A competing pipeline facility, the Moomba to Sydney Pipeline (MSP), while originating at a different point to the EGP, also supplied natural gas to Sydney and Canberra, and had available capacity. So too the Interconnect, a line transporting Victorian gas to New South Wales and the Australian Capital Territory. This set of facts is analogous to the Shell Jet Fuel Pipeline,¹⁵⁷ which while originating at a different point to the Caltex Jet Fuel Pipeline, meets the same downstream demand with spare capacity. In these circumstances, the Tribunal was *not* prepared to conclude that Duke could exert market power, due to the existence of competing facilities.

¹⁵³ BARA’s failure to appreciate this dimension of its submission has led it to make submissions with respect to criterion (a) that contradict its position on criterion (b). In particular, on the one hand, it is claiming that third party use of jet fuel infrastructure is manifestly incapable of obtaining sufficient volumes to justify a third pipeline. Yet, on the other hand, it is claiming that third party access will exceed or come close to the current market share of Shell (which operates a much longer and more complex pipeline than any conceivable third pipeline).

¹⁵⁴ Given that BARA is proposing a counter-factual (that is, a future state of affairs), Caltex assumes that it meant “there are, and will not be, any other facilities providing the same services”.

¹⁵⁵ Shell has the capability to import jet fuel into Gore Bay, but as the pipeline between Gore Bay and Clyde is also used for the transport of crude, and needs to be flushed prior to being used by a refined product, Shell imports some product into the Vopak Terminal and has negotiated access to the Caltex Jet Fuel Pipeline for this purpose.

¹⁵⁶ *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2.

¹⁵⁷ The competitive constraints with respect to the Caltex Jet Fuel Pipeline are in fact stronger, given that it is a short small bore diameter pipeline which can be further duplicated, capacity can be increased by third parties increased pumping at Vopak and trucking is an existing alternative.

350 In that case, the Tribunal concluded that:

“EGP will not have sufficient market power to hinder competition based on the commercial imperatives it faces, the countervailing power of other market participants, the existence of spare pipeline capacity and the competition it faces from the MSP and the Interconnect. As EGP does not have market power, the Tribunal cannot be satisfied that coverage would promote competition in either the upstream or downstream markets.”¹⁵⁸

351 BARA itself recognises that pipelines are capable of constraining one another. In the BARA Supplementary Submission, BARA claims that competing pipelines into Sydney Airport will compete to marginal cost.¹⁵⁹ In doing so, BARA explicitly claims that two pipelines into Sydney Airport would constrain one another. In this sense, BARA’s analysis recognises that the Shell Jet Fuel Pipeline is a constraint on the Caltex Jet Fuel Pipeline.

(d) **There are no identified impediments to accessing Sydney Airport that arise by reason of access to the Caltex Jet Fuel Pipeline**

352 BARA has not identified any current practical impediment by reason of access to the Caltex Jet Fuel Pipeline to competition in the supply of jet fuel at Sydney Airport. In this regard, the BARA submissions are largely a mix of unsubstantiated conjecture and assertion.

353 For example, BARA has submitted that alternative jet fuel suppliers “*must negotiate access to the Caltex Jet Fuel Pipeline*”, and that “*without declaration, the status quo arrangements will continue*”.¹⁶⁰ It is of course not the case that alternative jet fuel suppliers must negotiate access to the Caltex Jet Fuel Pipeline, with multiple other options for supplying the airport open to them. In any event, continuation of the status quo, as BARA puts it, without declaration, is a status quo in which Caltex makes available capacity to its pipeline to third parties to transport jet fuel to the Sydney JUHI, and those third parties compete for the supply of jet fuel at Sydney Airport.¹⁶¹

354 BARA has also contended that “*if access was not granted, there are unlikely to be any new entrants*” and further that “*there will be little if any, incentive for Caltex to allow the entry of new rival suppliers*”. To this end, it has provided a list of the ‘entrants’ which it claims are unable to access Sydney Airport by reason of being unable to secure pipeline access. Some relevant financial data in relation to BARA’s proposed alternative suppliers¹⁶² at Sydney Airport are set out in the table below.

Table 6: BARA’s proposed alternative suppliers at Sydney Airport

Potential entrant	Operating revenue (2010) ¹⁶³	EBIT (2010)	Market capitalisation	Employees
PetroFina Company	\$208,528,016,831	\$13,907,104,883 ¹⁶⁵	\$84,435,448,036 ¹⁶⁶	92,855

¹⁵⁸ *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2, [124]

¹⁵⁹ Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) -uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 3-6.

¹⁶⁰ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 24, s10.2(d).

¹⁶¹ Either directly, or indirectly (as is the case with Q8 which supplies jet fuel into the Vopak Terminal).

¹⁶² Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 23, s10.2(c).

¹⁶³ All exchange rates are derived from <http://www.xe.com> and are rounded to two decimal points.

Potential entrant	Operating revenue (2010) ¹⁶³	EBIT (2010)	Market capitalisation	Employees
Limited ¹⁶⁴				
Sinopec (Hong Kong) Limited ¹⁶⁷	\$286,234,678,509 ¹⁶⁸	\$15,513,700,483	\$717,427,948,810 ¹⁶⁹	373,375 ¹⁷⁰
Vitol Asia Pte Ltd ¹⁷¹	\$196,320,061,528	Unavailable	N/A ¹⁷²	330
World Fuel Services ¹⁷³	\$18,689,666,599	\$431,803,493	\$2,774,440,960 ¹⁷⁴	1,499
Kuwait Petroleum Aviation (Australia) Pty Limited ¹⁷⁵	\$89,814,166,661	\$4,948,806,266	\$482,267,399,531 ¹⁷⁶	16,619

355 Of those international jet fuel suppliers BARA identifies as potential new entrants (for whom access to the Caltex Jet Fuel Pipeline is presumably said to be a constraint) a number are already supplying jet fuel to international airlines in Sydney (for example, Q8 Aviation and World Fuel Services).¹⁷⁷ Neither of these two parties currently has access to the Caltex Jet Fuel Pipeline, with the former supplying on a delivered basis and the latter purchasing fuel on an into-wing basis.

¹⁶⁵ Figure is for adjusted net operating income.

¹⁶⁶ As at 2 November 2011: Bloomberg, *Market Snapshot* <<http://www.bloomberg.com/apps/quote?ticker=FP:FP>>. Converted from US\$ at contemporary exchange rate (0.96).

¹⁶⁴ PetroFina was the name of a company which merged with Total S.A. in 1999 to become TotalFina. Since 2003 TotalFina has been known as Total S.A.:Total S.A., *Company History* <http://www.totalpetrochemicalsusa.com/who_we_are/history.asp>. Unless otherwise stated, information is derived from Total S.A.'s 2010 Annual Report (31 December 2010) <http://www.total.com/MEDIAS/MEDIAS_INFOS/4523/EN/Total-2010-perspectives.pdf>. Annual Report figures converted from € at 31 December 2010 exchange rate (1.31).

