

**JUHI SYDNEY**

**Submission by Sydney Airport JUHI Joint Venture  
regarding the BARA application for 'Service No 1:  
provided by the Sydney JUHI Facility'**

**21 November 2011**

<b>Section A: Executive Summary</b>	<b>3</b>
<b>A1. Introduction</b> .....	<b>3</b>
<b>A2. Summary</b> .....	<b>3</b>
<b>Section B: Overview of the supply of jet fuel and the operation of the JUHI</b>	<b>8</b>
<b>B1. Key stages in the delivery of jet fuel to aircraft at Sydney Airport</b> .....	<b>8</b>
<b>B2. JUHI infrastructure at Sydney Airport and the services provided</b> .....	<b>12</b>
<b>B3. Ownership and operation of the JUHI</b> .....	<b>14</b>
<b>B4. Relevant markets</b> .....	<b>18</b>
<b>B5. Rationale for JV model of JUHI operation</b> .....	<b>19</b>
<b>B6. Current JUHI access procedure is appropriate and workable</b> .....	<b>25</b>
<b>B7. Arrangements at overseas airports are not comparable</b> .....	<b>29</b>
<b>Section C: Why BARA's application must be rejected</b>	<b>33</b>
<b>C1. The scope of the defined service is not adequately defined, and key services are not capable of declaration</b> .....	<b>33</b>
<b>C2. Criterion A cannot be satisfied</b> .....	<b>34</b>
<b>C3. Criterion B is not satisfied</b> .....	<b>44</b>
<b>C4. Criterion F cannot be satisfied</b> .....	<b>45</b>
<b>C5. The NCC should exercise its discretion against declaration</b> .....	<b>48</b>
<b>Annexure A – Clause 15 of the JV Agreement</b>	<b>50</b>
<b>Confidential Annexure B - Approaches in relation to access to the JUHI</b>	<b>54</b>

## Section A: Executive Summary

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### A1. Introduction

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1. This submission is made by the joint venture participants (**JV participants**) in the Joint User Hydrant Installation (**JUHI**) at Sydney (Kingsford-Smith) Airport (**Sydney Airport**). The participants in the JUHI joint venture (**JUHI JV**) are:
  - The Shell Company of Australia Limited (**Shell**);
  - BP Australia Pty Ltd (**BP**);
  - Caltex Australia Petroleum Pty Ltd (**Caltex**);
  - Mobil Oil Australia Pty Ltd (**Mobil**); and
  - Qantas Airways Limited (**Qantas**).
2. The JUHI JV is an unincorporated joint venture. Its operations are governed by a confidential joint venture agreement (**JV Agreement**).
3. The submission is structured in three parts:
  - Section A provides an introduction and an overview of the key points.
  - Section B provides an overview of the supply of jet fuel at Sydney Airport and an explanation of the operation of the JUHI. This information is provided to inform the National Competition Council (**NCC**) of the facts relating to the key issues given the lack of accurate information in the Board of Airline Representatives (**BARA**) application.<sup>1</sup>
  - Section C sets out the numerous grounds upon which BARA's application must be rejected by the NCC.

### A2. Summary

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4. BARA has requested the NCC to declare a service which comprises '[t]he services provided by the Jet Fuel Storage Facility (including facilities for refuelling trucks) and Jet Fuel Hydrant Pipeline Network Facility provided by the Sydney JUHI'<sup>2</sup> (the **JUHI Service**). For the NCC to declare this service, the NCC must be affirmatively satisfied of (amongst other things) the following key matters:
  - the service for which declaration is sought is properly described, and is a service capable of declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**);

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<sup>1</sup> Board of Airline Representatives of Australia, Application for Declaration, *Jet Fuel Supply Infrastructure to Sydney Airport: Service No 1 provided by the Sydney JUHI Facility*, 26 September 2011, (**BARA Application**).

<sup>2</sup> BARA Application, section 4.1.

- that access (or increased access) to the service would promote a material increase in competition in a market other than the market for the service (**Criterion A**);
  - that it would be uneconomical for anyone to develop another facility to provide the service (**Criterion B**); and
  - that access or increased access would not be contrary to the public interest (**Criterion F**).
5. The JV participants submit that BARA has failed to establish any of the above matters. A proper analysis of the operation of the JUHI, as set out in this submission, makes it clear that these criteria cannot be satisfied.
6. Even if the NCC is affirmatively satisfied of these matters, it is not compelled to recommend declaration. The JV participants consider there are a number of reasons – in addition to the failure to satisfy the declaration criteria – why declaration should not occur.

#### **A2.1 The service is not adequately defined**

7. There are a number of services facilitated by the JUHI. These services include storage and pipeline distribution services specified by BARA, but also include various other services - such as product testing, maintenance, into-plane provider and tanker support, and management services – all of which ensure the safe, efficient and reliable distribution of quality fuel around Sydney Airport.
8. BARA's application does not adequately define the service in respect of which access is sought. Further, it does not identify which of the range of services facilitated by the JUHI is sought to be declared with any specificity; it potentially covers services which are not the type of service to which Part IIIA can apply; and it therefore does not address the crucial issue of how regulated access to a limited subset of the range of services facilitated by the JUHI could practically be provided in light of the fuel security, quality, and management considerations involved in the operation of the JUHI.

#### **A2.2 Criterion A cannot be satisfied**

9. BARA has failed to demonstrate that access to the JUHI Service would promote a material increase in competition in any dependent market. An appropriate mechanism for third parties to supply fuel through the JUHI already exists. It is provided in the form of equity participation in the joint venture that owns the JUHI infrastructure. This equity based model provides a means of ensuring appropriate incentives pursuant to which the JV participants have in the past efficiently operated the JUHI and made the investments necessary to ensure sufficient capacity to meet demand requirements, and there is no reason to expect this will not continue to be the case in the future. The imposition of non-equity based access in the form of a regulated throughput fee is likely to distort incentives and may lead to underinvestment. Over time this will create the type of capacity constraints at the JUHI that the current model has successfully avoided, and will reduce - rather than materially promote - competition.
10. The joint operation of a single JUHI at Sydney Airport came about as a result of planning decisions by the Department of Aviation in the late 1960s. The ownership and operation of the JUHI is very different to the model used in the type of infrastructure to which Part IIIA

generally applies. The JUHI is not owned by a single monopoly provider which may have the ability and an incentive to exclude potential competitors from its facility. In the present case, ownership of the JUHI is based on a joint venture model which was established pursuant to a JV Agreement which expressly sets out a process by which any party interested in supplying fuel at the JUHI may join and acquire an equity interest in the JUHI JV.

11. The relevant entry criteria in the JV Agreement are commercially justifiable. They do not act as a barrier to participation by imposing irrelevant or discriminatory requirements, nor have they been applied by the JV participants so as to prevent new entry. To the contrary:
  - Qantas has already used the entry mechanism on two separate occasions to acquire equity interests in the JUHI JV. In each case, the application process only took around 13 months;
  - in the last 12 months, the JUHI JV has received a number of approaches by third parties who have expressed an interest in joining the JUHI. No third parties have indicated that they are unable to meet the entry criteria.
12. The rationale for the use of a JV model which permits new equity entry is a result of the costs and risks associated with owning and operating the JUHI facility. These include:
  - on-going capital expenditure requirements to maintain and expand the JUHI, many of which are unpredictable. These include new investments and changes in hydrant points due to airport layout changes and changes in aircraft configuration, as well as ongoing maintenance of pumping, filtration, tankage and other infrastructure to ensure the facility meets operational and regulatory requirements;
  - unquantifiable long-term risks, including environmental liabilities, fuel contamination and safety, and regulatory compliance liabilities.
13. Equity participation provides a clear and certain mechanism for capturing and allocating the potential risks and costs that arise from operating the JUHI across users, and ensuring that past, present and future costs and liabilities are dealt with and allocated in a transparent and fair manner for all participants.
14. If Part IIIA access was imposed on the JUHI and third parties were able to make use of the JUHI infrastructure by way of an access charge, ie. a throughput fee,<sup>3</sup> then it would have the potential to adversely impact on the efficient long-term operation of, and investment in, the JUHI. The nature of the costs and risks involved in operating the JUHI make it difficult to set a throughput fee that has any certainty of capturing the costs and risks involved. Where the throughput fee did not adequately cover these costs and risks, it would encourage free riding on the investment and exposure of current JV participants. This would likely result in skewed investment incentives and potentially give rise to under

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<sup>3</sup> For simplicity, in this submission the expression 'throughput fee' has been adopted as this is the terminology used by industry participants where a fee is imposed for the throughput of jet fuel at JUHI facilities. As an access charge negotiated or arbitrated following any Part IIIA declaration would be of this nature, the use of the expression 'throughput fee' is intended to capture a fee negotiated through a private contractual arrangement or pursuant to a regulated access regime.

investment in the JUHI, as JV participants sought to avoid expenditures for which they bear a disproportionate burden.

15. Accordingly, regulated access would not offer a better means of meeting the objects of Part IIIA than the current option of equity participation on commercial terms.
16. Furthermore, BARA has not adduced any evidence or credible argument to show that declaration of the JUHI Service would promote a material increase in competition in any dependent market.
17. In relation to the asserted market for the supply of jet fuel at Sydney Airport:
  - BARA seeks to rely on a table of price differentials at various airports to show that the price of jet fuel at Sydney Airport is subject to monopoly pricing. The data used is unreliable and misleading. It ignores a multiplicity of costs and other factors which make up a fuel differential, it does not use a consistent basis for comparing the various ports, it does not provide any indication of what part of the various differentials may represent supply margins, and so cannot in any way demonstrate that fuel suppliers at Sydney Airport obtain margins that could not be obtained in a competitive market. The JV participants reject any contention that there is monopoly pricing at Sydney Airport;
  - the erroneous simplicity of BARA's analysis is further demonstrated by its claims that there is a correlation between the number of suppliers of jet fuel and the level of competition. Even looking at the limited snapshot of airport locations put forward by BARA, it is clear that a higher number of suppliers reflects greater levels of demand at those airports;
  - further, the current joint venture model provided for in the JV Agreement means JV participants are not constrained in any bidding activity to supply jet fuel to airlines by individual capacity limits. By contrast, under a regulated access model, discrete portions of capacity would be allocated to third parties which would limit their ability to compete for larger parcels of demand;
  - for these reasons, BARA has not adduced any evidence to demonstrate that the claimed market for the supply of jet fuel at Sydney Airport is not competitive, nor that access would promote a material increase in competition.
18. In relation to the asserted market for the supply of into-plane services at Sydney Airport:
  - there are currently no significant barriers to new into-plane providers offering services at Sydney Airport, as BARA itself acknowledges;<sup>4</sup>
  - if current into-plane providers were not offering a competitive service then airlines could easily have sponsored a new entrant and purchased fuel on an ex-hydrant rather than into-wing basis;

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<sup>4</sup> Bara Application, p.45.

- the number of into-plane providers at Sydney Airport is also not inconsistent with the number of providers at the other airports around the world cited by BARA in its application;
  - for these reasons, BARA has not put forward any credible material to suggest that the claimed market for into-plane services at Sydney Airport is not currently effectively competitive, let alone that access to the JUHI would promote a material increase in competition.
19. In relation to the asserted markets for the supply of air passenger and freight markets at Sydney Airport:
- BARA itself has acknowledged that 'international and domestic passenger and freight markets are highly competitive.'<sup>5</sup> If the market is already highly competitive, then any claimed improvement in competition in the supply of jet fuel or into-plane services cannot materially increase competition above this level;
  - the costs associated with the utilisation of JUHI infrastructure as a proportion of airline fuel costs are very low. Competition in airline services is driven by a range of factors, including the availability and allocation of landing slots, and accordingly there is no basis upon which BARA can claim that there will be a material increase in competition if access is granted to the JUHI.

#### **A2.3 Criterion B cannot be satisfied**

20. BARA's application makes it clear that it is seeking declaration of a service provided by two distinct facilities, one of which is a 'jet fuel storage facility'. The fuel storage infrastructure owned by the JUHI comprises 5 storage tanks. Either under the social cost benefit test or a private test as to whether it would be uneconomical to develop such a facility, it is clear that this facility could economically be developed.
21. The capital cost of a tank will be the same whoever builds it. Tanks by their nature can be constructed to meet anticipated demand, thus avoiding under-utilised investment. Given the likely increase in the demand for jet fuel at Sydney Airport, and the fact that at the expiry of the JUHI lease the relevant storage facility may be relocated, it is clear that one of the facilities specified by BARA can be duplicated, and that BARA has therefore not demonstrated that Criterion B is satisfied.

#### **A2.4 Criterion F cannot be satisfied**

22. There are a number of factors which demonstrate that the imposition of regulated access in lieu of the current equity-based model would give rise to outcomes that would be contrary to the public interest. These include:
- potential benefits (if any) would be outweighed by the costs of regulation, and the potential for regulatory error to create significant disincentives for efficient investment in the JUHI infrastructure;

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<sup>5</sup> BARA Application, p.46.

- given the volumes of jet fuel supplied at Sydney Airport, regulated access is unlikely to lead to any significantly increased usage of the JUHI infrastructure compared to the existing equity-based model, and so the lack of utility in regulated access must be weighed against the cost of access; and
- contrary to BARA's claim that access will increase the reliability of supply at Sydney Airport, regulated access can have no positive impact on reliability issues, which are a matter of infrastructure capacity constraints rather than number of suppliers. To the contrary, the only impact regulated access could have on reliability issues is a negative impact of potentially creating a disincentive for the JV participants to efficiently invest in the JUHI infrastructure – thereby contributing to future capacity constraints.

#### **A2.5 The residual discretion should be exercised against declaration**

23. The NCC has a broad residual discretion not to recommend declaration of a service even if it is satisfied the declaration criteria are met. The JV participants submit that this discretion should be exercised, for the following reasons:

- the current process pursuant to which any party interested in supplying fuel at the JUHI may join and acquire an equity interest in the JUHI JV provides an appropriate mechanism of balancing the rights and interests of suppliers of jet fuel against the costs and risks of JUHI ownership and operation;
- it is clearly economical to duplicate at least part of the service, being another fuel storage facility;
- declaration would have no utility in light of the protections that must be afforded to the existing rights of the JV participants in any ACCC arbitration following declaration; and
- potentially significant costs of regulation would arise in circumstances where declaration would be of little utility.

#### **A2.6 Conclusion**

24. For all of the above reasons, the JV participants submit that there is no basis for the declaration of the JUHI Service. BARA has failed to put forward any credible material that could demonstrate that the declaration criteria under Part IIIA can be affirmatively satisfied, and factors to be considered under the residual discretion necessitate against declaration. The NCC should refuse to grant the BARA application.

