



B A R R A

Board of Airline
Representatives
of Australia Inc

The **leading** voice of airlines

SUBMISSION TO
THE PRODUCTIVITY COMMISSION
INQUIRY INTO THE NATIONAL ACCESS REGIME

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Executive summary

The Board of Airline Representatives of Australia (BARA) is the industry organisation that represents the interests of international airlines operating to and from Australia. BARA's membership currently comprises 29 scheduled airlines, which presently provide over 90 per cent of Australia's international flights (passenger and freight). BARA's views in this submission reflect those of its member airlines in their capacity in providing international passenger and freight services. They do not represent the views of domestic airlines, or the domestic operations of some member airlines or those member airlines which have expressed their own views to the Productivity Commission separately to BARA, such as Qantas.

BARA's interest in the review of Part IIIA of the *Competition and Consumer Act 2010* by the Commission relates to:

1. its perceived value in moderating the pricing behaviour of the operators of Sydney, Melbourne, Brisbane and Perth Airports, and
2. BARA's attempt to use Part IIIA to address the lack of effective competition between suppliers of jet fuel to international airlines operating to and from Sydney Airport.

In summary, BARA considers that Part IIIA currently serves little useful purpose. Part IIIA is designed to address the issue of 'naturally emerging' competition being blocked by the ownership and control of bottleneck infrastructure that has sufficient capacity to support greater levels of competition. The 'core infrastructure industries' of gas, electricity, telecommunications and government-owned railways are already covered by industry-specific arrangements. BARA is unaware of any current situations of naturally emerging competition being blocked by bottleneck infrastructure. Further, BARA considers that it is unlikely that this situation will emerge in any industry in the foreseeable future.

The problem is that Part IIIA is now being used to address issues outside its intended purpose. The emerging problems with the provision and pricing of infrastructure outside the core infrastructure industries involve different policy issues. In aviation, policy issues include moderating the pricing behaviour of Airport Operators and facilitating the emergence of effective competition between jet fuel suppliers at Sydney Airport given a lack of necessary infrastructure capacity. Part IIIA offers little, if anything, in addressing these policy issues.

BARA considers that a new basis is required for assessing and addressing the largely 'ad hoc' – but still nationally significant – issues that arise with the provision and pricing of infrastructure across industries from time to time. BARA proposes that an 'Infrastructure Forum' should be established, where infrastructure issues can be submitted and assessed and appropriate policy recommendations developed for consideration by the Australian Government.

The proposed Infrastructure Forum would differ from existing avenues for government intervention because an examination of policy issues would not require a government initiated inquiry through a terms of reference. Instead, the process would be initiated directly by users or suppliers, with issues for consideration submitted by them and recommendations

developed by the Forum. This would provide an efficient and effective way of assessing emerging issues with the provision and pricing of infrastructure outside the core industries.

Not an effective constraint on Airport Operators

Under the current ‘light handed’ economic regulation of Australia’s major international airports, international airlines can seek declaration of an airport if the airlines consider that the Airport Operator is misusing its market power.

BARA considers that Part IIIA currently offers no credible avenue for international airlines to pursue in response to unacceptable pricing behaviour by an Airport Operator. This is because there is little, if any, likelihood that airlines will ever be able to satisfy the higher threshold requirement that access promotes a ‘material’ increase in competition. In effect, when seeking to address inappropriate pricing behaviour by an Airport Operator, international airlines must now demonstrate that they do not compete effectively against one another.

This highlights the core problem with Part IIIA for price monitored airports. Part IIIA’s policy objective is to facilitate naturally emerging competition that is currently constrained due to the ownership and control of bottleneck infrastructure. Part IIIA’s declaration criteria are not designed to address the unacceptable pricing behaviour of an Airport Operator in the presence of effective competition between airlines.

Part IIIA has contributed a large amount of regulatory uncertainty and added no value in terms of encouraging meaningful negotiations between international airlines and Airport Operators.