¹⁶⁷ Wholly-owned subsidiary of China Petroleum & Chemical Corporation (CPCC):Sinopec Corp., *Wholly-owned & Controlling Subsidiaries* <http://english.sinopec.com/about_sinopec/subsidiaries/subsidiaries_joint_ventures/20090327/6826.shtml>.

¹⁶⁸ CPCC, 2010 Annual Report, 7 - <http://english.sinopec.com/download_center/reports/2010/20110413/download/Sinopec201020F.pdf>. Figures converted from RMB at 30 December 2010 (report date) exchange rate (0.15).

¹⁶⁹ As 2 November 2011: Bloomberg, *Market Snapshot* <<http://www.bloomberg.com/apps/quote?ticker=386:HK>>. Converted from US\$ at contemporary exchange rate (0.96).

¹⁷⁰ As at 31 December 2010: CPCC, 2010 Annual Report, 59.

¹⁷¹ Subsidiary of Vitol Group, headquartered in Rotterdam. Information is derived from Vitol Group, *Company Brochure* (10 January 2011) <<http://www.vitol.com/downloads/vitol-group-brochure-2011.pdf>>. Figures converted from US\$ at 10 January 2011 exchange rate (1.01).

¹⁷² Vitol is an unlisted company owned by its employees: Vitol Group, *About Vitol* <<http://www.vitol.com/about-vitol.html>>.

¹⁷³ All information derived from World Fuel Services, 2010 Annual Report (31 December 2010) <<http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9ODg0NjJ8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1>>. Annual Report figures converted from US\$ at 31 December 2010 exchange rate (0.98).

¹⁷⁴ As at 2 November 2011: Bloomberg, *Market Snapshot* <<http://au.finance.yahoo.com/q?s=INT>>. Converted from US\$ at contemporary exchange rate (0.96).

¹⁷⁵ Subsidiary of Kuwait Petroleum Europe BV; ultimate parent is Kuwait Petroleum Corporation (KPC) - Special Purpose Financial Report for year ended 31 March 2011 lodged with ASIC. Information is derived from KPC, *Annual Report 2009-2010* (31 March 2010) <<http://www.kpc.com.kw/MediaCentre/Publications/default.aspx>>. Figures converted from KD at 31 March 2010 exchange rate (3.75).

¹⁷⁶ KPC is a state-owned company but is the fourth largest in value on the Financial Times "Non-Public 150" list: <http://www.ft.com/intl/cms/s/2/5de6ef96-8b95-11db-a61f-0000779e2340.html#axzz1ct3jblj8>. Valuation converted from \$US at list date exchange rate (1.28 - 14 December 2006).

¹⁷⁷ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 23, s10.2(c).

- 356 It follows that such suppliers are able to compete for the supply of jet fuel to airlines at Sydney without contracted access rights to the Caltex Jet Fuel Pipeline in their own right. If the lack of a contracted access right was an impediment to such “new entrants”, which appears currently not to be the case, then such suppliers could readily avail themselves of other transport options. As can be seen, they are extremely sizeable commercial enterprises. To suggest that these companies are incapable of underpinning a \$50-\$60 million investment to supply jet fuel at Australia’s largest airport lacks credibility.
- 357 Further, BARA contends that “[g]iven Caltex’s commitment to increase the capacity of the Caltex Jet Fuel Pipeline, it is likely that existing users will lose market share in line with Caltex increasing its own share”.¹⁷⁸ The proposition is nonsensical. A “monopolist” would not increase capacity (as Caltex is doing) to increase its market share, it would take existing capacity away from third parties – which in Caltex’s case, currently consume [C-I-C] [REDACTED] [C-I-C] of pipeline capacity. The contention can be further put into perspective when it is considered that Caltex has [C-I-C] [REDACTED] [REDACTED] [C-I-C] and its expansion of pumping capacity will further free up available time for third party users of its pipeline.
- 358 Caltex competes for sales (market share), like any other participant in a competitive market, by the quality of its product and service, and the competitiveness of its price. It cannot increase market share simply by increasing its capacity. This could only occur if there was significant unmet demand for jet fuel, and no alternative suppliers were capable of servicing that additional demand. This cannot be the case currently, not least given that the Shell Jet Fuel Pipeline is under-utilised and affordable, and that timely investments in additional trucking capacity are feasible.

(e) **Caltex has no incentive to refuse access**

- 359 More generally, the proposition that Caltex “will increase its market share of the supply of jet fuel at Sydney Airport”, is devoid of any analysis. Caltex does not have a unilateral capacity to increase its share of sales of jet fuel at Sydney Airport. It must compete for those sales with a range of other jet fuel suppliers. If it is conjectured that it can profitably increase sales by withholding capacity beyond that required to meet its reasonably anticipated requirements, then the question is why it has not done so in the past. The fact that it has not, is evidence contrary to the proposition that it somehow has the unilateral market power assumed by BARA.
- 360 BARA argues that Caltex has no interest in increasing competition in the jet fuel market, and thus it has little, if any, incentive to grant access.¹⁷⁹ Clearly, this assertion cannot be correct, given that Caltex currently provides access on commercial terms and has an intention to provide further access once the Stage 2 Upgrade has been completed. Indeed, BARA’s entire case hinges on Caltex expanding capacity in excess of its own requirements to accommodate increased access. It is therefore not credible for BARA to claim that Caltex has no incentive to grant access in the context of an application that depends on that very incentive for the additional capacity necessary to make increased access possible.

¹⁷⁸ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 24, s10.2(d).

¹⁷⁹ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 23, s10.2(d) and 51, 11.10(c).

- 361 What BARA's simplistic analysis fails to explain is why, in circumstances where it regards Shell and Caltex as collectively trying to prevent downstream competition, in contradiction to its own view expressed in the BARA Supplementary Submission that alternative pipelines into Sydney Airport compete to marginal cost, both Caltex and Shell have entered into extensive wholesaling arrangements. In Caltex's case, not only does it offer access to the pipeline, but it also wholesales its fuel to third parties and makes it available to Qantas at numerous points in the chain (into-JUHI, ex-JUHI and into-plane). Likewise, Shell is prepared to wholesale jet fuel on a delivered basis into Port Botany for use by Q8 Aviation, and has similar arrangements with Qantas across the various supply-chain assets.
- 362 A more reasonable analysis of Caltex's incentives is that, where Caltex does increase capacity, it has an option-value on the additional capacity. That is, there is a positive value associated with it having the ability to expand its downstream supply in the event it is able to do so. However, if it is not able to secure additional supply – ie because alternative suppliers (including Shell) are winning volume in the downstream market at its expense – then its incentive is to make capacity available to other suppliers in order to improve its asset utilisation, provided it is fairly compensated for the costs incurred in its so doing (including a fair compensation for its lost option-value). The truth of this incentive is already evident in the access arrangements that Caltex has entered into. Caltex already grants Qantas, BP and Shell a collective [C-I-C] [REDACTED] [C-I-C] of capacity on the Caltex Jet Fuel Pipeline under commercial arrangements.
- 363 BARA alleges that market power is evident in the transport chain between the Vopak Terminal and the Sydney JUHI. If that contention was right and access to two stages of that transport chain (the Caltex Jet Fuel Pipeline and the Sydney JUHI) were regulated, there is a risk that any market power would be shifted to the operator of the Vopak Terminal.