### **Section B: Overview of the supply of jet fuel and the operation of the JUHI**

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#### **B1. Key stages in the delivery of jet fuel to aircraft at Sydney Airport**

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##### **B1.1 Sources of supply**

25. Jet fuel (being Jet A-1) acquired by airlines operating out of Sydney Airport comprises both domestically manufactured product and imported product.



26. The current available sources of supply are:
- locally produced by the Caltex and Shell refineries at Kurnell and Clyde, respectively;
  - supply from other domestic refineries;
  - wholesale purchases by third parties from Australian refineries; and
  - overseas imports.
27. The Vopak facility currently has a total storage capacity of approximately 92 million litres for jet fuel, and generally supplies up to 7.9 million litres per day of jet fuel into Sydney Airport.<sup>6</sup> As a result of Shell's decision this year to cease refinery operations at Clyde by mid-2013 and convert the refinery and the Gore Bay terminal to a fuel import facility,<sup>7</sup> it is likely that in the future more jet fuel at Sydney Airport will be sourced from imports.
28. The majority of jet fuel supplied at Sydney Airport is transported to the JUHI at the airport via two dedicated jet fuel supply pipelines:
- One pipeline, owned by Caltex, connects to Caltex's Kurnell refinery. There are two tie in points on the Caltex pipeline, one at the Mobil/BP JV Botany terminal (which is not currently in use) and one at the Vopak bulk storage/import facility. The Caltex pipeline has the maximum capacity to deliver to the JUHI approximately 5.0 million litres per day when pumping from the Kurnell refinery and approximately 7.9 million litres per day when pumping from the Vopak facility.<sup>8</sup>
  - The other pipeline, owned by Shell, connects the JUHI infrastructure to Shell's Clyde refinery. The Shell pipeline has a maximum capacity of 3.9 million litres of jet fuel per day to the JUHI.<sup>9</sup> There is also a connecting pipeline from the Clyde refinery to Shell's Gore Bay terminal.
29. In May 2010, Caltex announced an investment of over \$20 million to significantly upgrade its pipeline to almost double its current capacity. The project is expected to help meet the fuel needs at Sydney Airport until at least 2019.<sup>10</sup>
30. The Caltex and Shell pipelines connect to the JUHI depot, which is located at the northern end of the international precinct at Sydney Airport. The fuel passes through metering and filtering equipment owned by Shell and Caltex, before it is received into the JUHI.

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<sup>6</sup> Sydney Jet Fuel Infrastructure Working Group Report dated 30 April 2010, "Infrastructure for the Provision of Jet Fuel at Sydney Airport for the Period to 2029", (**SJFIWG Report**), p. 24.

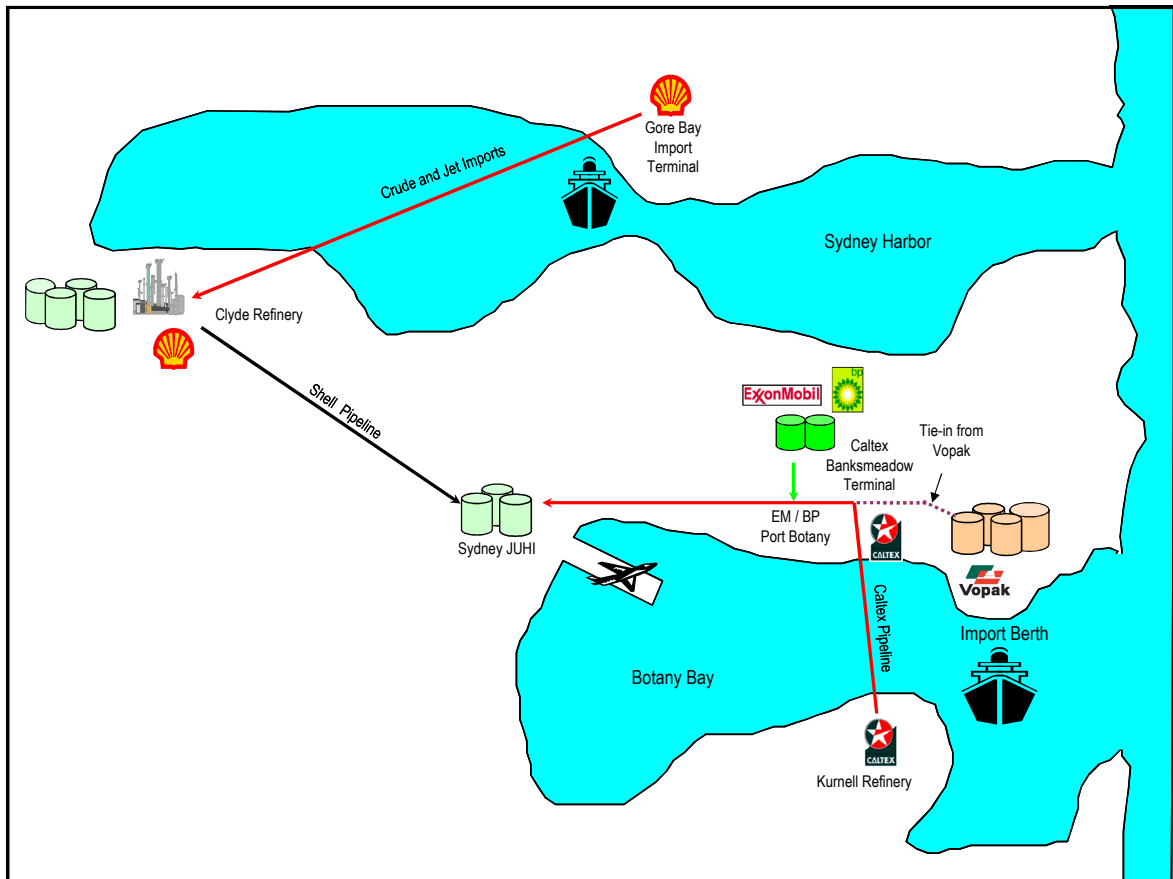
<sup>7</sup> Shell, 'Proposal on future of Clyde refinery' (Media Release, 12 April 2011)  
<[http://www.shell.com.au/home/content/aus/aboutshell/media\\_centre/news\\_and\\_media\\_releases/2011/proposal\\_on\\_future\\_of\\_clyde\\_12042011.html](http://www.shell.com.au/home/content/aus/aboutshell/media_centre/news_and_media_releases/2011/proposal_on_future_of_clyde_12042011.html)>.

<sup>8</sup> SJFIWG Report, p. 24.

<sup>9</sup> SJFIWG Report, p. 24.

<sup>10</sup> Caltex, 'Caltex investment to benefit Sydney air travel' (Media Release, 5 May 2010) available at <http://www.caltex.com.au/LatestNews/Pages/NewsItem.aspx?ID=13185>.

**Figure 1: Jet fuel supply into Sydney Airport**



31. Jet fuel can also be delivered to the JUHI via trucks. For example, trucks can be loaded at a terminal (for example, Banksmeadow, Parramatta and Vopak) for road transport of jet fuel. Some jet fuel is currently trucked by BP into the JUHI from the Vopak terminal.

**B1.2 Storage and hydrant system**

- 32. Once delivered into the JUHI, jet fuel is stored in 5 above ground storage tanks with total capacity of around 29 million litres.<sup>11</sup>
- 33. From the storage tanks, fuel can be transported through underground pipelines to apron hydrant outlets located adjacent to aircraft gates at the international and domestic terminals for distribution when needed.
- 34. Jet fuel can also be transported to aircraft by tankers from the JUHI storage tanks, rather than through the underground pipelines. For example, most of the General Aviation (**GA**) area located adjacent to the domestic terminal at Sydney Airport is serviced by tanker vehicles rather than from the hydrants.

<sup>11</sup> [Redacted for confidentiality].

### B1.3 Delivery into-plane

35. For delivery of jet fuel 'into-plane', fuel is withdrawn out of the JUHI system by into-plane providers who then distribute the fuel into the aircraft itself. There are currently three into-plane providers at Sydney Airport:
- AirRefuel Pty Ltd (owned by BP);
  - Zip Airport Services Pty Limited (owned by Shell); and
  - Airport Fuel Services Pty Limited (**AFS**) (an incorporated joint venture owned by Caltex, BP, Mobil and Qantas, with Caltex as the operator).
36. Into-plane providers use fuel distributed from either the hydrant system or bulk tankers.
37. Where an aircraft is fuelled via a hydrant, a hydrant truck is used which connects to the hydrant system via a ground pit connection and to the aircraft. Pressure from the hydrant enables the fuel to be pumped on to the aircraft.
38. The JUHI JV is not involved in the supply of jet fuel into-plane. To the extent that a JV participant is involved in contracting with airlines for the supply of jet fuel, each participant manages its own customer relationships, attending to its own marketing, invoicing and customer pricing. Each participant also arranges into-plane services to its customers.

**Figure 2 – Fueling 'underwing' via a hydrant connection**



39. Where an aircraft is fuelled via tanker, a truck will load at the JUHI through a dedicated location connection and the fuel will be metered onto the truck. The truck is then driven off the JUHI site to an aircraft. These trucks typically have a capacity of between 8,000 to

22,000 litres. Fuel is then delivered into the aircraft and is metered into the plane via equipment and metering measures carried in the truck itself. Fuelling via a tanker is a slower process than fuelling via a hydrant and volumes are limited to the capacity of the truck.

**Figure 3 – Fuelling 'overwing' via a tanker**



## **B2. JUHI infrastructure at Sydney Airport and the services provided**

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### **B2.1 JUHI infrastructure**

40. The JUHI consists of the following physical infrastructure:

- five Jet A1 storage tanks with total capacity of around 29 million litres (2 x 10 million litres built in the 1990s, and 3 x approximately 3 million litres built in the 1970s) located at the JUHI depot;
- ten hydrant pumps with a total capacity of 45,000 litres per minute at 1,000 kPa pressure used to pressurise the hydrant lines;
- approximately 10 kilometres of underground pipelines (known as the reticulation or hydrant network) connecting the storage tanks to the international and domestic terminals and freight bays;
- approximately 190 hydrant points at the aprons of the international and domestic terminal aircraft bays;
- hydrant connections/service pits;

- metering equipment;
  - filtering equipment including 10 outlet filters and 2 internal JUHI filters;
  - a leak detection system;
  - a control system which operates all pumps and valves located at the JUHI;
  - a tank for fire water and fire protection infrastructure;
  - a vehicle workshop and truck washing bay;
  - a diesel generator;
  - a diesel bowser;
  - a truckfill bay; and
  - a switch room and other auxillary equipment.
41. The JUHI facilities have been classified by the JV participants into three components:
- 'Component A' which is the JUHI depot and international underground hydrant pipeline located in the international precinct;
  - 'Component B' which is an underground cross runway pipeline which connects the international pipeline to the domestic pipeline; and
  - 'Component C' which represents the domestic underground hydrant pipeline located in the domestic precinct.

## **B2.2 Services provided by the JUHI to JV participants**

42. A number of services are provided by the JUHI at Sydney Airport to enable fuel to be stored on-site at the airport and delivered to into-plane providers. The main services are:
- the receipt of fuel from pipelines and trucks;
  - the storage of fuel in tanks;
  - the injection of fuel into the reticulation network system from the storage tanks;
  - the distribution and pumping of fuel through the pipelines from the storage tanks to the domestic and international bays to enable larger aircraft to be serviced from the hydrant points;
  - strict product quality checks<sup>12</sup> at various points in the storage and distribution process, including:
    - as the fuel enters the JUHI;
    - at the storage tanks; and
    - at the point where fuel enters the hydrant pipelines;

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<sup>12</sup> Notably, in addition to meeting global specifications regarding fuel quality control, the JUHI performs more frequent checks on product quality based on its experience in fuel supply – checking appearance, density, water and conductivity ever two hours as fuel enters the JUHI.

- the processing of fuel samples which are returned from the aircraft and can then be used in other non-aviation uses;
  - defueling in the event that aircraft require fuel to be removed;
  - specialised hydrant and equipment repair and maintenance for all JUHI equipment located airside (e.g. pit cans and pipeline);
  - routine hydrant maintenance conducted on a weekly basis on various sections of the hydrant line to protect fuel quality and ensure that the equipment is fully operational and compliant with all applicable fuel aviation standards;
  - provision of vehicle workshop and truck washing bay used by into-plane providers for maintenance and repairs to the specialised aviation vehicles used to fuel aircraft from hydrants and bulk tankers;
  - supply of diesel to refuelling trucks and tankers from a diesel bowser;
  - refuelling for companies to fill their tankers from a truckfill bay;
  - use of equipment for calibration of meters on vehicles used to meter the fuel onto aircraft through master meters.
43. Services are also provided in relation to:
- operating manuals, accounting and accounts payable/receivable services, inventory reconciliation, and stock management to enable fuel distribution from the JUHI to be managed; and
  - capital planning and management of JUHI infrastructure projects.

### **B3. Ownership and operation of the JUHI**

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#### **B3.1 Background to the creation of the JUHI**

44. Australian airports historically had separate on-site jet fuel storage and reticulation facilities owned by different fuel suppliers. This was the case at Sydney Airport, where prior to the establishment of the current JUHI, each of the main fuel suppliers had operated their own facilities at what is now the domestic terminal area. Aircraft were refuelled through a combination of tankers, as well as hydrants. Mobil operated a hydrant facility for Ansett, and all fuel acquired by Ansett from hydrants was supplied by Mobil. Similarly, Caltex operated a hydrant system for TAA (now Qantas). BP and Shell supplied fuel by tankers. All of the parties had separate fuel depots at the airport supplied by trucking.
45. However, space and efficiency considerations drove development decisions, and the then government owners of Australian airports began to mandate single facility arrangements. The current JUHI at Sydney Airport was established through a master planning process conducted in the late 1960s by the Department of Aviation. As part of the development of the current international terminal (T1), the Department of Aviation determined that there would be a single fuel storage facility at the airport.
46. The current JV participants (other than Qantas) entered into an agreement in 1969 with the Commonwealth of Australia and certain airlines for the financing, construction and

operation of the original aviation fuel storage and reticulation system at the North West terminal area of Sydney Airport.