(f) **There is no factual case capable of meeting the legislative criteria**

- 364 BARA has presented a factual case that increased access to the Caltex Jet Fuel Pipeline would result in new entry into the market. Implicit in BARA's thesis is a number of unsupported assumptions:
- that new entry, additional to what would otherwise occur under the counterfactual (bearing in mind that Caltex already provides access, and plans to provide more), will occur;
 - that this access *would* be material;
 - that the mere existence of additional suppliers (irrespective of whether entrants would be less efficient than incumbent suppliers) would equate to a material promotion of competition.
- 365 Inadequate support is provided for each of these assumptions, none of which can be described as self-evident or uncontroversial. It follows that there is insufficient evidence on which the NCC can be satisfied, on a "with and without" basis, that access to the Caltex Jet Fuel Pipeline could occur, that it would occur, and that it would be competitively significant if it did occur.

366 In particular, no evidence (beyond unsubstantiated assertions from BARA itself) is provided with respect to:

- whether access will be taken up;
- the identity of new entrants (beyond a list of the world's major jet fuel suppliers);
- the volume of new supply;
- the scale of any entrant;
- the timing of any entry;
- the materiality of any entry (noting that there are potential capacity constraints);
- the nature of the entry, and its effect on competition (ie will it be low-cost, discounted entry, etc); and
- the terms and conditions of access.¹⁸⁰

367 Caltex notes that the Tribunal has previously concluded that it cannot be positively satisfied that criterion (a) was met without having regard to considerations such as those listed above.¹⁸¹ The Tribunal has indicated that the correct approach to criterion (a) is not “entirely theoretical”.¹⁸² Instead, according to the Tribunal, “whether or not access will be taken up is ... an essential consideration”, and “what matters [for the purpose of assessing criterion (a)] is the likelihood of access, the sufficiency of access, and the likely timing of access”.¹⁸³

368 It follows that the BARA Application does not provide a sufficient foundation for the NCC to be satisfied that increased access would promote a material increase in competition.

369 In this regard, it is important to note that in 2009 the Australian Government conducted a detailed review of the aviation industry and reached the following conclusion in relation to competition amongst fuel suppliers at Australian airports:

“The Government does not believe a case has been made for intervention in this field at the present time. The commercial barriers to entry in this market are modest when compared to other investment decisions in the aviation industry and there are no regulatory barriers limiting the ability of the other suppliers to compete in the market.

The Government has not been provided with evidence that shows the existing suppliers have used their position to prevent new participants from entering the market, however the broader provisions of the [CCA] apply. Airlines or other parties can raise these matters with the Australian Competition and Consumer Commission if necessary.”¹⁸⁴

370 In that context, and in the absence of any compelling case to the contrary, the NCC should not be persuaded that criterion (a) is fulfilled.

¹⁸⁰ The Tribunal in BHP indicated that it only needed to identify „reasonable’ terms and conditions for the purpose of criterion (a). However, BARA has not provided any information on the terms on which it assumes access will occur.

¹⁸¹ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1063].

¹⁸² *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1064].

¹⁸³ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [104], [1066].

¹⁸⁴ “Australian Government, *National Aviation Policy White Paper*, December 2009, 188.

6.2 Into-plane services at Sydney Airport

- 371 BARA does not propose that access to the Caltex Jet Fuel Pipeline would enable dedicated into-plane service providers to enter a market (however defined), nor indeed, is it obvious why access (or increased access) would enable such entry.
- 372 BARA acknowledges that barriers to entry into an into-plane market are low and does not identify access to the Caltex Jet Fuel Pipeline as presenting a barrier to entry for into-plane services. BARA acknowledges that “*existing service providers cannot prevent other willing operators from delivering [into-plane services] and that a new service provider merely requires a licence granted by SACL*”.¹⁸⁵ In this respect, the fact that there has been no entry by a dedicated into-plane operator over an extended period of time, despite there being no barrier to it occurring, is consistent with the position articulated earlier, namely that into-plane services may not be functionally separable from the supply of jet-fuel.
- 373 In any case, BARA claims the competitive implications of access in its proposed market for into-plane services would only come from “*potential new suppliers of jet fuel [seeking] to provide ‘end-to-end’ services to airlines, which would include into-plane services*”.¹⁸⁶ Consistently with the possibility that into-plane services are not a functionally separate market, BARA does not claim that access (or increased access) to the Caltex Jet Fuel Pipeline would result in any persons supplying into-plane services without also providing jet fuel, rather, its submission implicitly assumes that effect of declaration on the jet fuel market will be mirrored by an effect in its into-plane services market.
- 374 As a practical matter therefore, even putting aside the market definition question, if the NCC is not satisfied that competition would be promoted in the jet fuel market, as Caltex contends it would not, then there would not appear to be any support in the BARA Application for a different conclusion to be reached with respect to an into-plane market.
- 375 Further, there is, of course, no reason why competing into-plane services cannot be provided at present, irrespective of the level of access on the Caltex Jet Fuel Pipeline. Despite low barriers to entry, BARA does not claim that entry by dedicated service providers is likely, or has occurred in the past. Caltex is likewise unaware of any history of independent into-plane service providers in Australia, or any plan for any such company to enter the market here;¹⁸⁷ this is not, in any event, a situation that would be altered by increased access to the jet fuel pipeline.
- 376 Caltex would add to this that the capital costs of entry are comparatively low, with both a hydrant cart (\$400,000) and a re-fuelling tanker (\$450,000) of comparatively low cost relative to their 20-year asset life, and able, in any case, to be leased. Further, while some training is necessary in order to operate the vehicle and the fuelling panel on various aircraft (approximately 3-6 months in length), the requisite skill level is not so high as to amount to a material barrier to entry. In any case, an entrant would hire skilled workers, rather than train a workforce from scratch.

¹⁸⁵ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 41, s11.4(c).

¹⁸⁶ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 47, s11.9(b).

¹⁸⁷ In some overseas markets, into-plane services are provided by dedicated third-party ground handling companies (ie incorporating baggage handling, catering, passenger ramp access, etc). There is no history of that practice in Australia.

6.3 International and domestic freight and passenger services

377 There is no credible basis for BARA to claim that competition would be promoted in any market for air services (however defined) from increased access to the Caltex Jet Fuel Pipeline:

- No basis that suggests that “increased” competition in jet fuel would, for example, lead to an increase in jet fuel suppliers, as it is not credible to suggest that the level of air travel into and out of Sydney is practically constrained by (or permitted by) reduced (increased) supply of jet fuel.
- It is not credible to suggest, as the BARA Application does, that the level of air travel into and out of Sydney Airport is practically constrained by (or promoted by) the number of jet fuel suppliers, and that increased numbers of suppliers would result in a promotion of competition in an aviation market.
- In any case, it is difficult to see that a component as relatively small as the cost of transport could have any effect on the viability of downstream operations.
- As a logical proposition, on BARA’s application, improved competitive conditions in a market for air services could only come about through improved competition in the supply of jet fuel. It follows that there can be no reason for the NCC to consider the effect of access on the air services market. If competition is promoted in the jet fuel market (which it would not be) the statute is satisfied and there is no need for the NCC to consider an air services market, and if it is not, then there is no reasoned basis to think that competition might then be promoted in a market for air services. In any case, the provision of freight and passenger services is already extremely competitive.
- Even if there were some effect on the air services market from increased access to the Caltex Jet Fuel Pipeline (which is not the case), without there being a concomitant promotion of competition in the jet fuel market, there is no evidence or reason to think that it would be a material effect.

378 Given these considerations, together with BARA’s failure to undertake a credible competition analysis of the effect of access on a properly defined air services market, Caltex submits that there is no evidential basis for the NCC to be satisfied that increased access to the Caltex Jet Fuel Pipeline would promote competition in a “*market for international and domestic passenger and freight services*”.

7 Criterion (c) – National significance

379 The BARA application wrongly equates the significance of Sydney Airport itself with the significance of the pipeline facility. The Caltex Jet Fuel Pipeline is a short pipeline, that is only around 200mm in diameter, and is one of numerous petroleum-related pipelines that either supply Sydney Airport or could do so at comparatively low cost. Currently, the jet fuel requirements of Sydney Airport could be met through a combination of existing pipelines, a new pipeline, or the trucking of fuel to the Sydney JUHI. It is quite incorrect therefore to equate the Caltex Jet Fuel Pipeline as being of the same national significance as the runways and terminals operated by SACL.¹⁸⁸

¹⁸⁸ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 56, s12.4.

8 Criterion (f) – Public interest

8.1 Background to the criterion

380 The NCC cannot recommend that services provided by means of the Caltex Jet Fuel Pipeline be declared unless it is positively satisfied that access (or increased access) to the facility would not be contrary to the public interest.

381 There is no presumption, as a starting point, that access (or increased access) would not be contrary to the public interest. As with each criterion, criterion (f) requires a careful consideration of the factual with access compared to a counterfactual without access and, in its particular terms, whether, in the circumstances of each case, access would be contrary to the public interest. As noted above, in the Pilbara Tribunal Decision, the Tribunal held that such analysis involves, at a minimum, a consideration of whether the costs of access outweigh the benefits.¹⁸⁹ Such a cost-benefit analysis is likely to involve both quantitative as well as qualitative aspects.¹⁹⁰ Further, it was noted that “*there will be some consequences [of access] which, while not certain, are likely to occur. It is inappropriate to simply ignore those consequences... the Tribunal should consider consequences that are likely to arise as a result of access, giving them a weight that pays regard to their degree of likelihood*”.¹⁹¹

382 The factual circumstances that the Tribunal considered in the Pilbara Tribunal Decision are not dissimilar to those in the present case. In that case, as here, the facility to which access was sought had been duplicated,¹⁹² and it was accepted that further infrastructure investments were required in order to meet growing demand.¹⁹³ Those investments would need to occur, as here, in a coordinated way in order to limit the commercial impact of capacity constraints and supply disruptions.¹⁹⁴ Further, the facility to which access was sought was at capacity, and increasing the level of access to it would require the facility to be expanded.¹⁹⁵ Lastly, access in that case would result in operating inefficiencies,¹⁹⁶ which, while not of the same magnitude in the present case, are nevertheless present and require assessment.

383 From these circumstances, the Tribunal identified two key likely costs of access:¹⁹⁷

- That access would discourage the development of alternative railroads, one of which had already been constructed. The Tribunal considered that, given that access to alternative railroads may well be less constrained, and provide far more certainty of use for third parties than access to the existing lines, the

¹⁸⁹ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1161].

¹⁹⁰ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1169].

¹⁹¹ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1172].

¹⁹² BHPBIO's Mt Newman railroad had been largely duplicated by the Chichester Line, which was operated by Pilbara Infrastructure Pty Ltd, and which ran adjacent to the Mt Newman railroad for approximately 175km. See: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [418].

¹⁹³ In this respect, it is noteworthy that the Tribunal accepted that, in the event that the Hamersley Line was not declared, Fortescue Metals Group would construct alternative lines from Solomon to the Anketell Port and to its Chichester railroad. See: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [768].

¹⁹⁴ In an iron ore supply-chain, investments in railroads are coordinated with downstream investments (relevantly, ports) and upstream investments (relevantly, mines). Thus, for example, Fortescue Metals Group's then plans to upgrade its Christmas Creek mine required a new rail extension, as well as three berths, two ship loaders, two stackers, two reclaimers and two train dumpers at Anderson Point See: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [447].

¹⁹⁵ Relevantly, the Tribunal found that only very small volumes of third party iron ore (10Mtpa) could be accommodated on the Mt Newman and the Hamersley lines without causing significant disruption to the access providers train operations (and even then, some disruption would be necessitated). Any greater level of access would require the lines to be expanded. See: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 [711], [713].

¹⁹⁶ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1304].

¹⁹⁷ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1304].

discouragement of their development by the making available of a regulated alternative was a material cost of access.

- That access will most likely lead to delays in the access provider making investments in its facility and/or changes in the operating parameters of that facility, whether by way of expansions, adopting new procedures, or introducing technological developments. The delays associated with regulated access, particularly given the context of capacity constraints and coordination issues in the supply-chain, would give rise to a material cost, particularly to the access provider.

384 These particular costs distinguished the Pilbara Tribunal Decision from earlier cases, such as Services Sydney and the two Sydney Airport matters, where it was clear that the relevant facilities (respectively, the Sydney Water sewerage reticulation system and Sydney Airport itself) had no substitutes, and were not economically duplicable, capacity constrained or part of integrated supply-chains. In those circumstances, none of which are true in the present case, the costs associated with access, particularly the costs associated with distorting investment incentives could not arise to the same level of materiality as in the latter Pilbara Tribunal Decision.