47. Under a joint venture agreement entered into on 31 March 1994, the participants at the time agreed to interconnect the international and domestic hydrant systems with planned extensions, in order to develop and operate a single storage and linked reticulation system for both the domestic and international terminals.
48. The background to the establishment of the JUHI at Sydney Airport was therefore not, as BARA's application implies, the result of private interests developing a monopoly asset which could exclude other competitors, or the adoption of a restrictive model compared to other potential overseas airport fuel storage systems that operate in a different manner. The JV participants entered the JV Agreement at the request of the Federal Government. Further, the JV Agreement was designed so that entry by third parties in the future was possible (as discussed in section B3.4 below).

### **B3.2 Operation of the JUHI**

49. The ownership and operation of the JUHI is generally governed by the JV Agreement which is commercially confidential. The JUHI JV does provide this agreement to parties applying to take an equity interest in the JUHI JV, once they provide a confidentiality undertaking. In order to enable an informed discussion of key issues relating to the operation of the JUHI, the JV participants have agreed to disclose clause 15 of the JV Agreement.<sup>13</sup>
50. Under the JV Agreement, the JV participants assume an obligation to become operator of the JUHI JV on a rotational basis (**the JUHI Operator**), with a term of five years which may be extended. Shell is the current JUHI Operator.
51. The JUHI Operator takes responsibility for:
- managing the receipt of transfers from suppliers into the storage facility, storing the received transfers, 'reticulating' the received transfers via the distribution network to the tarmac outlet at each aircraft parking bay;
  - monitoring total JUHI fuel volume movements. The JUHI Operator performs a daily reconciliation of jet fuel stocks using the JUHI stock spreadsheet. Incoming and outgoing jet fuel volumes are balanced daily, and a report issued to all JV participants which sets out the participant's incoming and outgoing volumes, and the total volume stored in the JUHI;
  - managing and liaising with participants in relation to stock positions so as to ensure that planned supplies into the JUHI by individual participants will be made in the right quantities and at the right time such that all participants are able to meet their respective anticipated demand requirements;
  - maintenance of the JUHI generally;

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<sup>13</sup> Email from Allens Arthur Robinson to the National Competition Council, dated 14 November 2011, providing clause 15 as a non-confidential extract from the JV Agreement.

- managing capital investments and the implementation of projects;
  - budgeting, cost control and managing the joint venture accounts;
  - facilitating and chairing the Operations Committee meetings;
  - health, safety and environment management; and
  - provision of corporate support (legal, external affairs, finance) with respect to the JUHI's operations.
52. Importantly, the JUHI Operator's role includes ensuring that Sydney Airport has adequate fuel for operating aircraft and that each supplier's planned transfers align with their projected demand. This requires the JUHI Operator to communicate with suppliers about their expected and actual volumes, and to communicate with the National Operating Committee (**NOC**) about known supply issues. This is discussed in more detail below.

### **B3.3 Management of fuel supply at Sydney Airport and NOC**

53. Following a supply disruption in September 2003 which resulted in supply rationing at Sydney Airport, a taskforce was established with a remit to investigate the events and make recommendations to avoid a recurrence. The taskforce, known as NOC, now has an ongoing role of monitoring stock levels in various JUHIs<sup>14</sup> including at Sydney Airport, reviewing reports on supply risks (according to a "traffic light format") and reporting on any issues that may adversely affect the availability of product to stakeholders at any of the relevant JUHI's.
54. The NOC includes an independent member appointed by the Australian Government, as well as a representative from each of BP, Caltex, ExxonMobil and Shell. A Qantas supply representative also attends NOC meetings for discussion on matters relevant to the Sydney JUHI. The NOC meets each month to assess the forward three month supply capability of each airport based on each fuel supplier's logistical and operational plans along the jet fuel supply chain.
55. At Sydney Airport, the JUHI Operator communicates with NOC regularly regarding the state of fuel availability using the traffic light format, following the process set out below:
- at the beginning of each month, each supplier provides the JUHI Operator with a preliminary distribution advice setting out the volumes they intend to deliver to the JUHI over the next month;
  - each week, the JUHI Operator assesses the volumes each supplier transfers to the JUHI against actual usage, in order to determine if they are bringing in sufficient stock.
  - the JUHI Operator submits to each supplier a summary of this information, requesting either additional product or if necessary requiring the supplier to reduce incoming transfers;

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<sup>14</sup> The JUHIs at Adelaide, Brisbane, Cairns, Darwin, Hobart, Perth, Melbourne, Sydney, Auckland, Christchurch and Nadi Airports.



- several times each week, each supplier provides the JUHI Operator with a 7-day rolling transfer schedule with planned transfer volumes over the next 7 days;
  - every week, each supplier provides the JUHI Operator with a traffic light summary showing their supply capability over the next 6 week period;
  - following receipt of each supplier's traffic light summary, the JUHI Operator collates a weekly traffic light report consolidating all suppliers' information for the next 6 week supply forecast which it then provides to NOC;
56. NOC then collates each JUHI report and issues a weekly report of supply capability to aviation stakeholders.

#### **B3.4 Criteria for participation in the JUHI**

57. Clause 15 of the JV Agreement sets out the qualifying criteria to be met in order for a third party to become an equity participant in the JUHI JV. A copy of clause 15 of the JV Agreement is set out at Annexure A. The criteria in clause 15 are commercially reasonable, and are discussed in detail below in section B6.1.
58. Prospective participants in the JUHI JV are required to make an equity purchase based on the replacement value of the JUHI assets.<sup>15</sup> An independent valuation is organised by the JUHI JV's Operating Committee, but if the applicant is unsatisfied with the valuation, it may require the current replacement value of the JUHI to be referred to a mutually agreed independent assessor, or failing agreement, an assessor appointed by the President of the Institute of Chartered Surveyors (NSW).<sup>16</sup>

#### **B3.5 JUHI JV operating costs and fees**

59. The operating costs within the JUHI JV are largely allocated on a user-pays basis, ensuring that participants who supply and withdraw larger volumes through the JUHI are liable for a proportionally larger share of the costs.
60. **[Redacted for confidentiality].**
61. **[Redacted for confidentiality].**

#### **B3.6 JUHI lease**

62. The JUHI infrastructure is located on land leased from Sydney Airport Corporation Limited (**SACL**).<sup>17</sup>
63. This lease can be terminated by SACL on three years notice at any time after 1 October 2015. Upon termination of the lease, the owners of the JUHI must remove the JUHI facilities (except for the underground pipelines at the tarmac) from the premises if required by SACL.
64. Key obligations the JUHI JV participants bear under the lease include:

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<sup>15</sup> Clause 15.5 of the JV Agreement.

<sup>16</sup> Clause 15.8 of the JV Agreement.

<sup>17</sup> Lease between Sydney Airport Corporation Limited and The Shell Company of Australia Limited, dated 11 September 2009.

- to operate the JUHI in accordance with good industry practice and to maintain adequate supplies of aviation fuel. This obligation necessitates the ongoing expenditure of substantial amounts of capital in terms of significant levels of maintenance as well as regular upgrades and new capital works. For example:
  - new investment or changes to hydrant points on the apron have regularly been required in the past due to:
    - changes in airport layout and the development of new gates to enable increased passenger and aircraft movements;
    - changes in aircraft configuration (eg. such as new wide bodied aircraft or the A380);
    - airport building and terminal improvements, such as new baggage handling systems;
- considerable ongoing investment is needed within the JUHI depot in terms of the pumping filtration, tankage, buildings, electrical and control systems necessary to ensure the depot remains fully functional and able to meet airline requirements as well as statutory operational requirements and international standards for aviation fuel standards;
- to relocate some or all of the pipeline and reticulation system, at 180 days notice. The cost of such a relocation depend upon a number of factors, and in some instances must be fully borne by the JUHI JV. As noted above, changes in airport layout and aircraft configuration have regularly required the JUHI JV to relocate JUHI infrastructure including hydrant locations;
- to pay to SACL a monthly usage fee, based on the amount of jet fuel supplied from the JUHI facility;
- at the end of the lease, to commission a report from a site investigator of the contamination levels at the premises. If any contamination above acceptable limits under the Airports (Environment Protection) Regulations 1997 is detected, then the JUHI JV must undertake a cleanup at SACL's direction. Cleanup is completed upon the production of a certificate to the effect that any contamination above acceptable limits has been cleaned up.

## **B4. Relevant markets**

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### **B4.1 Market definition**

65. It appears that BARA views the market for 'the service' for which declaration is sought as a market for the provision of jet fuel storage facilities (and associated refuelling facilities) and jet fuel hydrant network facilities at Sydney Airport. BARA has then defined three dependent markets, being an upstream market for the supply of jet fuel at Sydney Airport, a downstream market for the supply of into-plane services at Sydney Airport, and a downstream market/s for the supply of (domestic and international) air passenger and freight services at Sydney Airport.

66. The JUHI JV considers these market definitions to be artificial, and to ignore the commercial realities of jet fuel supply at Sydney Airport.
67. BARA's application seeks to define markets through an analysis of the supply of jet fuel by the two vertically integrated producers, Shell and Caltex. It fails to take into account the potential for wholesale competition through ex-refinery sales, the past, current and potential future activities of Mobil and BP, and the relevance of sales of fuel to Qantas, including the portion of self supply Qantas has through imports from the Vopak Terminal. Particularly given the potential for significant additional pipeline capacity to become available in the future, it is misconceived to characterise the supply of jet fuel to Sydney Airport as being through two vertically integrated producers.
68. Further, it is inappropriate to define markets by reference to a backwards focus on supply over the last few years when clearly there are other actual and potential suppliers of jet fuel, and the new capacity on the Caltex pipeline will further enhance the ability of those (and other) suppliers. The conversion of Shell's refinery to an import terminal may also impact delivery options in the near future.
69. Due to the limited timeframe provided to the JUHI JV to respond to BARA's application, and for the purposes of this submission only, the JUHI JV has addressed the declaration criteria on the basis of BARA's alleged markets. However, this is not an acceptance by any of the JV participants of the existence of such markets.

## **B5. Rationale for JV model of JUHI operation**

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### **B5.1 Equity participation is necessary for a fair allocation of long-term costs and risks**

70. The nature of the costs and risks associated with operating a JUHI are difficult to predict or accurately quantify. While equity participants pay a share of the costs based on the percentage volumes they put through the JUHI, this fee essentially only covers operational costs and does not try to cover off potential long-term liabilities (for example, environmental, labour re-organisation, and augmentation, relocation and replacement of facilities). Instead, these costs are met as and when they are incurred by the participants under an agreed allocation basis. For example, environmental remediation costs are typically agreed to be allocated on an historical (e.g. 5 year) basis.
71. With their substantial experience in the industry, the JV participants believe that equity participation provides the most certain and transparent mechanism for allocating the large and uncertain costs and risks between users in a manner which ensures reliable operation and on-going investment in the infrastructure.
72. The main costs and risks involved in use and operation of the JUHI are set out below.
- (a) Regular capital expenditure requirements which cannot always be anticipated in advance**
73. The operation of the JUHI involves a substantial capital investment. The facility must be able to supply fuel at Sydney Airport to meet all existing demand and any new developments. The JUHI JV is required to expend funds on a regular basis, and it can be difficult to predict in advance the nature or final cost of such developments. The JUHI

facility has historically required regular investments of capital, and it is likely there will continue to be long-term calls on capital made of JUHI JV participants in the future. These investments involve a number of risks, including that they may not obtain a return on capital.

74. By way of example:

- the JUHI JV participants have been required to support the operation of Airbus A380 aircraft through Sydney Airport with hydrant extensions. In 2006, Sydney Airport had a requirement for two A380 bays, in 2007 another four bays, and in 2008 one further bay. The conversion costs of these bays incurred by the JUHI JV are typically in the order of \$500,000 - \$700,000 per bay. This investment may sit idle in excess of 12 months before being used, and, depending upon the number of A380s visiting Australia, some of these bays may not be required at all;
- the British Airways/Air France Concorde hydrant system sits under the tarmac at Sydney Airport and was largely unused, except for a short period in the late 1960's.

75. Future airport developments will mean that there are additional capital requirements which will be borne by the JUHI JV participants. **[Redacted for confidentiality]**.

76. Aside from the proposed expenditure for the new tank, each of the other listed projects have been requested by SACL, requiring significant expenditure by the JUHI JV.

77. Between 2006 and 2010, significant capital projects undertaken by the JUHI JV included:

- \$2.78 million for modifications to hydrants to accommodate A380 aircraft;
- \$555,000 for relocation of pipelines for terminal expansion;
- \$393,000 for JUHI control system upgrade Stage 1; and
- \$317,000 for hydrant pipeline leak detection upgrade.

78. As can be seen, regular capital investments are involved in operating the JUHI, and these frequently arise from expansion needs of SACL and are largely beyond the control of the JV participants. The participants will also have to bear certain costs associated with any future relocation of parts of the JUHI required by SACL under the lease.

**(b) Management and oversight costs**

79. Costs related to the management of the JUHI itself and overheads are at times difficult to quantify. The JUHI Operator provides staff to carry out the duties of the JUHI Operator as described in section B3.2 above, as well as general governance duties, such as ensuring regulatory compliance and handling communications within the JUHI JV and also externally on behalf of the JV, such as communications with NOC and the management of supply issues. There are also costs involved in commercial negotiations with SACL over issues such as lease tenure, lease terms and conditions, rental adjustments, relocation of assets and related hydrant licenses. Although these costs are, insofar as they can be predicted, included in the JUHI budget, the budget does not contain many other costs borne by each participant in relation to the JUHI JV.

80. For example, each participant must make available staff to comprise the JV Operational Committee. The Committee's principal duties include the determining of the capital

expenditure programme, the design and components of any alterations to the JUHI, review the JUHI's budget, monitor the JUHI Operator's performance and to consider applications for new participants. These duties require substantial time both for the participant's representative on the Committee and for other staff within the participant responsible for such decisions, none of which is charged to the JUHI JV budget, and which is difficult to quantify.