8.2 The BARA application

385 BARA deals with the essential overriding public benefit criterion in short formulaic response to issues posed in the standard NCC application form. The treatment of investment incentives is reduced to the proposition that “*declaration will not reduce the incentive to invest... [as] Caltex has already committed to upgrading the Caltex Pipeline to its maximum capacity [and] ... once this occurs, Caltex has advised that it cannot further meaningfully increase the capacity of the Caltex Pipeline.*”¹⁹⁸ No independent or other analysis is provided.

386 In doing so, BARA has, in effect, assumed that no issue will (or could) arise with respect to the effect of regulated access on Caltex’s investment incentives or the efficient operation of the pipeline. Such an assumption is contrary to the basic assumption underpinning regulated access, namely, that it is a “second best” outcome that will always involve the imposition of some costs but that these costs ought to be counterbalanced by associated improvements in competitive conditions.¹⁹⁹

387 The prospect of regulated access to the Caltex Jet Fuel Pipeline entailing adverse consequences or imposing material costs cannot be ignored or assumed away. While BARA may contend that there is some countervailing benefit that offsets those costs (which is not accepted), any such benefits need to be clearly identified and assessed so they can be weighed against the costs.

388 In this respect, as discussed above, BARA has failed to set out a cogent or probative case on the likelihood, sufficiency and timing of access. Its case that access will promote competition is not only unsubstantiated, but also fails to provide any detail (as is required by the Tribunal’s analysis of criterion (f) in the Pilbara Tribunal Decision)²⁰⁰ on whether access will be taken up, the extent it will be taken up, and the likely terms and conditions on which it will be taken up. This makes it impossible to meaningfully assess, not only whether criterion (a) is satisfied, but also whether the sufficiency of the benefits identified under criterion (a) outweigh the costs associated with regulated access such as to

¹⁹⁸ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Jet Fuel Pipeline Facility*, 26 September 2011, 59, s15.1(c).

¹⁹⁹ *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2, [44].

²⁰⁰ *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1165].

conclude that access would not be contrary to the public interest, as required by criterion (f).

8.3 The costs of regulated access to the Caltex Jet Fuel Pipeline

389 The adverse consequences of regulated access to the Caltex Jet Fuel Pipeline necessarily include:

- interfering with commercial incentives to upgrade the capacity of the Caltex Jet Fuel Pipeline;
- reducing efficiency of operation of the Caltex Jet Fuel Pipeline;
- increasing reliability risks through the Caltex Jet Fuel 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 Jet Fuel 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.

390 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.

(a) Caltex's incentive to invest in the Caltex Jet Fuel Pipeline

391 The curtailment of Caltex's ability to determine the terms and conditions on which it will make access to the Caltex Jet Fuel Pipeline available must necessarily increase the cost and time associated with making investments in the pipeline, and reduce its incentives to invest as compared to a world in which Caltex was not under the same constraints. Contrary to BARA's assertion that Caltex has already taken the decision to invest in the pipeline and no future investment decisions will ever be required, Caltex has:

- not finished undertaking the Stage 2 Upgrade project;
- further investment decisions are required in order to successfully complete that project and make additional capacity available to third parties; and,
- even after the completion of the Stage 2 Upgrade project, further investment decisions will of course be required in the future, even if the pipeline is at its maximum theoretical capacity.

- 392 While the materiality of the effect of regulated access on these decisions will depend on the nature of the investment and the extent of the access, there is no question that the impact of regulated access will be to reduce Caltex's incentive to invest.
- 393 Even where the adverse incentive effects of regulated access can be compensated for by way of a high access price, it is difficult (if not impossible) to preserve the same *timing* of investment decisions in a regulated environment. On any multi-user facility, access seekers and providers necessarily have different views on the necessity and timing of any investment. These differences arise because each user has different commercial priorities, are of differing profitability, and in any case, do not wish to support investments that might give their rivals an advantage. Further, users have differing views on their liability to pay for any incremental investment, particularly where the benefits they obtain from the investment are difficult to quantify (ie a reduction in congestion costs, or more reliable operation). The protracted nature of negotiating incremental investment in such a context is considerably worsened by regulated access, which affords access seekers opposed to investment (or at least, opposed to paying for investment on commercial terms offered by the service provider) an opportunity to game the process without a material risk of losing access rights. Conversely, it gives access seekers that require investment a free option to compel the access provider to make that investment at a price that would not be commercially attractive to it. Even where the regulator is able to respond effectively to these scenarios, this necessarily takes a protracted period of time.
- 394 In the Sydney Airport jet fuel supply-chain, where capacity is scarce and demand is rapidly increasing, the costs of such delay could be very significant indeed. In this respect, the BARA application does not acknowledge or address the costs that may be incurred by stakeholders if regulated access to the Caltex Jet Fuel Pipeline results in Caltex's investment decisions being delayed or deferred.

(b) Incentives for third parties to invest in jet fuel supply infrastructure

- 395 The BARA Application limits its consideration of investment incentives to the investment incentives of the service provider. Yet it is well accepted that one of the most significant adverse investment consequences of regulated access is under investment by third parties in alternative facilities. Indeed, as noted above, it was just such an effect that was the central reason why the Tribunal concluded that access was contrary to the public interest in the Pilbara Tribunal Decision.
- 396 All users in the jet fuel supply chain at Sydney Airport face a non-trivial build/buy calculus with respect to transportation of jet fuel from a terminal to the JUHI. Regulated access must, by definition, alter that build/buy decision, by making the „buy' decision more attractive to providers that compete with the regulated service provider.²⁰¹ In short, regulated access will provide a potential access seeker with a free option to explore commercial negotiations with Caltex rather than invest itself and, if those negotiations are unsuccessful, to seek access on regulated terms. This undermines the business case for facilities-based investments, thereby imposing distortions, reducing competition and innovation, and encouraging regulatory dependency and arbitrage.

²⁰¹ The purpose of regulated access is to reduce the cost of a „buy' price that has been set at an anticompetitive level by a natural monopolist. If regulated access does not have this effect, ie because the „buy' price is already competitively set, then that begs the further question as to why regulation is required at all.

- 397 This is a very real likelihood in this case, given the range of alternatives available, including as noted above:
- investment in the upgrade of pumping capacity by Vopak;
 - use of, and investment in capacity upgrades for, the Shell Jet Fuel Pipeline;
 - trucking and investment in trucking facilities;
 - the development of a further pipeline connecting Port Botany storage terminals to Sydney Airport.
- 398 A particular cost in this case is that associated with the reduced reliability of discouraging investment in additional supply-chain assets. Supply chain investments that are made to supply jet fuel at Sydney Airport, whether in the form of improved trucking capability, the upgrade of the Shell Jet Fuel Pipeline, or a new pipeline, provide assurance to airlines that there is adequate redundancy in the system to respond to supply disruptions. In an unregulated environment, Caltex has taken steps to support reliability through upgrading the Caltex Jet Fuel Pipeline. By discouraging these investments, and encouraging competing providers to rely on the Caltex Jet Fuel Pipeline with the prospect of mandated regulated access (where they may otherwise not do so), regulated access necessarily has the tendency to reduce the long-term reliability of supply at Sydney Airport.
- 399 Further, regulated access will almost certainly reduce the incentive for the Vopak Terminal to increase flow rates through the Caltex Jet Fuel Pipeline from the Vopak Terminal to the Sydney JUHI through further investment in pumping facilities. The flow rate that is achievable from the Vopak Terminal is lower than that achievable (following the capacity upgrade) by Caltex from Kurnell as a result of Vopak's lower capacity pumping infrastructure. Investment in more efficient pumps would result in more efficient use of time the Vopak users already have on the Caltex Jet Fuel Pipeline. If regulated access provided the prospect of holding out for cheaper access to capacity from Caltex (after it has invested in increased pumping), compared to investment in pumping by Vopak, the incentives of the Vopak Terminal users to support enhanced pumping facilities and the commercial opportunity for Vopak to invest would decrease. This is particularly material as increased Vopak pumping capacity would actually support the development of an alternative pipeline.
- 400 On a longer term basis, it is agreed that additional pipeline capacity (either or both a Shell Jet Fuel Pipeline upgrade or a new pipeline) will be required. Additional pipeline capacity is likely to be required by 2019 and may be required sooner if trucking and Vopak capacity options are not taken up, or demand increases at a faster rate, or both. BARA itself forecasts the need for an additional pipeline from about 2020.²⁰² BARA estimates a lead time at approximately five years. While Caltex considers that the required lead time is likely to be shorter than that, it agrees that there will necessarily be a period of years between a decision to build an additional pipeline and that pipeline becoming operational. Regulated access over a competing pipeline (the Caltex Jet Fuel Pipeline) must necessarily impact on the commercial assessment of the case for new pipeline capacity. The effect of regulatory intervention into the Sydney Airport jet fuel supply chain is likely, at its most benign, to have the effect of *delaying* decisions to invest in new pipeline capacity, which on BARA's own analysis would optimally need to be made in the next two to three years.

²⁰² Board of Airline Representatives of Australia, *Supplementary submission in relation to Criterion (b) - uneconomic for anyone to develop another facility to provide the service*, 27 October 2011, 2.

401 The cost of delay (or indeed, deferral) in investment in transport alternatives is likely to be particularly high given the projected growth in demand at Sydney Airport and the requirement for further investment to meet that demand over time.

(c) The efficient and reliable operation of the Caltex Jet Fuel Pipeline

402 Regulated access to the Caltex Jet Fuel Pipeline raises the material prospect of less efficient utilisation of the pipeline. Capacity is optimally made available on the basis of a daily allocation. Allocating capacity on that basis minimises pump changeover time. As noted in section 4.5, whenever Caltex provides access to BP, Shell and Qantas, Caltex shuts off its pipeline to allow for appropriate procedure and checks to maintain pipeline integrity and product quality. Currently, changeovers take half an hour and are undertaken at the end of the day, where required, between 11.30pm and midnight. After changeover, the jet fuel in the pipeline is pumped by the particular user from the Vopak Terminal.

403 Increased access (including increasing number of third party users) increases the frequency of pump changeovers and, therefore, the pumping time wasted during the changeover, the cost of preparing for changeovers, and the risk of technical issues arising. Further, the cost of changeovers is not limited to the direct costs of the changeover itself, but materially includes the costs associated with the increased risk of parties not having sufficient product to utilise their allocated slot, leading to inefficiencies and wasted pumping time. This is not a remote possibility, but rather a present operational feature of multi-user pipelines that Caltex currently manages through a pipeline scheduling system. The more users on the pipeline however, the more difficult it is for Caltex to maintain the integrity of the scheduling system and ensure that the pipeline remains fully utilised.

404 It is worth stressing that the costs associated with lost pumping time are not necessarily borne solely by the access seeker, but impose costs more broadly in terms of underutilisation of the pipeline.

405 Further, regulated access is likely to increase the risks of multi-product contamination. It is not possible to perfectly separate jet fuel product pumped through the pipeline by different parties, and in any case, all product is commingled in the JUHI. The more parties that use the Caltex Jet Fuel Pipeline to transport imported jet fuel the greater the likelihood that one party's jet fuel will be off-specification and contaminate other jet fuel. This is not a theoretical risk.

406 In 2005, jet fuel imported on the "Ping Chi" oil tanker was off-specification due to its conductivity properties. However, it was distributed to several terminal facilities (including the JUHI) before it was detected. This in turn contaminated the jet fuel supplies in those terminal facilities, all of which needed to be treated and recertified. This caused a "black light" incident in 2005.

407 These costs are not recognised let alone assessed in the BARA Application.

(d) Reduced coordination of decision-making in the jet fuel supply chain

408 The safe and reliable operation of the Sydney Airport jet fuel supply-chain depends on the effective coordination of multiple parties, with differing commercial interests: the Sydney JUHI (and its participants), the two pipelines, and the port and terminal operators. BARA's Application essentially proposes that two of these assets, namely, the JUHI and one of the pipelines, should be subject to regulated operating and investment outcomes.

409 This has the real risk of causing delays and increased costs associated with coordinating the behaviour of supply-chain participants:

- It will leave some operating parameters in the supply-chain (terminals and ports, into-plane services, and the Shell Jet Fuel Pipeline) free to be determined by commercial arrangements, while subjecting others (the Sydney JUHI and the Caltex Jet Fuel Pipeline) to regulated outcomes (and regulatory processes and time frames) which may or may not be consistent with the commercial parameters negotiated at other points in the supply chain and commercial decision-making timeframes. This may result in asymmetries and operating inefficiencies, and/or the *de facto* regulation of assets that are not subject to declaration;
- It will make some investment decisions subject to a regulated outcome, thereby potentially delaying investments in unregulated assets and imposing costs on all market participants. If, for example, on-airport storage is to be relocated or expanded, then it can reasonably be expected that existing pipelines will need to be modified to connect to it and that such pipeline connections will be necessary to ensure sufficient volumes of fuel are available at the expanded or relocated JUHI facility. Regulated access may cause delays to the upgrade or relocation of the JUHI given the potential for the ACCC involvement in any commercial negotiations as to the timing, and cost recovery, of any additional capital works on the Caltex Jet Fuel Pipeline. Such a delay would not only affect investments made by Caltex and the JUHI, but also the timing of any upgrade of the Shell Jet Fuel Pipeline.