**(c) Unquantifiable long-term risks associated with ownership of the JUHI**

81. There are a range of significant risks associated with ownership of the JUHI, many of which are difficult to accurately quantify on a future basis.
- Environmental liabilities
82. A key risk is the long-term environmental liabilities of the JV participants. The JUHI JV is required to remediate contamination caused by the JUHI at the end of the lease term. The potential costs of doing so were estimated, in 2007, to be in the order of nearly \$**[Redacted for confidentiality]** based in part upon the known environmental state of the site as well as clean up costs of other major facilities.
83. Environmental remediation costs can be substantial and take place over a significant period of time. This is demonstrated by the former Hong Kong airport in Kowloon, which closed in 1999 and then took 8 years for a full clean up and remediation to be completed.
84. Remediation liabilities have historically increased with the tightening of prevailing regulations, which further adds to the uncertainty around future costs in this regard.
85. New participants which join the JUHI JV are not, however, responsible for any contamination occurring before the date they join, so new participants are not penalised on joining the JUHI by being required to assume any pre-existing environmental liabilities.
- Fuel contamination, security and safety issues
86. The participants also bear the potential risk of liability for fuel contamination if the JUHI facilities are not properly maintained, which could be a very significant liability depending upon the consequences for airlines and passengers. Accordingly, whilst they must not only meet all applicable industry standards, the participants may elect to undertake additional steps to ensure quality control in order to mitigate this risk.
87. Similarly, the participants bear the potential risk of liability for safety issues, such as explosions, fires and leaks. The participants must take all reasonable precautions against the outbreak of fire and must observe and comply with SACL's directions in relation to the detection, prevention and control of fire at the airport.
88. Being the occupants of the site, the participants must also ensure the security of the site and facilities. In relation to security, SACL may prescribe rules relating to the operation, use and occupation of the airport. The participants must comply with all directions given by the airport in relation to the secure operation of the airport. Expected security changes are also likely to affect the JUHI and give rise to significant costs.
- Regulatory compliance risks
89. The participants also operate in an environment which is heavily regulated, and changes to operating practices are regularly needed to bring the JUHI into line with standards issued

by International Air Transport Association (*IATA*) and the Joint Inspection Group (*JIG*). They are accordingly subject to the ongoing risk of changes to regulatory standards which have significant compliance costs. For example, JIG recently imposed new standards to ensure greater safety around hydrant valves and pit tethering. In order to implement these changes, a budget of approximately \$300,000 has been allowed for by the JUHI.

90. As can be seen from the above, the risks associated with operation of the JUHI facility are significant, and by their nature difficult to predict and accurately quantify.

#### **B5.2 Difficulty of capturing costs and risks in a throughputting fee**

91. The reason equity participation is offered by the JUHI JV rather than throughputting is that equity participation provides a much more clear and certain mechanism for capturing and allocating the potential risks and costs that arise from operating the JUHI across users, and ensuring that past, present and future costs and liabilities are dealt with and allocated in a simple, transparent and systematic manner. Through-putting arrangements (either in the form of a negotiated contractual arrangement or pursuant to a Part IIIA arbitration process) have the potential to adversely impact on the efficient long-term operation of, and investment in, the JUHI.

- (a) Throughputters face minimal risks compared to equity participants

92. Third parties seeking throughputting have minimal risks, as they have invested no capital in the JUHI. Throughputters may enter and exit the supply of jet fuel without investment or disposal risks, using the assets of the investing participants at a point in time when they perceive those assets as delivering value to them and leaving when the assets no longer do so. For example, JV participants may make a substantial investment over several years seeking a favourable lease outcome and making investments in the JUHI so as to comply with existing lease obligations, all the time bearing the uncertainty and risk of uncertain tenure and the ability to recoup a return on their investment. Throughputters do not bear these risks, and can instead await a favourable lease outcome before seeking access to throughput.

93. Given the nature of the costs and risks involved in operating the JUHI, it would be difficult to set a throughput fee that would capture and provide an appropriate return over operating costs, current capital costs, future capital expenditure requirements, and operational risks including environmental liabilities. The pricing methodology would need to employ some kind of dynamic cost premium, which would create price uncertainty and may be perceived as unacceptable to would-be throughputters. Even this mechanism would not capture long term risks such as environmental liabilities, and retrospective capture of these costs would not be possible.

- (b) Free-riding will lead to underinvestment

94. Critically, the availability of through-putting arrangements may encourage free-riding on the investment and exposure of current JV participants. If a throughput fee was developed, but this fee was set at a level that did not adequately compensate the parties for the costs and risks outlined above, then it would place throughputters at a long-term competitive advantage to equity participants. This would very likely result in under investment in the facility, as JV participants sought to avoid expenditures that they would perceive

themselves as bearing a disproportionate burden. This, in turn, might encourage equity participants to drop out of the JUHI JV, which would result in remaining JV participants bearing an even greater share of operational and ownership risks. This would act as a significant disincentive on remaining participants to invest further capital in the facility, given the greater share of risk that each participant would bear.

95. Free-riding concerns could potentially be exacerbated given the features of the supply of jet fuel at Sydney Airport, where a relatively small number of airlines comprise a large proportion of jet fuel demand. Throughputters may be able to secure key customer contracts of large volumes but can drop in and out of jet fuel supply without paying regular throughput fees and so are not obliged to contribute to the ongoing costs of operating JUHI infrastructure to service all demand. This could result in JV participants finding it unprofitable to continue to compete for remaining volumes – acting as a further incentive to reduce investment in the JUHI or potentially exit JUHI ownership.
  96. An obvious potential solution to the risk of a throughput fee being set too low is to charge a fee that provides a high degree of comfort that likely future costs and risks would be captured. The JV participants note that throughput fees charged to parties that are not members of jet fuel facility consortia in the United States are often significantly higher than for members (see section B7.1). Such a course of conduct would, in addition to raising potential competition law issues, not be likely to result in greater competition.
- (c) Hypothetical example
97. The following diagram represents a hypothetical set of events that may occur in relation to a JUHI that is declared open for access for third parties.

**Figure 4 Example of risks and costs required to be allocated in through putting fees**

Year	Third Parties				Event	
	A	B	C	D		
2011					Third parties gain the right to access via throughputting arrangement	
2012						
2013						Large future environmental liability identified around hydrant line, relates to loss of containment in 2012-2013. Costs expected around 2017-2020.
2014						Change of JUHI Operator. Staff redundancy costs generated and participants agree to fund these over next three years.
2015						SARS issue in Asia. Large drop in volume at this location. Costs on unit rate basis increase for participants well above planned level.
2016						Large capital investment required of participants, despite lease tenure remaining uncertain. \$10m required in 2019.
2017						Environmental Liability originally identified in 2013 addressed. Cost 180% over expected costs due to recent changes in statutory requirements/limits.
2018						
2019						One participant withdraws from the JUHI. Investment of \$10m identified in 2016 made by remaining participants. Departing participants rejoins as throughputter B.
2020						
2021						Liability arises from JUHI incident where contractor suffers serious injury. Large costs incurred in 2021.
2022						Lease expires. JUHI provided with month-by-month tenure while airport determines location of fuel supplies under the long term airport master plan.
2023						JUHI begins to build new facility incurring capital investment over 2 years of \$17m. Participants required to fund this.
2024						JUHI relocates and commences operation at new facility.
2025						Old JUHI site to be remediated in 2027.
2026						Participants budget for large demolition and remediation costs from old JUHI site.
2027						
2028						Remediation of old site completed.
2029						

98. This illustrates the likely difficulties that would arise in seeking to set a throughputting fee that fairly allocates costs and liabilities to equity participants and third party throughputters. For example:

- in 2014, when staff redundancy costs are incurred in relation to the change of JUHI Operator, should those costs be passed on to throughputters? Given that party C is leaving the market in 2014, can a once-off charge be made to them? Is it fair to party D, which has only just joined, to have to pay those costs?
- in 2017, when the environmental liability that was originally identified in 2013 is addressed, should any throughputters bear the cost? If so, which of the throughputters should be responsible? Party C at that stage had long left, or in other circumstances may well no longer exist by this point. Yet D would argue that it is unfair that it should have to pay given that it was not even in the market when the environmental liability was identified;
- in 2019, when the \$10 million capital expenditure is made and former participant B commences as a throughputting third party, should the same rate be paid by each of A, B and D? B paid for the environmental liability in 2017 as a participant. For the calculation of the throughputting fee, how many years should be used to base



the amortisation of the capital expenditure, when it is unclear when the JUHI will relocate?

- in 2026, when it becomes obvious that the cost of site remediation for the old JUHI will be large, party C leaves to avoid the cost. Is it fair for the participants and parties A and D to incur all of those costs? Should party C be charged a share of those costs when it leaves, or when it rejoins as a throughputter in 2029? How about party B? How should the costs be passed through – a lump sum charge or simply increased fees for future years for all users?
99. The hypothetical events described in this case study are realistic potential occurrences in the running of a JUHI facility that could occur over the life of JUHI infrastructure. The timing and magnitude of these events are unpredictable and cannot be planned for in advance.
100. As a result, equity participation in the JUHI JV is the preferable mechanism for providing access to the JUHI because it offers a clearer method for allocating costs and risk across users, and past, present and future costs and risks are dealt with and allocated in a simple, transparent and systematic manner.

## **B6. Current JUHI access procedure is appropriate and workable**

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### **B6.1 Current entry criteria are objectively reasonable**

101. The JV Agreement governing the operation of the JUHI explicitly provides for a mechanism by which access can be obtained to the services provided by the JUHI. That mechanism is equity participation in the JUHI JV.
102. The JV Agreement sets out the qualifying criteria to be met in order for a third party to become an equity participant in the JUHI JV. These criteria each have a reasonable commercial basis as explained below. The fact that many of the criteria would need to be satisfied even if third party access by way of a throughput type arrangement was to occur illustrates that entry to the JUHI by equity participation does not involve the imposition of requirements that are unreasonably onerous or unnecessary.

#### *(a) The Applicant shall acquire a shareholding in Component A*

103. The first criterion is a practical requirement which involves applicants acquiring an interest in Component A (where the depot and international pipeline is located). It is not possible to store fuel without an interest in Component A. For any party wishing to supply fuel to the international terminal, or to supply fuel by tanker in the GA area, only a shareholding in Component A would be required. For example, Qantas initially only acquired an interest in Component A when it joined the JUHI in 1988.

#### *(b) If the Applicant requires a shareholding in Component C, a shareholding in Component B shall be required*

104. If an applicant wishes to supply fuel in the domestic precinct through hydrant points, they will need to acquire a shareholding in Component C. To do so, they must also acquire a shareholding in Component B, being the cross runway pipeline which connects the international pipeline to the domestic pipeline, as this pipeline enables the fuel to be

transported to the domestic precinct. This criterion simply reflects the practicalities of utilising the JUHI infrastructure at the international and domestic precincts given the location of the various facilities.

*(c) If legally required the Applicant shall establish that it has a Certificate of Approval from the Civil Aviation Authority for the distribution of aviation fluids and greases.*

105. This criterion only applies if there is such a legal requirement in operation for suppliers have particular qualifications to distribute aviation fuel.

*(d) The Applicant's demand upon the JUHI shall be such that it will not prejudice the use of the JUHI by the Participants*

106. This criterion relates to the possible situation where capacity at the JUHI is insufficient to meet airline demand, such that the only way of providing access to a new participant would be to reduce the capacity available to existing providers. This would obviously have the potential to place existing JV participants at risk of breaching their contractual supply obligations to airlines.

107. Such a situation does not exist at the JUHI at the current time. In any event, this type of restriction would exist under a throughputting arrangement, since the JUHI participants would not be willing to offer throughputting if granting throughput rights to a new party would inevitably mean restricting the contractual rights of existing users.

*(e) The Applicant shall be able to deliver to the JUHI on a continuing basis compatible aviation fuels sufficient to supply its customers' and or its requirements in full, which meet the product specifications defined in the Agreement and have access to a National Association of Testing Authorities approved laboratory testing facilities consistently and promptly to confirm such quality*

108. This criterion relates to the need for applicants to ensure that any fuel introduced to the JUHI meets strict quality thresholds given that fuel will be co-mingled in the storage tanks (which would be imposed under any throughput arrangement) and to demonstrate their intended delivery method into the JUHI.

*(f) The Applicant shall be financially capable of fulfilling the obligation of a Participant, have sufficient qualified manpower to perform the obligations of a Participant, and have insurance coverage which is adequate to meet the indemnity obligations of a Participant. In particular, the Applicant shall be capable of providing an into-plane fuelling service to its own customers.*

109. The key requirement of this criterion is that an applicant must have sufficient insurance cover to be in a position to indemnify the other participants against liability for claims arising out of aircraft refueling, as liability for such claims is the responsibility of the participant whose customer's aircraft was the object of refueling. A requirement for insurance of this type would be standard even if supply was to occur by way of a throughputting arrangement.

110. It is also a requirement that the applicant can provide into-plane fuelling services to their own customers (noting that this may be done through a third party provider).

*(g) The Applicant shall be technically capable of assuming the obligations and responsibilities of the JUHI Operator when required to do so in accordance with the provisions of this Agreement*

111. As the JV Agreement provides for the role of the JUHI Operator to rotate between the JV participants, and given the ability for current participants to exit the JUHI (including the JUHI Operator), it is necessary that an applicant has the technical capability of assuming the obligations and responsibilities of the JUHI Operator if required to do so. The primary role of the JUHI Operator, as described in section B3.2 is to ensure there is sufficient jet fuel supply available to meet forecast demand at the airport. Having regard to the skills and experience of parties likely to seek to supply fuel at Sydney Airport,<sup>18</sup> being parties involved in jet fuel supply at locations around the world, this does not appear to be a requirement that likely potential entrants would have difficulty meeting.

*(h) The Application shall comply with any other entry criteria imposed by the Participants*

112. This criterion is intended to provide flexibility for changes to laws, operational procedures, safety requirements, insurance needs and the like, such that obligations which the existing equity participants are obliged to comply with also become a requirement on new participants. At the current time there are no additional entry criteria which are required to be met other than those in clause 15 of the JV Agreement. The flexibility to accommodate these type of changes would form part of any throughputting arrangement.

*(i) The Applicant shall become a party to this Agreement, and become a party to the related Agreements, including in particular the indemnification agreement relating to liabilities arising out of aircraft refuelling and including agreements with appropriate government authorities*

113. The main requirement in this criterion is the need for an applicant to enter an indemnification agreement in relation to claims arising out of aircraft refuelling, the general principle of which is that it is only the JV participant whose customer was being refuelled will be liable for such claims. This requirement is in line with standard industry practice and standards for participants in joint fuel storage facilities. An indemnification requirement would form part of any throughputting arrangement.

114. By requiring an applicant to become a party to the JV Agreement, applicants would need to be capable of meeting the practical requirement of becoming part of the JUHI JV Operating Committee post entry. This Committee meets on a regular basis to consider the construction and operation of the JUHI, including capital investment, engineering design, financial and operational policies, quality control and any other matters relating to the JUHI. Again, having regard to the nature of the likely applicants for participation in the JUHI, it is unlikely that they would not be able to satisfy this requirement.

115. Each of the above criteria is clearly linked to the need to ensure users of the JUHI have appropriate technical qualifications and capabilities for supplying aviation fuel, and the need for owners of the facility to bear the associated costs and risks of owning and operating the JUHI and to operate the JUHI effectively.

116. As noted above, most of these criteria would need to be met by a supplier of jet fuel at Sydney Airport due to safety and quality requirements, regardless of whether the supplier was delivering fuel as a throughputter or as an equity participant.

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<sup>18</sup> BARA's Application lists the major multinational fuel supply companies Kuwait Petroleum, PetroFina, Sinopec, Vitol and World Fuel Services.

117. The JV participants consider that each of these criteria are commercially necessary and legitimate, and do not represent a barrier to participation in the JUHI.

**B6.2 Successful entry under existing mechanisms has occurred**

118. The entry criteria do not act as a barrier to participation in the JUHI, as demonstrated by the fact that to date the only applications by a third party to become part of the JUHI JV were both successful. Qantas satisfied the qualifying criteria in 1988, when it purchased an interest in 'Component A', and then again in 2001 when it purchased an interest in 'Component C'.<sup>19</sup>
119. For both its 1988 entry and its 2001 entry, the process took approximately 13 months from the date Qantas applied to be an equity participant to the date it became a participant.
120. The main issue that was the subject of negotiation between the JV participant and Qantas in 2001 were the costs of an environmental base line survey which was required to be conducted. As new entrants are not responsible for claims arising from any environmental issues that occurred prior to their entry, such a survey was conducted to form a base line for any liability arising thereafter.
121. In essence, the parties agree on the environmental condition of the premises prior to purchase of a share in the JUHI by way of a baseline Environmental Site Assessment (**ESA**). The ESA is conducted by an independent and suitably qualified environmental consultant. The baseline ESA includes an assessment of the condition of the soil and groundwater at the area that the applicant wishes to purchase, in order to determine whether or not soil and groundwater contamination has occurred.
122. In making the assessment, the site investigator must have regard to the applicable State and Commonwealth regulations. The baseline ESA is arranged and paid for by the applicant, and costs associated with the baseline ESA are deducted from the purchase price if the applicant buys into the JUHI within 2 months of the report completion date. If the applicant does not purchase into the JUHI during this period, the costs associated from the baseline ESA will be borne by the applicant.

**B6.3 New applications continue to occur**

123. Recently, the JUHI JV was approached by BARA about potential access to the JUHI. The approach by BARA was apparently not confidential as BARA has referred to this in its access application.
124. BARA wrote to the JUHI JV in June 2011 indicating that it would like to explore the possibility of international airlines establishing, either individually or jointly, a throughput arrangement with the JUHI. The JUHI JV responded in June 2011 that the request would need to be considered internally. A meeting ultimately occurred with BARA in August 2011. At that meeting the steps required to join the JUHI were explained. The JUHI JV wrote to BARA in September 2011 reiterating that the JV Agreement provides for equity

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<sup>19</sup> The cross-runway pipeline was constructed in the 1990s, and it was at this point that interests in Component B were acquired.

participation, and that a Confidentiality Agreement needed to be executed by each airline before information concerning the operation of the JUHI could be disclosed.

125. In addition to BARA's application, the JUHI JV has recently received confidential inquiries from four other substantial multinational companies about possible use of the JUHI. The other approaches are confidential and are summarised in Confidential Annexure B.
126. Participation in JUHIs by way of equity is a relatively common means of accessing airport fuel storage and hydrant distribution systems around the world, and the JV participants consider that the types of potential entrants identified by BARA that may wish to use the Sydney Airport JUHI would be familiar with these operational models and their requirements.
127. The fact that a number of such recent requests have been made to the JUHI JV suggests there is no merit to BARA's claim that requiring equity participation and the satisfaction of qualifying criteria deter entry.

#### **B6.4 No denial of access has occurred**

128. The JUHI JV has been willing to engage with any potential applicants. It has dealt with each approach in good faith. At no time has the JUHI JV sought to apply the qualifying criteria in such a manner that might constitute a barrier to entry. To date, no third party has expressed the view to the JUHI JV that the qualifying criteria or the manner in which they are implemented by the JUHI JV are inappropriate or overly burdensome. The only third party that has formally applied for equity participation – Qantas – was able to enter the JUHI JV.
129. In terms of the length of time it takes for a third party to gain admission to the JUHI JV, the JV Agreement imposes a number of obligations on the participants, in the form of the Operating Committee, to deal with applications promptly.<sup>20</sup> In the case of Qantas's entry in both 1988 and 2001, it only took approximately 13 months from when an application for participation was made to when participation was granted. This is not an unacceptably lengthy period of time, and negotiation of a commercial agreement for access on other terms such as a throughputting arrangement could easily take as long if not longer.

#### **B7. Arrangements at overseas airports are not comparable**

130. In its application, BARA seeks to draw direct comparisons between the operation of the jet fuel facilities at Sydney Airport against other international airports. For instance, BARA has claimed that 'Access to the Sydney JUHI is particularly restrictive when compared with arrangements that are in place overseas. For example, at Los Angeles Airport, open access arrangements are in place where suppliers (including airlines) can choose whether or not to become a member of the JUHI'.<sup>21</sup> The BARA submission also features a table

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<sup>20</sup> See e.g. clause 15.1 of the JV Agreement which requires the Operating Committee to deal with applications as quickly as reasonably practicable. See also clause 15.4 which requires the outcome of an application to be notified to the Applicant as soon as is reasonably practicable and clause 15.6 which requires the Operating Committee to arrange for the necessary valuation of the JUHI and to complete it as soon as is reasonably practicable.

<sup>21</sup> BARA Application, p.4.

comparing the volumes of jet fuel used at various international airports and the number of fuel suppliers present at those airports<sup>22</sup>, as well as a graph comparing the jet fuel differentials charged at Sydney Airport compared to a number of other international airports.<sup>23</sup>

131. A myriad of factors determine the number of suppliers, level of price and access arrangements at any airport. BARA's analysis ignores these factors, which include:
- the ownership and the allocation of operational responsibilities and risks for the JUHI;
  - the level of involvement of the local government in the ownership and management of the airport and its related infrastructure;
  - the quality, capacity and accessibility of infrastructure upstream of the JUHI, for delivery of jet fuel into the JUHI;
  - the number of jet fuel producers, refiners and production capacity available in the markets supplying, or potentially supplying, the JUHI;
  - the distance of the airport from its sources of jet fuel, which impacts on the transportation costs that drive the jet fuel differential;
  - the size (or volume) of the jet fuel market at the location; and
  - historical factors.
132. Case studies of several of the airports to which BARA seeks to make comparison are set out below. In the JUHI JV participants' view, the differences in ownership, operation and market conditions at these airports mean that the simplistic comparisons put forward by BARA are inaccurate and misleading.

#### **B7.1 United States – different ownership structures and historical factors**

133. Until approximately the 1980s, jet storage and hydrant facilities at major airports in the United States were generally owned and/or operated by jet fuel suppliers, in a manner similar to that currently seen at Australian airports. However, due to a range of factors including high costs, unpredictable airport-mandated capital expenditure and risks, jet fuel suppliers have gradually exited these arrangements at many major airports. The jet fuel storage and distribution facilities, which are owned by government municipalities or authorities, were subsequently leased to airline consortia. These operations are generally run on a minimum-cost basis.
134. In the case of Los Angeles Airport, which has been put forward by BARA as a point of comparison to Sydney Airport, the city owns the airport, and leases the storage tank facilities to LAXFuel, a non-profit mutual benefit corporation whose members are airlines, on a long-term basis. LAXFuel develops and operates the facilities for the benefit of its airlines. Under the lease between LAXFuel and the city, the facilities were contemplated to be made available to non-member throughputters.

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<sup>22</sup> BARA Application, p. 49-50.

<sup>23</sup> BARA Application, p. 53.

135. Under the standard user agreement for the facilities for throughputters at LAX, fees for through-putting are substantially higher (around 1.5 times) than the fees charged to members of the consortium. The JUHI JV participants understand that at other United States airports the through-putting fees are typically around 1.25 to up to double the fee paid by consortium members at those airports. As a result, the majority of airlines that utilise these facilities join the airline consortium to access the lower fees, and it is generally only smaller operators or freighter operators who only pass through sporadically that utilise the through-put arrangements.
136. The comparison in the BARA submission of Sydney Airport to the situation at LAX is therefore not valid, as the operational and ownership arrangements are completely different. What the United States model does show, however, is that parties who are not part of the consortia operating the fuel storage and distribution facility pay substantially higher fees than parties who are members. Practically, this leads to most users of the facilities joining the airline consortium rather than utilising the throughputting arrangements.

#### **B7.2 Canada – airline consortia**

137. The Canadian Airport jet fuel facilities at major airport locations are generally owned by an airline consortium. A fixed fee is charged to join the fuel consortium at a particular airport and lower into-plane fees are then charged. For throughputting airlines that do not join the fuel consortium, the into-plane fees are significantly higher.

#### **B7.3 Europe and the United Kingdom– deep upstream market supported by comprehensive infrastructure**

138. Overall market conditions and infrastructure in Europe are greatly different to that in Australia. A far larger number of fuel suppliers are active in the mature, high volume and geographically concentrated European market. Participants in the market include global oil companies, national oil companies, marketers that are traders and/or refiners and/or resellers, airlines that self-supply, etc. This is facilitated by the comprehensive fuel distribution infrastructure.
139. Distribution of jet fuel throughout Europe is through the Central European Pipeline System (**CEPS**) and the Northern European Pipeline System (**NEPS**). They were built in the late 1950s by NATO, and excess capacity of the pipeline may be used by civilian users. Currently, around 90% of the fuel transported through the system is for civilian users. The pipelines are managed by a separate entity, which is responsible for setting the tariffs on the pipeline. The tariff depends on where the fuel being moved enters and leaves the system. This pipeline network is part of the larger distribution network that includes ships, barges, rail or pipes. Due to the geographically concentrated market and higher volumes, these networks are far more efficient than those in Australia.
140. In the United Kingdom one of the major supply routes for jet fuel is via the Government Pipeline and Storage System (**GPSS**) which is a major government owned pipeline system built during the second world war to supply RAF airbases around the United Kingdom and is now a major supply route for London Heathrow, London Gatwick and Stansted Airports. The system is owned by the UK Ministry of Defence and operated on their behalf by the Oil and Pipeline Agency, which is a government agency. The Ministry of Defence has priority

access for the military airfields via the GPSS but spare capacity is made available on a commercial basis.

141. Even in this environment of high numbers of suppliers having easy access to throughput facilities, supplying to airports with substantially greater volumes than Sydney Airport, there are still often no more than 5-7 suppliers at any given airport. As the figures in BARA's application show, there are only 5 suppliers at Charles de Gaulle airport (Paris), despite having almost twice the volume, and 6 at Amsterdam airport. Further, if one looks at the ratio of suppliers to volumes supplied, Sydney Airport is ahead of many large European airports (7<sup>th</sup> out of the 15 airports identified by BARA).
142. In any event, a number of joint venture-owned JUHIs in Europe have qualifying criteria for entry into the joint venture which are substantially similar to clause 15 of the JV Agreement. This has not prevented entry, a number of new participants have entered those joint ventures.
143. For example, the London Heathrow Jet fuel facilities operate on a similar model to Sydney and one of the potential suppliers quoted by BARA (Vitol) has recently invested to become an equity participants in the London storage and hydrant joint venture.
144. In summary, despite BARA's contention that open access has driven increased competition in European markets, the JUHI JV participants believe the evidence shows that the competitive environment is similar in nature to Sydney. The modestly higher supplier numbers at European airports reflects that the markets are high volume, relatively mature and geographically concentrated and in some locations supported by older, government-owned legacy infrastructure.

#### **B7.4 Taipei and JFK airports – government owned facilities**

145. The JUHI JV participants understand that at Taipei and New York's JFK airports, a local government authority owns and operates the jet fuel storage and reticulation system. Under such a system, it is unsurprising that the operating authority charges a throughput fee applicable to all suppliers on a non-discriminatory basis as the capital and operational risks and liabilities are held by the state.

#### **B7.5 Hong Kong – mixed management**

146. The infrastructure at Hong Kong airport (being the hydrants and facilities near the terminals) was originally invested in and operated by the Aviation Fuel Service Co (**AFSC**), a joint venture between jet fuel suppliers and Cathay Pacific, at the time the new airport was built. In 2003, the Hong Kong government exercised an option to purchase the infrastructure, so it is now owned by the government but still operated by the AFSC under an operation agreement.
147. Throughput fees on the infrastructure are set under an annual budget, with a percentage margin as agreed by a 'Management Association' comprised of the Airport Authority, Cathay Pacific, representatives of other airlines and jet fuel suppliers. The import terminal for aviation fuel, Permanent Aviation Fuel Facilities, was invested in and operated by a third party. However, fees for using the terminal must also ultimately pass the approval of the Management Association.



### **B7.6 Singapore – most similar structure to Sydney**

148. Unlike the examples above, Singapore Airport's fuel storage and hydrant facility, like the Sydney Airport JUHI, is a joint venture comprised of fuel suppliers, CAFHI Pte Ltd (with six shareholders), with joint venture arrangements similar to those at Sydney. Despite this, the data contained in BARA's application shows that the fuel price differential at Singapore Airport is one of the lowest amongst the airports used in the BARA comparison. The JUHI JV participants consider the Singapore example to be instructive in showing that there is little to no relationship between the access arrangements and the number of suppliers or the price of fuel at a particular airport.

## **Section C: Why BARA's application must be rejected**

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### **C1. The scope of the defined service is not adequately defined, and key services are not capable of declaration**

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#### **C1.1 Failure to define the service to which access is sought**

149. BARA has defined the service it is seeking declaration of as a JUHI Service, being '[t]he services provided by the Jet Fuel Storage Facility (including facilities for refuelling trucks) and Jet Fuel Hydrant Pipeline Network Facility provided by the Sydney JUHI'.<sup>24</sup>
150. As explained in section B2.2 above, there are a large number of services facilitated through the JUHI infrastructure. These services include storage and pipeline distribution services, but also include various essential product testing and maintenance services to ensure fuel quality and reliability of supply, as well as services to support into-plane service providers, and services to support the delivery of fuel by tankers rather than through the JUHI pipeline network, and accounting, reconciliation and stock management services to enable fuel distribution from the JUHI.
151. BARA's application does not adequately define the service in respect of which access is sought. It is not clear:
- whether only the services directly provided by the specified facilities, being storage and reticulation services, are covered by the application; or
  - whether it is envisaged that all of the services facilitated by the JUHI infrastructure and performed by the JUHI Operator would be declared for open access to third parties.
152. In either case, BARA's application is deficient.
- (a) Storage and reticulation services
153. If declaration is only sought for the use of the storage and reticulation infrastructure, which is what BARA's application seems to suggest, then it is unclear how access seekers would be able to provide or acquire the numerous other services that are necessary to make use of the facilities.