410 These issues associated with regulating just two elements (of which one has an existing substitute) in an integrated supply-chain are not recognised or assessed in the BARA Application.

8.4 Conclusion

411 The legislation requires the NCC to be satisfied that access (or increased access) to the Caltex Jet Fuel Pipeline would not be contrary to the public interest.

412 If there is insufficient evidence before the NCC on this point, that is, if there is insufficient analysis of clearly identifiable costs and no material assessment of overall benefits against which to assess such costs, then the NCC cannot be satisfied that access is not contrary to the public interest. In this respect, the BARA Application manifestly fails to provide the NCC with any evidence on which it can be satisfied as to criterion (f).

413 Caltex ought to properly be able to respond to a considered analysis of the costs and benefits of access, informed by a practical assessment of likely access scenarios. The absence of a properly substantiated public benefit case in the BARA Application, as well as an undeveloped and inadequate explication by BARA of the likelihood, sufficiency and timing of any access, necessarily precludes Caltex from undertaking a detailed public interest analysis at this time.

414 It is not the case that Caltex must establish that regulated access brings with it costs that outweigh the supposed benefits of access. More so, given that there is no particular reason to think that Caltex would have undertaken a detailed assessment of all the costs of regulated access to its pipeline in readiness for an access application of which it had no prior notice. Caltex can (and has, as set out above) identify practical examples of the costs of regulated access that it can identify at the present time, but it cannot be expected – nor does the legislation require – to undertake a full cost-benefit analysis in reply to BARA's application.

415 In any case, given the issues identified above, it is open to the NCC to go further than indicating that criterion (f) has not been satisfied and conclude, on the material before it that, given the availability of transport alternatives, and the lack of any material competition benefits, the necessary presence of likely costs (even of unknown magnitude at this time), must necessarily mean that access is contrary to the public interest.

9 Conclusion

- 416 The BARA Application does not provide a sufficient basis to satisfy the criteria for declaration under Part IIIA. Its fundamental premise, that the Caltex Jet Fuel Pipeline is “*monopoly supply infrastructure*”²⁰³ and that “*Caltex has the incentive and ability to limit competition between the providers of jet fuel at Sydney Airport*”²⁰⁴, does not reflect reality.
- 417 Contrary to BARA’s assertions:
- there is workable competition for the supply of jet fuel at Sydney Airport. Several jet fuel suppliers compete to supply airlines’ needs in a global market;
 - there are several options for transporting jet fuel to Sydney Airport. Jet fuel can be brought from any refinery or import available storage facility via existing pipeline infrastructure or trucking. In the future, an additional pipeline will need to be built, or the capacity of the Shell Jet Fuel Pipeline expanded, to fulfil demand;
 - Caltex has no ability or incentive to refuse access to the Caltex Jet Fuel Pipeline where capacity is available, and it has not done so. While Caltex has not refused access to the Caltex Jet Fuel Pipeline, in the theoretical event that it did, competitive fuel supply to the Sydney JUHI would continue given the range of options for jet fuel suppliers.
- 418 Overall, the BARA Application does not provide sufficient basis for the NCC to be satisfied that the relevant statutory criteria are met. The supporting submissions:
- contain no probative material from which to conclude that access (or increased access) would promote a material increase in competition in any relevant market;
 - provide no basis on which to conclude that it would be uneconomical to develop another facility to provide the services provided by the Caltex Jet Fuel Pipeline;
 - conflate the national significance of Sydney Airport with the question of the significance of approximately 10 km of 200 mm pipeline running from Port Botany to Sydney Airport; and
 - do not address the adverse public interest implications, relative to investment incentives for further capacity, of subjecting one pipeline asset to the risk of Part IIIA arbitration. This is all the more apparent in the context of both multiple jet fuel transport and investment options for increasing throughput on the Caltex Jet Fuel Pipeline.
- 419 Caltex has already expressed its view that there has been very limited time and opportunity to properly address the application and gather the necessary information and analysis. Nevertheless, Caltex has attempted to identify the key flaws in the BARA Application and the key reasons for why the Caltex Jet Fuel Pipeline should not be declared, and has provided substantial information in the time available to explain why the statutory criteria are not met. Caltex requests that, where necessary and appropriate, it be afforded a proper opportunity to put forward additional material to address the relevant criteria.

²⁰³ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 3.

²⁰⁴ Board of Airline Representatives of Australia, *Application for Declaration – Service No 2: provided by the Caltex Pipeline Facility*, 26 September 2011, 4.

420 Should the NCC have any questions in relation to this submission, please contact Luke Woodward, Gilbert + Tobin on 02 9263 4014 or by email: LWoodward@gtlaw.com.au.

Schedule 1 — The Caltex Jet Fuel Pipeline



Schedule 2 — Cost examples

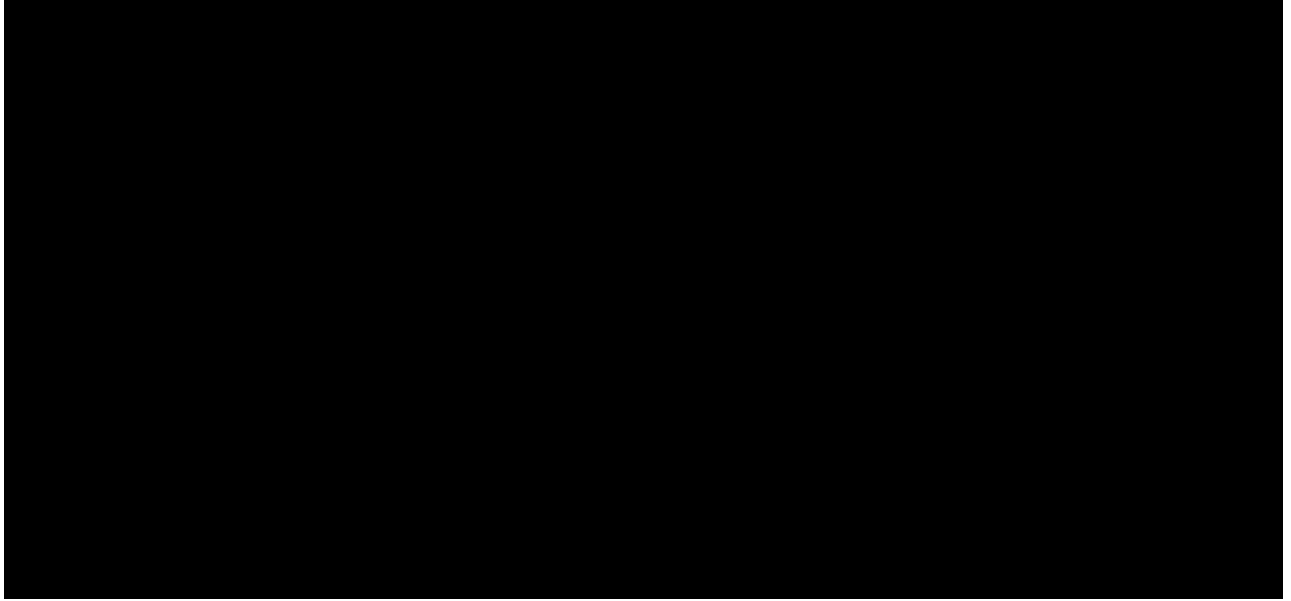
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Schedule 3 — Third party access requests

[C-I-C]



[C-I-C]

Schedule 4 — Definitions

ACCC means Australian Competition and Consumer Commission.