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<sup>24</sup> BARA Application, section 4.1.

154. For example, the rigorous product testing and filtering services performed at regular intervals as fuel is transported into, out of and around the JUHI infrastructure does not appear to fall within BARA's definition of the JUHI Service. BARA's application does not address whether access seekers would provide their own product testing (and how practically this could be done), or whether BARA is suggesting that the JUHI Operator could somehow be compelled to perform these services for third party throughputters as part of the storage and reticulation networks being declared. It is not at all clear from BARA's application how practically a third party would be able to meet the product safety and quality requirements for throughputted fuel unless all the services currently facilitated through the JUHI JV were provided to the access seeker.
155. BARA is an organisation comprised of a large number of airlines with substantial knowledge as both consumers of jet fuel and also as participants in fuel storage facilities at various airports around the world. It is unacceptable for BARA's application to lack an appropriate level of specificity in terms of the precise services provided by relevant facilities for which access is sought. It is no answer for BARA to contend that it lacks sufficient details of the facilities operated by the JUHI to be able to specify with clarity the subject matter of its application – for example, the existence of filtering and testing equipment is common knowledge to BARA and its members. BARA has the knowledge necessary to set out in a clear manner whether the numerous services provided by the JUHI JV are within the scope of the application, however the application failed to do so.
- (b) Other services
156. The type of 'service' that can be the subject of declaration under Part IIIA is a service 'provided *by means of a facility*', which relevantly includes '*the use of an infrastructure facility*', the '*handling or transporting things*', or a 'communications service or similar service'. It does *not* include the supply of goods, the use of intellectual property or the use of a production process except to the extent that it is an integral but subsidiary part of the service.<sup>25</sup>
157. Clearly a large number of the services facilitated through the JUHI infrastructure and/or provided by the JUHI Operator which together enable the safe, reliable and efficient storage and distribution of acceptable quality jet fuel around Sydney Airport go beyond the 'use of infrastructure or the 'handling or transporting' of goods which are the types of services which are capable of declaration under Part IIIA. If BARA intended that these services be captured in its description of the services provided by the Jet Fuel Storage Facility and the Jet Fuel Hydrant Pipeline Network Facility, then its application is flawed as such services are not capable of declaration.

## C2. Criterion A cannot be satisfied

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### C2.1 Introduction

158. BARA has asserted that access under Part IIIA will satisfy Criterion A by promoting a material increase in competition in three dependent markets:

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<sup>25</sup> Section 44B of the CCA, emphasis added.

- the upstream market for the supply of jet fuel at Sydney Airport;
  - the downstream market for into-plane services at Sydney Airport;
  - the downstream domestic/international market/s for the supply of air passenger and freight services at Sydney Airport.
159. However, BARA has not provided any evidence which could enable the NCC to be *affirmatively* satisfied that regulated access to the JUHI Service would promote a *material* increase in competition in any of the asserted dependent markets.
160. To the contrary, the JV participants submit that:
- there is no evidence to suggest that any JV participant or participants have market power and an incentive to use market power to adversely affect competition. In fact, access to the JUHI is already reasonably available through equity participation (and is therefore not a barrier to entry to dependent markets);
  - regulated access would not more effectively promote the objects of Part IIIA than the status quo of access via equity participation in the JUHI JV on commercial terms; and
  - in any event, there is already effective competition in each of the three dependent markets identified by BARA and accordingly regulatory intervention is unwarranted.

**C2.2 No market power concerns: access is reasonably available**

161. Part IIIA access can have no material effect on dependent markets where there is no evidence that an incumbent has market power and is likely to use it to adversely affect competition as access to the service is already reasonably available.
162. For the reasons set out in detail in section B5 above, access to the JUHI is available via equity participation in the JUHI JV. The criteria for equity participation are reasonable and based on objectively justifiable commercial reasons, as explained in detail in section B5 above. It is not credible to suggest, as BARA does, that the mere fact there are criteria for entry and that the JUHI JV may decide which applicants meet that criteria means third parties are effectively dissuaded from applying for equity participation. Moreover, the majority of the qualifying criteria for equity participation would need to be met by a throughputter in any event – equity participation does not act as a significant barrier to entry.
163. Further, it is clearly not the case that participation in the JUHI JV is limited to vertically integrated suppliers of jet fuel. Three of the five JV participants, BP, Qantas and Mobil, do not have upstream petroleum refinery operations in Sydney. The participants have diverse business models, and cannot be said to have any shared incentive to block entry to upstream or downstream markets. To the contrary, it is more likely to be in the interests of all participants to allocate the significant costs and risks involved in owning and operating the JUHI efficiently. The most efficient allocation is through users taking equity in the facility.
164. The joint venture ownership model of the JUHI is very different to the types of infrastructure to which Part IIIA generally applies. It is not owned by a monopoly provider which may

have a clear incentive combined with an ability to block potential entry to dependent markets by excluding potential competitors from its facility. In the present case, ownership of the infrastructure is based on a joint venture model and specifically provides for additional participation on clear and objectively reasonable criteria. There has been no denial of participation to would be applicants. In these circumstances, there is no evidence of the existence or incentive to misuse market power.

**C2.3 The objects of Part IIIA are served by equity participation and regulated access is not a better alternative**

165. The objects of Part IIIA are to promote the economically efficient operation, use and investment in the relevant infrastructure, thereby promoting effective competition in upstream and downstream markets.<sup>26</sup>
166. The JV participants refer to and repeat the information in sections B5 above, which demonstrates that the costs and risks associated with owning and operating the JUHI facility mean that equity participation in the entity that owns the infrastructure is the most effective and reliable way of ensuring users share costs and risks. As a result, access via equity participation in the JUHI JV sets the right incentives for the facility owners to maximise the operation of the JUHI, and to invest to meet future requirements. The JUHI infrastructure is not at capacity and the JV participants continue to make investments to further increase capacity in light of increasing anticipated demand.
167. The JV participants further refer to and repeat the information in sections B5.2 above in relation to throughputting skewing investment incentives. Given the difficulty of reliably estimating throughput fees which appropriately allocate existing and future costs and liabilities across non-equity access seekers through a throughput fee, the likelihood is that if the fee could be set too low (giving rise to disincentives to invest in JUHI infrastructure because of free riding and a depleted number of equity participants to share the costs and risks) or too conservatively (creating barriers to throughputters compared to equity participants, and possibly resulting in over-investment).
168. The requirement for equity participation is based on a commercially justifiable need to share risks and prevent free riding, it is not designed to limit market entry. Indeed, market entry has not in fact been limited as a result of equity participation being the means through which access to the JUHI can be gained. There are no instances in which an applicant has been denied equity participation. The only third party to make a formal application, Qantas, was granted equity participation, as discussed in section B6.2 above.
169. BARA's application refers to regulated access enabling potential suppliers of 'relatively small volumes' of jet fuel<sup>27</sup> access on a short term basis, and 'limiting the costs and time of securing relatively small volumes of jet fuel demand'.<sup>28</sup> Part IIIA regulation was never intended to provide alternative lower risk/cost means of access for opportunistic users where reasonably available means of access exist.

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<sup>26</sup> Section 44AA of the CCA.

<sup>27</sup> BARA Application, p 17.

<sup>28</sup> BARA Application, p.15.

170. Accordingly, there is no warrant for regulatory intervention, and a regulated outcome would not offer a better means of meeting the objects of Part IIIA than the current option of equity participation on commercial terms. Indeed, it is more likely to create disincentives to investment that could create capacity issues that currently do not exist.

**C2.4 No material increase in competition in the market for the supply of jet fuel**

171. While the JV participants consider that the availability of access via equity participation is sufficient to demonstrate Criterion A cannot be met, nonetheless the participants wish to respond to erroneous allegations made by BARA regarding the supply of jet fuel at Sydney Airport.

172. BARA has essentially argued that the market for the supply of fuel at Sydney Airport is not effectively competitive for three reasons:

- it asserts there are high jet fuel price differentials at Sydney Airport compared to other airports;
- it asserts there is poor reliability of jet fuel supply at Sydney Airport;
- there are only three or four existing suppliers at Sydney Airport.

173. None of these factors demonstrates a lack of competition at Sydney Airport.

**(a) Price differentials are due to costs and do not indicate monopoly profits**

174. BARA's application cites high fuel differentials as an indication that jet fuel prices at Sydney Airport exceed competitive levels. This misconstrues what the price differentials represent, and what factors are taken into account in a differential and how they will differ from airport to airport.

175. A fuel supplier's margin comprises only one component of the fuel differential. A range of significant cost factors are also included in a fuel differential, which factors vary from airport to airport and between individual suppliers. For Australian airports, these cost factors comprise the bulk of the quoted fuel differential:

- as there is no jet fuel index benchmark actively traded specifically for Australian ports, the Mean of Platts Singapore (**MOPS**) is used as a proxy benchmark. When MOPS is used for Australian airport pricing, the benchmark does not include freight from Singapore or relevant source port to Australian ports and related charges (insurance and transit volume loss);
- most significantly then, the differential will include the cost of transport. For Australian airports, this will be sea freight (mainly from Asia), with long voyage times and small multi-product cargoes, often with the need for two port loading and/or two port discharge. Unlike many other freight destinations, (for example, Hong Kong, Thailand and Malaysia), there is minimal return freight cargo from Australia, and hence the freight costs to Australia includes an additional vessel repositioning cost. Other airports generally do not incur such significant transport costs. Airports such as Singapore, for example, which are located close to fuel trading hubs, need not include significant (or in some cases any) transport cost component in their fuel differentials.

- in Australia, most fuel supplier costs (such as storage, pipeline fees and into-plane fees) are incurred in Australian dollars, but international buyers require quotes (and pay) in US dollars. Due to the strengthening Australian dollar over the past few years (from around \$0.80 in early 2007 to above parity now), this has inflated the quoted price differential;
  - in many cases, fees, charges and taxes imposed by airport and local authorities or government bodies will be included in the differential;
  - local labour, service and on-airport costs, including for wharfage, terminal storage and handling will be included. These costs are significantly higher for Australian airports than they are, for example, for Asian airports;
  - factors that are variable by customer will be included which reflect credit terms, assessed risk and the size and nature of that customer's business. For example, at some locations the majority or some fuel will be purchased on a delivered basis and the differential will include all the costs of distribution into-plane, whilst in other locations customers will themselves arrange for delivery and so the costs of into-plane services will not be reflected in the differential.
176. A supplier's margin will then be added to these costs, which together make up a fuel differential.
177. It is therefore not possible to draw any conclusions around the profits of jet fuel suppliers by simply comparing fuel differentials at airports, without considering what cost factors are taken into account at each airport. BARA has not undertaken any such analysis, and instead simply makes an assertion of monopoly profits which is unsupported by facts.
178. In addition, all of fuel differentials in Figure 3 of BARA's application are quoted by reference to the MOPS index, even though most of the airports in that graph do not source jet fuel from Singapore. Fuel differentials at airports in the United States, Middle East and Europe are only meaningful if calculated by reference to the fuel price at the fuel export hub from which those airports source their fuel needs. The fuel price at Singapore is irrelevant at those locations. Calculating the fuel differential for overseas airports by reference to the MOPS, as BARA appears to have done, introduces an additional unknown component to the fuel differential cited - making this an unreliable comparator of fuel suppliers' differentials, let alone margins.
179. The JV participants consider that lower price differentials are only roughly indicative of a lower cost base, and give minimal indication of the margins charged by infrastructure providers.
180. The JV participants strongly reject any allegation that monopoly profits are obtained by jet fuel suppliers at Sydney Airport or that the JUHI JV operates so as to secure monopoly rents.
- (b) Reliability of supply is not an indicator of effective competition and will not be assisted by regulated access**

181. BARA's application alleges that the supply of jet fuel at Sydney Airport is characterised by poor reliability.<sup>29</sup> BARA asserts that increased access to the JUHI would increase the reliability of jet fuel supplies, and continues to assume throughout its application that a greater number of participants and more diversity of supply would address reliability issues.<sup>30</sup> These claims are flawed for the reasons set out below.
182. As explained in section B3.2 above, NOC coordinates the provision of a weekly JUHI 'traffic light' report to aviation stakeholders based on information provided by fuel suppliers. A green, amber or red traffic light indicates the level of capacity required to recover the fuel stocks should there be a problem – they are indicators of current levels of supply and, in the case of amber and red lights, potential future risks to supply.
183. A black traffic light indicates that demand management is required, and this is the point at which supply to aircraft may be rationed. A black traffic light event last occurred at Sydney Airport in December 2009 when demand was higher than anticipated as a result of additional flights. During this period, airlines were only limited to 100% of their usual demand and normal services at Sydney Airport were not affected (additional services airlines might have wanted to offer or the nomination of Sydney Airport as an alternate location in flight planning was affected).
184. In any event, supply reliability cannot be improved by a greater number of suppliers. The majority of the traffic light incidents at Sydney Airport are caused by unpredictable events, including upstream supply disruptions or unanticipated demand. Improvements to jet fuel infrastructure will assist to address such incidents when they arise, and such solutions are already underway. The announced upgrade of the Caltex pipeline due to be operational in the first quarter of 2012 will improve the flow rate into the JUHI and provide additional capacity to the fuel supply market. The conversion of Shell's Clyde refinery into an import terminal may also improve the ability to pipe increased volumes into the JUHI to replenish stock levels when required. The JUHI is investing in new tank storage.
185. For the reasons set out in section B5.2, regulated access in fact has the potential to chill future investment in infrastructure, and should not be imposed when normal market forces have already resulted in investments to key infrastructure.

**(c) Number of suppliers do not indicate levels of price competition**

186. The JV participants do not consider that any conclusions can be drawn about the competitiveness of a jet fuel market on the basis of the number of fuel suppliers.
187. For example, BARA's application notes that Kuala Lumpur (where fuel demand is similar to Sydney Airport) has only three suppliers, yet it is shown in figure 3 of BARA's application as having the second lowest price differential of the airports surveyed. The JV participants consider this is consistent with their view that cost is the primary driver of the fuel differential. The JV participants consider that Kuala Lumpur's low differential is likely to be largely attributable to its relatively low shipping costs (from Singapore) and low labour costs compared with Sydney.

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<sup>29</sup> BARA Application, pp.52 and p.54.

<sup>30</sup> BARA Application, pp.47 and p.49.

188. Looking to another example from BARA's application, the nine suppliers in Hong Kong service about 2.5 times the demand of Sydney Airport, and the six Singapore suppliers service approximately double the Sydney demand. A reasonable observation that can be made from this data is that a higher number of suppliers at other airports simply reflects higher demand at those airports.

189. The number of market participants is accordingly not a strong indicator of market performance.

**(d) The ownership model does not act as a barrier to entry or expansion**

190. For all the reasons set out in section B6.1, it is clear that the terms of the JV Agreement facilitate entry. Further, the terms of the JV Agreement also facilitate the expansion or contraction of individual participants' market shares on a competitive basis. In particular:

- each JUHI JV participant is entitled to supply and withdraw whatever quantity of jet fuel is required for that participant to service its contracted customers and its own fuel requirements, with no reserved capacity quantities or maximum throughput quantities; and
- charges and adjustments are made on the basis that the majority of JUHI costs are borne by suppliers in proportion to their usage of the facility.

191. Because each supplier has access to the JUHI by way of equity participation, it will not be constrained in its bidding activity by any individual capacity limits or restrictions in the JUHI. Conversely, any supplier may choose not to supply for a period (or at all) without incurring significant costs by holding its equity stake or being required to transfer it. Effectively, all of the physical capacity in the JUHI can be utilised by the suppliers in the proportions that correspond to their share of contracted customer demand at any point in time. The same principles would apply if new suppliers joined the JUHI JV.

192. By contrast, the provision of access to third parties on a throughput basis is likely to have a number of outcomes which may limit competition in the medium to long term:

- any throughput agreement is likely to give a new entrant a defined capacity entitlement only, meaning it can compete with other participants only up to its maximum allocated volume, and as a result new entry via a throughput agreement would be less competitive than new entry through JUHI equity participation;
- the terms, conditions and charges for throughput would need to be set on a basis which reflects the assumption of risk by the equity participants, which could well result in significantly higher throughput charges than those incurred by participants under the current equity access model;
- to the extent that an appropriate allocation of risk and cost cannot be adequately reflected in throughput charges, the incentives for efficient incentives in the JUHI will be altered. If new entrants using the facility on a throughput basis will not be funding expansions or accepting the associated risks on the same basis as equity participants, this may encourage a withdrawal of equity in favour of throughput arrangements, and in any event is likely to create a disincentive for equity participants to invest efficiently in expansions or upgrades of the facility.



193. Accordingly the current ownership model does not operate as a barrier to entry or expansion in the market, and is in fact potentially more likely to facilitate competition in the medium to long term than a capped throughput arrangement.

**(e) Conclusion**

194. BARA has not adduced any real evidence to demonstrate that the alleged market for the supply of jet fuel at Sydney Airport is not effectively competitive. The data referred to in the BARA application to suggest limited supply competition, monopoly rents and poor supply reliability does not demonstrate any lack of competition in the market.
195. In fact, the genesis of BARA's application does not appear to be concerns with significant barriers to entry or expansion or monopolistic behaviour. Rather, the premise of the application appears to be to enable potential suppliers of 'relatively small volumes' of jet fuel to gain low-cost entry without having to enter into long-term commitments in the market.<sup>31</sup>
196. There is no evidence that regulatory intervention is warranted in the market for the supply of jet fuel, nor that regulated access on a throughput basis would have any positive effect on competition.

**C2.5 No material increase in competition in any market for into-plane services**

197. As noted above, there are currently three into-plane providers at Sydney Airport (AirRefuel Pty Ltd, Zip Airport Services Pty Limited and AFS). These providers are owned by the JV participants, and were established in order to enable the participants to deliver fuel to aircraft at Sydney Airport.
198. BARA has submitted that as a result of Part IIIA access, new jet fuel suppliers may enter the market for the supply of jet fuel and will seek to provide 'end-to-end' services to airlines and other jet operators, and hence these suppliers may establish their own into-plane providers. BARA's argument appears to be that any addition of new providers demonstrates a material increase in competition in an alleged market for into-plane services at Sydney Airport.
199. However, there are currently no significant barriers to new into-plane providers offering services at Sydney Airport. There are no limitations on the number of into-plane providers that can operate at Sydney Airport. Provided they meet regulatory requirements and obtain a licence from SACL to provide the service, a third party can currently establish an into-plane service and solicit business from JV participants or from airlines at Sydney Airport. As BARA itself acknowledges, existing into-plane providers cannot prevent other willing operators from delivering an into-plane service.<sup>32</sup> It is feasible for into-plane providers to operate from an offsite location. In Melbourne and Auckland for example, an into-plane operator drives onto and off the airport via public roads to provide the into-plane service to aircraft.

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<sup>31</sup> BARA Application, p.15.

<sup>32</sup> BARA Application, pp.43 and p.45.

200. Significantly, there is nothing to prevent airlines contracting directly with a third party into-plane provider at Sydney Airport and purchasing fuel from suppliers on a non-delivered basis. If there was any extraction of monopoly rents or other uncompetitive behaviour in the provision of into-plane services at Sydney Airport, third party operators would already have entered, under sponsorship from airlines or otherwise.
201. In addition, the number of into-plane providers at Sydney Airport is not inconsistent with the number of into-plane providers at other airports around the world. Looking at the airports BARA cites in its submission as having a large number of jet fuel suppliers, the number of into-plane providers is relatively similar to that at Sydney Airport.

**Figure 5 Number of into-plane providers at various airports cited by BARA<sup>33</sup>**

<b>Airport cited by BARA</b>	<b>No. of fuel suppliers (estimated by BARA)</b>	<b>No. of into-plane providers (estimated by JV participants)</b>
London (Heathrow)	9	3
Hong Kong	9	2
Los Angeles	10	5
Frankfurt	5	2
Dubai	5	4
Paris (Charles de Gaulle)	5	3
New York	6	1
Tokyo (Narita)	9	2
Singapore	6	2
Seoul	7	3
Bangkok	6	2
Amsterdam	6	4
Sydney	4	3
Taipei	6	4
Kuala Lumpur	3	3
Osaka (Kansai)	6	2

202. It is highly unlikely that the entry of more jet fuel suppliers by way of regulated throughputting at the JUHI (particularly where BARA refers to entry on a potentially short-

<sup>33</sup> The airports and number of fuel suppliers at each airport are taken from the BARA Application, Table 2, p.48. The JV participants have provided their estimate of the number of into-plane providers at these airports.

term basis and for small volumes) could have a significant impact on the supply of into-plane services, whether by creating an additional provider/s or otherwise.

203. Accordingly, there is nothing to suggest that any market for into-plane services at Sydney Airport is not currently effectively competitive or that access to the JUHI operates as a barrier to entry in this market. Regulated access to the JUHI, even if it results in an increase in the number of jet fuel suppliers to Sydney Airport, would not result in a material increase in competition in the supply of into-plane services.

**C2.6 No material increase in competition in any domestic/international market/s for air passenger and freight services**

204. BARA has submitted that regulated access will promote a material increase in competition in the domestic and international market/s for air passenger and freight services at Sydney Airport because access will lead to improvements in the related markets for jet fuel supply and into-plane services, which will in turn improve commercial opportunities for air passenger and freight services, resulting in greater service offerings and/or lower prices to customers.
205. As explained in sections C2.4 and C2.5 above, Part IIIA access will not lead to a material and sustained improvement in the competitive conditions of the jet fuel supply or into-plane services markets. Accordingly, there will be no flow on effects from these markets which would result in any material change in the air passenger and freight services market/s.
206. Further, BARA itself acknowledges that 'international and domestic passenger and freight markets are highly competitive.'<sup>34</sup> Where the markets are, as is claimed by BARA, already highly competitive, then any claimed improvement in the price of jet fuel cannot materially increase competition.
207. In addition, it is not clear how any claimed reduction in an input cost faced equally by all airlines operating at Sydney Airport will materially increase competition. Given many airlines employ fuel surcharges which enable fuel price fluctuations to be passed on, an across the board reduction in fuel surcharges will not necessarily result in any material increase in competition between airlines. In any case, airlines employ various hedging strategies against the MOPS component of the jet fuel price, which makes up a substantial part of the total cost of the fuel at Australian airports at current MOPS levels.
208. In the JV participants' view, a more important factor for competition between airlines at Sydney Airport would be the availability and allocation of landing slots. The participants are not aware of any airlines having exited from Sydney Airport due to the state of competition in jet fuel supply.
209. There is no evidence that has been put forward by BARA upon which it can be concluded that there would be a material increase in competition in markets for air passengers or air freight upon declaration of the JUHI facilities.

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<sup>34</sup> BARA Application, p.46.

### C3. Criterion B is not satisfied

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210. Criterion B has in the past been assessed using a 'social cost benefit' test. This test looks at whether, from society's perspective, a single facility can meet demand at less cost than two or more facilities. However, the Full Federal Court of Australia has recently determined that a 'private' test applies to Criterion B.<sup>35</sup> Under the private test, an assessment must be made of whether it is economically feasible for someone in the marketplace to develop an alternative to the relevant facility. As assessment is made of whether it is, in fact, profitable for another person to duplicate the relevant infrastructure. This is distinct from the former test which sought to evaluate from society's perspective whether it is efficient for infrastructure to be duplicated through a weighing up of costs and benefits. The Full Federal Court's decision is subject to an appeal to the High Court. Accordingly, this submission considers Criterion B in the context of both a social cost benefit test and a private test.
211. BARA's application makes it clear that it is seeking declaration of a service provided by two distinct types of facilities:
- the 'jet fuel storage facility'; and
  - the 'jet fuel hydrant pipeline network facility'.
212. BARA has not discharged its burden to demonstrate that the NCC can be affirmatively satisfied that Criterion B is met in relation to either set of facilities, as it has not identified all the social costs and benefits, nor attempted to assess private profitability, for either set of facilities.
213. More significantly, the JV participants consider it would be economical for a third party to develop the storage facility.
214. The jet fuel storage facility comprises five storage tanks, with total capacity of approximately 29 million litres (2 x approximately 10 million litres and 3 x approximately 3 million litres). **[Redacted for confidentiality]**. Given the expected rapid growth in demand for jet fuel outlined in the BARA application, it seems likely that additional storage tanks will need to be constructed at Sydney Airport during the 15 year proposed period of declaration.
215. Whether a social cost benefit test or a private test is applied, no evidence has been adduced which would enable the NCC to be affirmatively satisfied that it would be uneconomical for anyone to develop another storage facility. Indeed it seems likely that it would be economical for a third party to develop another storage facility.
216. Applying a social cost benefit test, the storage facilities here are very different from the type of facility that one would expect would be a natural monopoly able to meet all reasonably foreseeable demand at less cost than if a second facility is built. There are already five facilities (tanks) and there is no reason to believe that there would be any significant cost saving in a sixth, seventh or subsequent tank being constructed by the JUHI facility rather than a third party. The capital cost of a tank will be the same whoever constructs it. Tanks

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<sup>35</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58.

by their nature can be sized to meet relevant demand. Depending on the size of the tanks there may also be minimal operating cost efficiencies from one party operating six tanks rather than one party operating five and another one.

217. Applying a private test, there is no reason to conclude that it would not be privately economically feasible for a third party to construct its own storage tank. For the reasons discussed above in relation to the social cost benefit tests, it is unlikely that there would be substantial cost savings from a sixth, seventh or subsequent tank being constructed and operated by the JUHI facility rather than a third party. Given this, if it is economically feasible for the JUHI facility to construct a tank then it is likely to be economically feasible for a third party to construct a tank.
218. Furthermore, there is nothing to suggest that a third party would face insurmountable practical problems in constructing its own storage tank, notably it is feasible that storage tanks could be constructed offsite. In this respect, the current Sydney Airport Master Plan highlights that in the longer term offsite storage is a possibility.<sup>36</sup>

#### **C4. Criterion F cannot be satisfied**

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##### **C4.1 Introduction**

219. For all the reasons outlined above, regulated access would not increase competitive conditions in any relevant market. Accordingly, none of the purported public interest benefits outlined in BARA's application<sup>37</sup> would result.
220. Even if competitive conditions were increased, the consequences BARA has suggested without any supporting material are highly unlikely to flow from regulated access to the JUHI Service.
221. The JV participants submit that there are clear factors which demonstrate regulated access would in fact be contrary to the public interest:
- potential benefits (if any) are small, and would be outweighed by the costs of regulation leading to disincentives to efficiently invest in the infrastructure and regulatory error;
  - regulated access is unlikely to lead to any increased usage of the JUHI infrastructure by third parties compared to the status quo, and so the lack of utility in regulated access must be weighed against the costs of regulated access; and
  - the key public interest issue in this context is ensuring reliable supply of jet fuel to Sydney Airport, and regulated access is likely to undermine incentives for the efficient investment in infrastructure, whilst not having any positive impact on supply reliability.

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<sup>36</sup> Sydney Airport Corporation Limited, *Sydney Airport Master Plan*, 2009. p.80. Available online at: [http://www.sydneyairport.com.au/corporate/community-environment-and-planning/~/\\_media/Files/Corporate/Environment%20Plan/Master%20Plan/MasterPlan09.ashx](http://www.sydneyairport.com.au/corporate/community-environment-and-planning/~/_media/Files/Corporate/Environment%20Plan/Master%20Plan/MasterPlan09.ashx).

<sup>37</sup> BARA Application, pp.61-62.