Acpl means Australian cents per litre.

AFQRJOS means the Aviation Fuel Quality Requirements for Jointly Operated Systems, a set of industry-agreed fuel quality standards.

AFS means Airport Fuel Services Pty Limited.

Application or **BARA Application** means the access application submitted by BARA to the NCC dated 26 September 2011.

BARA means the Board of Airline Representatives of Australia.

BARA Further Supplementary Submission means the further supplementary submission made by BARA on 4 November 2011.

BARA Supplementary Submission means the supplementary submission made by BARA on 27 October 2011.

BP means BP Australia Limited.

BPA means Board of Perth Airport Pty Limited, formerly Westralia Airports Corporation Pty Limited.

Caltex or **CAL** means Caltex Australia Limited and its subsidiaries, including Caltex Australia Petroleum Pty Limited.

Caltex Banksmeadow Terminal means the fuel terminal owned by Caltex at Banksmeadow in south-east Sydney.

Caltex Jet Fuel Pipeline means the 17km pipeline is used to transport jet fuel from the Kurnell Refinery and other fuel storage terminals to Sydney Airport.

Caltex Newcastle Terminal means the fuel terminal owned by Caltex at Newcastle, north of Sydney.

Caltex Refineries means Caltex Refineries (NSW) Pty Ltd.

[C-I-C] [REDACTED]
[REDACTED] [C-I-C].

CCA means the *Competition and Consumer Act 2010* (Cth).

Chevron means Chevron Corporation.

CPCC means China Petroleum and Chemical Corporation.

Duke Eastern means the Tribunal decision *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2.

EGP means Eastern Gas Pipeline.

EPAA means the *Environmental Protection and Assessment Act 1979* (NSW).

HSRA means hedge settlement rate.

JUHI means joint user hydrant installation.

KL means one kilolitre, or one thousand litres.

Kurnell Refinery means the oil refinery owned by Caltex at Kurnell in Sydney.

Kurnell Wharf means the fuel terminal at the Kurnell Refinery.

Kuwait Petroleum Corporation or **KPC** is the state-owned petroleum corporation of Kuwait.

LOA means length overall.

Lytton Refinery means the fuel refinery owned and operated by Caltex at Lytton in Brisbane.

ML means one megalitre, or one million litres.

Melbourne Airport means the international airport at Tullamarine in Melbourne.

Mobil means ExxonMobil Corporation.

Mobil/BP Terminal means the fuel terminal owned by Mobil and BP at Botany in Sydney.

MOPAG means Mean of Platts Arab Gulf.

MOPS means Mean of Platts Singapore.

MSP means Moomba to Sydney Pipeline.

nb means nominal bore.

NCC means the National Competition Council.

Newport Terminal means the fuel storage terminal owned by Caltex at Newport near Melbourne.

Parramatta Terminal means the fuel storage facilities in Parramatta, Sydney owned by Shell.

Pilbara Federal Court Decision means the decision of the Full Federal Court in *Pilbara Infrastructure Pty Ltd and Anor v Australian Competition Tribunal and Ors* [2011] FCAFC 58.

Pilbara Tribunal Decision means the decision of the Tribunal in *Fortescue Metals Group Limited* [2010] ACompT 2.

Platts is a division of the McGraw-Hill Companies and is a provider of energy and metals information and a source of benchmark price assessments in the physical energy markets.

Q8 Aviation is a subsidiary of Kuwait Petroleum Corporation.

Qantas means Qantas Airways.

SACL means Sydney Airport Corporation Limited.

Shell means the Shell Company of Australia Limited.

Shell Jet Fuel Pipeline means the 42km jet fuel pipeline owned and operated by Shell and which runs from Shell's import terminal at Gore Bay, via the refinery at Clyde, to the Sydney JUHI.

Silverwater Terminal means the jet fuel storage facilities at Silverwater in western Sydney owned by the Sydney Metropolitan Pipeline Pty Ltd.

Silverwater-Newcastle Pipeline means the pipeline owned by Caltex running from the Silverwater Terminal to Newcastle.

SJFIWG means the Sydney Jet Fuel Infrastructure Working Group.

SJFIWG Report means the final report of the SJFIWG dated 30 April 2010.

SMP means the jet fuel pipeline owned by Sydney Metropolitan Pipeline Pty Ltd running from the Caltex Banksmeadow Terminal alongside the Caltex Jet Fuel Pipeline, under Sydney Airport, to the Silverwater Terminal.

SSI means State Significant Infrastructure.

SSNIP means small but significant and non-transitory increase in price.

Stage 1 Upgrade means Caltex's upgrade to the Caltex Jet Fuel Pipeline, completed in March 2010.

Stage 2 Upgrade means Caltex's \$20 million further upgrade to the pipeline infrastructure at the Kurnell Refinery and Caltex Banksmeadow Terminal.

Sydney Airport means Sydney Kingsford Smith Airport.

Sydney JUHI means the JUHI at Sydney Airport.

Sydney Ports means Sydney Ports Corporation.

Sydney Ports Berth means the bulk liquids berth at the south-western end of Brotherson Dock at Port Botany owned and operated by Sydney Ports.

TPL means Terminals Pty Limited.

TPL Terminal means the fuel storage terminal at Port Botany owned by TPL.

Tribunal means the Australian Competition Tribunal.

United Aviation Services means United Aviation Services B.V., a Dutch-registered aviation services company which resells jet fuel at Sydney Airport.

Universal Aviation means Universal Aviation Australia Pty Ltd, an aviation services company which is a jet fuel reseller at Sydney Airport. Universal Aviation is a subsidiary of Universal Weather and Aviation Inc., an aviation services company based in the United States.

USc/g means US cents per gallon.

Vopak means Vopak Terminals Sydney Pty Ltd

Vopak Terminal means the storage and handling facilities for liquid chemicals and petroleum products at Port Botany in Sydney owned Vopak.

WACL means Westralia Airports Corporation Limited.

World Fuel Services means World Fuel Services Corporation.

Worldscale means the unified system of establishing payment of freight rate for a given oil tanker's cargo.