**C4.2 Any potential benefits of regulated access are outweighed by the significant costs**

222. A key consideration in assessing the public interest is whether the potential benefits of regulation will outweigh the potential costs. It is clear that there are substantial costs from regulated access of the JUHI Service:

- as set out in sections C2.2 and C2.4(d) above, permitting access to the JUHI by parties that do not have to fund capital expansions or assume the risks of operating the facility will create a disincentive for the JV participants to efficiently invest in the facility;
- the history of capital investments by the JV participants demonstrates that the current equity based system has provided appropriate incentives for expansion. The fact that the JUHI is not currently beyond its capacity, and is currently investing in new tank storage capacity, further illustrates this point;
- the difficulties associated with properly capturing the uncertain costs and risks facing the JV participants in a throughput fee are described in detail in section B5.2 above, and apply equally to the setting of an access charge in any access arbitration with the ACCC. The potential for regulatory error in the setting of access charges will be a matter of real and legitimate concern for JV participants. The operation of an airport JUHI, in particular the environmental risks and regular requirements for capital expenditure at the request of SACL as lessor, is very different in nature to regulation of other infrastructure such as railways or gas pipelines or airside services;
- the potential for access to be used by parties only seeking to supply key customer contracts, or to supply volumes on a short-term or sporadic basis, exacerbates the issues associated with setting an appropriate throughput fee under an access regime;
- as noted in section B5.2 above, the risk of access seekers free riding off the investments made by JV participants, may encourage members of the JUHI JV to drop out and avoid the ongoing capital and environmental liabilities associated with ownership of the JUHI.<sup>38</sup>

223. The creation of these substantial potential costs would occur in circumstances where there is no clear benefit from allowing third party access under Part IIIA. The demand for jet fuel at Sydney Airport is not correlated to the number of suppliers of jet fuel at the airport. An airline's jet fuel demand is based on various factors, including more importantly the number of slots an airline has been able to secure at Sydney Airport. Whether there are 5 parties competing to supply an airline with fuel at Sydney Airport or 10 parties will not affect an airline's demand for fuel. At most, access will rearrange customer supply portfolios between jet fuel suppliers. It will not generate any greater reliability of supply nor increase the volume of fuel in the JUHI. At best, regulated access is likely to result in some additional parties supplying jet fuel at Sydney Airport, potentially on a short-term basis and

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<sup>38</sup> [Redacted for confidentiality].

for small volumes. This potential benefit does not compare to the significant potential downsides from regulated access.

224. In these circumstances, the JV participants submit that regulated access would be contrary to the public interest as the potential costs would outweigh any potential benefits.

**C4.3 Significant downsides in regulated access in circumstances where there is little utility in regulated access**

225. As outlined in section B5.2, regulated access is likely to act as a disincentive to new investment in the JUHI.
226. Given the predictions of increased jet fuel demand at Sydney Airport cited in BARA's application, a lack of investment in the JUHI would eventually be likely to result in demand outstripping the capacity of the JUHI storage tanks. In such a situation, there would be little utility in granting access under Part IIIA given the limitations in Part IIIA on the ACCC making any access determination that does not take into account the legitimate interests of the service provider and users, or depriving the JV participants of their existing contractual rights.<sup>39</sup>
227. For these reasons, the limits that will exist on the ACCC in making any access determination further highlights that declaration would not be in the public interest given it would lack any real utility but would impose significant costs and risks on the JV participants.

**C4.4 Reliability of supply not assisted by regulated access, and in fact regulation may undermine investments needed to increase reliability**

228. A key public interest issue in this context is clearly reliability of supply of jet fuel to Sydney Airport. However, any belief that regulated access would positively contribute towards increased supply reliability is misguided.
229. Ensuring adequate volumes of jet fuel are available at Sydney Airport to meet the increasing demand of airlines is not a question of adding more suppliers, it is a question of ensuring infrastructure is able to get fuel on site, including during periods of unexpected demand or upstream supply interruptions.
230. As explained in section C2.4(b) above, the expansion of Caltex's pipeline and the conversion of Shell's Clyde refinery into an import terminal can be expected to have a positive impact on the movement of jet fuel volumes to Sydney Airport. The addition of another storage tank at the JUHI will also assist. Adding suppliers to the system will not have any discernible impact.
231. Furthermore, for all the reasons set out in section C2.4(d) above, regulated access is likely to undermine incentives for the efficient investment in infrastructure. Rather than having a positive impact on supply reliability, any impact regulated access would have is likely to be negative through the chilling of investment in a regulated asset.

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<sup>39</sup> Sections 44X(1)(a) and 44W(1)(c) of the CCA.

## **C5. The NCC should exercise its discretion against declaration**

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### **C5.1 Introduction**

232. The NCC has a residual discretion not to recommend declaration of a service even if it is satisfied that all of the declaration criteria are met.
233. This discretion is a very broad one, and may be affected by a wide range of considerations of a commercial, economic or other character not squarely raised by the other criteria.<sup>40</sup>
234. The JV participants submits that, even if the NCC is satisfied of the declaration criteria, it ought to exercise its discretion not to recommend declaration of the JUHI Service for the following reasons:
- The current procedure for obtaining access to the JUHI through equity participation is sufficient;
  - It is clearly economical to duplicate part of the service (i.e. another storage facility);
  - That declaration would have little utility in light of the protections that must be afforded to the JV participants in the event of an ACCC arbitration; and
  - There are significant costs of regulation in circumstances where declaration would have little utility.

### **C5.2 Application is premature and inappropriate**

235. For the reasons set out in detail in section B6.1, BARA has failed to identify any deficiency in the current procedure for obtaining access to the JUHI. Given BARA itself only recently approached the JUHI and inquired about throughputting, its request for declaration under Part IIIA is premature. The high level and general nature of the assertions and contentions in BARA's application highlight the lack of any evidence that the equity process is not a reasonable means of obtaining access.
236. BARA's application is also opportunistic in nature as it will place leverage on the JUHI JV at a time that a parallel process of discussions has only just commenced with BARA and a range of other potential applicants regarding entry into the JUHI JV. The cost and distraction of the Part IIIA access application, combined with existing applicants potentially awaiting the outcome of this application, mean that equity participation applications under the existing process may slow down or be suspended, thus delaying potential entry under the existing mechanism. This outcome will occur notwithstanding the fact that the existing mechanism has been shown to be capable of effectively permitting new participants into the JUHI JV.
237. In addition, significant improvements in the infrastructure upstream from the JUHI are planned in the short term, with both of the major pipelines feeding into the JUHI undergoing changes. Caltex will invest over \$20 million to expand its pipeline to almost double its current capacity. While Shell has yet to make a final decision on the plans for its pipeline

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<sup>40</sup> See *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, [1163].



following the conversion of Clyde to an import facility, this may result in greater jet fuel volumes being supplied through its pipeline, freeing up capacity on the Caltex pipeline.

238. These developments, which are already occurring as a result of normal market forces, will deliver many of the benefits that the BARA application claims will be achieved upon declaration. It is therefore premature for BARA's application to be made at this time of expected significant structural changes to the manner in which jet fuel is supplied to Sydney Airport.

**C5.3 It is economical to develop another facility to provide part of the JUHI Service**

239. The NCC is expressly required to consider whether it would be 'economical for anyone to develop another facility that could provide part of the service.'<sup>41</sup> For the reasons set out in section C3 above, it is clear that it would be economical for a third party to develop another storage facility to provide part of the JUHI Service.
240. The storage facility is a significant part of the JUHI Service which is sought to be declared. The JV participants submit that the NCC should exercise its discretion in favour of declining to recommend declaration in these circumstances.

**C5.4 Declaration of little utility and there are significant costs of regulation**

241. For the reasons outlined in section C4.3 above, declaration would be little utility in light of the protections that must be afforded to the JV participants in the event of an ACCC arbitration. Given no greater access is likely to be obtained by third parties under Part IIIA regulation compared to the potential for use under equity participation on commercial terms, and in light of the significant potential costs of regulation, the NCC ought to exercise its discretion against recommending declaration.

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<sup>41</sup> Section 44F(4) of the CCA.

## **Annexure A – Clause 15 of the JV Agreement**

- 15.1 Any person desiring to become a Participant (hereinafter called "an Applicant") shall be admitted on the basis of and in accordance with the procedure set out below. The Operating Committee shall deal with applications as quickly as reasonably practicable.
- 15.2 On written enquiry by an Applicant the Operating Committee will send the Applicant a list of the qualifying criteria detailed in Clause 15.3 hereof and request the Applicant to establish in writing that it meets such qualifying criteria.
- 15.3 Admission of the Applicant shall be subject to the following criteria:-
- (a) the Applicant shall acquire a shareholding in Component A;
  - (b) if the Applicant requires a shareholding in Component C, a shareholding in Component B shall be required;
  - (c) if legally required the Applicant shall establish that it has a Certificate of Approval from the CAA for the distribution of aviation fluids and greases under the terms of Civil Aviation Regulation 30 sub-regulations (1), (2), (3) and (4) and Civil Aviation Orders Part 104, Section 104.2 or any amendment, substitution or addition thereto or any new governing regulations and order which may come into effect;
  - (d) the Applicant's demand upon the JUHI shall be such that it will not in any way prejudice the use of the JUHI by the Participants;
  - (e) the Applicant shall be able to deliver to the JUHI on a continuing basis compatible aviation fuels sufficient to supply its customers' and or its requirements in full, which meet the product specifications defined in this Agreement and have access to a National Association of Testing Authorities approved laboratory testing facilities consistently and promptly to confirm such quality;
  - (f) the Applicant shall be financially capable of fulfilling the obligation of a Participant, have sufficient qualified manpower to perform the obligations of a Participant, and have insurance coverage which is adequate to meet the indemnity obligations of a Participant. In particular, the Applicant shall be capable of providing an into-plane fuelling service to its own customers;
  - (g) the Applicant shall be technically capable of assuming the obligations and responsibilities of the JUHI Operator when required to do so in accordance with the provisions of this Agreement;
  - (h) the Applicant shall comply with any other entry criteria imposed by the Participants; and
  - (i) the Applicant shall become a party to this Agreement, including all such supplementary amendments that have heretofore become part of this Agreement; and become a party to any related Agreements, including in particular the indemnification agreement relating to liabilities arising out of aircraft refuelling and including agreements with appropriate government authorities.
- 15.4 If, after receipt and examination of written evidence submitted by the Applicant pursuant to Clause 15.2 hereof, the Operating Committee considers that the Applicant does not meet

such qualifying criteria, it shall so inform the Applicant, supplying all necessary particulars so that the Applicant may take steps as are necessary to meet such qualifying criteria. If the Applicant is unable within one hundred (100) days of such notice to satisfy the Operating Committee that it is able to meet such qualifying criteria, the application shall be deemed to be withdrawn. When the Operating Committee is satisfied that the Applicant does meet such qualifying criteria, it shall so notify the Applicant, advise the Applicant in writing of the basis on which the purchase contribution shall be calculated, send it details of the documents referred to it in Clause 15.3 (viii) hereof and invite the Applicant to submit a formal application to purchase Ownership Shares in the JUHI subject to agreement on the amount of the purchase contribution. In either event such notification shall be given as soon as is reasonably practicable and the Operating Committee will endeavour to give notification within fifty (50) days after receipt of such written evidence from the Applicant. The formal application shall be accompanied by a non-refundable fee, equal to the estimated cost of evaluating whether the Applicant met the qualifying criteria and of determining the purchase contribution.

15.5 The Applicant shall be required to make a purchase contribution to the existing Participants for an Ownership Share in the JUHI. The purchase contribution shall consist of four elements: current assessed value of the JUHI, pre-commissioning organisational costs, capital risk already incurred by the Participants and (if applicable) the benefit of previously negotiated advantageous arrangements.

- (a) The current assessed value of the JUHI shall be calculated by taking the current replacement value of the facilities and deducting therefrom such allowances for fair physical wear and tear as is appropriate and reasonable in the circumstances.
- (b) The pre-commissioning organisational costs and capital risk elements will be ascertained on the basis of such compensation as the Operating Committee shall consider to be fair and reasonable in the circumstances but which shall not exceed, in the case of the pre-commissioning organisational costs element, ten per cent (10%) of the current replacement value element, and, in the case of the organizational cost element plus capital risk element, twenty per cent (20%) of the current replacement value element, unless demonstrably incurred organisational costs or capital risk are such as to make a higher percentage fair and reasonable.
- (c) The benefit of previously negotiated advantageous arrangements shall be calculated as the value to the Applicant of its participation, on becoming a Participant, in any arrangements previously negotiated by the existing Participants and which are inherently advantageous to the Participants generally or the terms for which have, through the lapse of time, become advantageous. Without prejudice to the generality of the foregoing, such arrangements shall include if applicable the lease granted by the FAC and capital investment taxation concessions.

- 15.6 On receipt of formal application pursuant to Clause 15.4 hereof, the Operating Committee shall arrange for the necessary valuation of the JUHI and as soon as the data is available provide the Applicant with details (including the amount) of the purchase contribution. Such valuation shall be completed as soon as is reasonably practicable and, except for delays occasioned by a third party evaluator, the Operating Committee will endeavour to accomplish such valuation within one hundred (100) days.
- 15.7 If the amount of the purchase contribution is acceptable to the Applicant, the Applicant shall be entitled to become a Participant thirty (30) days after payment of the purchase contribution in full, provided that:-
- (a) such payment is made within sixty (60) days after the date of the Operating Committee's notification to the Applicant of the amount of the purchase contribution; and
  - (b) the Applicant has within such thirty (30) days period become a party to this Agreement and the Agreements referred to in Clause 15.3 (viii) hereof.
- 15.8 If, however, the amount of the purchase contribution is not acceptable to the Applicant, the Applicant shall have the right to require the current replacement value of the JUHI on which the purchase contribution is based to be referred, on the basis set out below, to a mutually agreed independent and qualified assessor, or failing such agreement, within thirty (30) days of the date of the first nomination by the Applicant or the Operating Committee to the other, an assessor to be appointed by the President for the time being of the Institute of Chartered Surveyors (NSW) to determine such current replacement value pursuant to Clause 15.5 (ii) hereof. Such right shall be exercised within twenty (20) days of the date of the Operating Committee's notification to the Applicant of the amount of the purchase contribution. Upon such right being exercised:-
- (a) the parties shall furnish the assessor with all information written or oral and other evidence which he may reasonably require for his determination. The assessor shall be required to submit his determination within one hundred and twenty (120) days after his appointment: if such determination is equal to eighty per cent (80%) or more of the current replacement value specified by the Operating Committee or if the Applicant does not pay the purchase contribution determined by the assessor, the assessor's fee shall be paid by the Applicant. If the current replacement value determined by the assessor is less than eighty per cent (80%) of that specified by the Operating Committee and if the purchase contribution is paid by the Applicant, the assessor's fee will be paid by the Operating Committee. The amount of the purchase contribution shall forthwith be increased or decreased, as appropriate, to take account of the assessor's determination.
  - (b) the Applicant shall be entitled to become a Participant thirty (30) days after payment of the purchase contribution in full, provided that:-
    - (A) such payment is made within sixty (60) days of the assessor's determination; and

(B) the Applicant has within such thirty (30) day period become a party to this Agreement and the Agreements referred to in Clause 15.3 (viii) hereof.

15.9 The purchase contribution shall be divided among the existing Participants in proportion to their Ownership Shares.

**Confidential Annexure B - Approaches in relation to access to the JUHI**

[Redacted for confidentiality].