Cannot facilitate the emergence of effective competition between jet fuel suppliers at Sydney Airport

BARA’s member airlines depend upon the reliable and cost competitive supply of aviation jet fuel. Jet fuel currently represents about one third of total airline operating costs.¹

For a number of years many of BARA’s member airlines have complained that, when they tender for the supply of jet fuel at Sydney Airport, there is little or no competition between the existing oil company suppliers.

In response to this lack of competition, BARA sought declaration of key components of the jet fuel infrastructure supply chain to Sydney Airport. In assessing BARA’s applications, the National Competition Council found that:

- (a) there was not effective competition between jet fuel suppliers, and
- (b) it was not privately profitable to duplicate the infrastructure.

However, declaration could not be justified because of current capacity constraints, especially in the pipeline owned and controlled by Caltex.

¹¹ International Air Transport Association (IATA), *Fact Sheet: Fuel*

Part IIIA, therefore, cannot address the lack of competition between jet fuel suppliers at Sydney Airport. It highlights the fact that Part IIIA's usefulness is limited to situations where there is sufficient capacity in the bottleneck infrastructure.

A new policy direction is required for Australia's remaining infrastructure industries

BARA believes that a new policy direction is required to address problems with the provision and pricing of infrastructure outside the core infrastructure industries.

What is required is an Infrastructure Forum, where infrastructure issues can be submitted for assessment by users or suppliers and appropriate policy recommendations developed for consideration by the Australian Government (including dismissing the issue). Additionally, parties to a dispute could seek non-binding recommendations from the Forum, which should prove useful in resolving particular infrastructure issues without the need for government intervention.

Some key components of the proposed Infrastructure Forum would be:

- Simple overarching objectives –
Issues assessed should be examined in the context of the productivity of the Australian economy and the welfare of Australians.
- Applying party(s) required to clearly state the nature of their issue(s) and attempts to resolve it with the infrastructure provider (or seeker) –
General guidance should be provided on the form and information of the application submitted. However, it should not be the rigid information requirements as occurs under Part IIIA access applications.
- Statement as to why the issue(s) warrants some form of government intervention –
The current national significance test would remain suitable,
- Statement as to why the intervention is sought by the applying party(s) and how the benefits of the intervention outweigh likely costs.

The Forum should be resourced with expert staff to rigorously examine issues put before it. The Forum would seek information from interest parties, including the other party(s) to the disputed issue. The Forum would need appropriate inquiry and information gathering powers, such as those available under section 95R-95W of the *Competition and Consumer Act 2010*.

The Forum would publish a draft report for consideration and then issue final recommendations for consideration by the Australian Government. The final report and recommendations should be publicly available.

If both parties to a dispute are seeking non-binding recommendations from the Forum, then the dispute could be held in private. However, final recommendations should be publicly available.

BARA suggests that the Infrastructure Forum be established within the National Competition Council, complementing its current competition assessment functions.

1 Introduction

BARA welcomes the opportunity to provide a submission to the Commission's review of the national access regime (Part IIIA). BARA considers that, as Part IIIA has been available to access seekers for a number of years and has been used in a number of instances, a review of its effectiveness is timely.

In developing its submission, BARA is mindful of the fact that government intervention over the provision and pricing of infrastructure can generate as many problems as it seeks to solve. However, it is a reality that governments are actively involved in all major infrastructure industries. Whether it be electricity, gas, telecommunications, railways, airports or urban water (to name the major industries), governments are involved in how services are delivered and priced. As such, the more relevant question is usually what is the appropriate form of intervention, rather than if intervention should occur at all.

When issues relating to the provision and pricing of infrastructure services outside the core infrastructure industries have arisen, some dissatisfied parties have sought declaration of the infrastructure services under Part IIIA. This has proven to be an inadequate process, characterised by lengthy legal decisions, rather than robust analysis of the infrastructure issues in question.

BARA's submission focuses on the inability of Part IIIA to support the light handed economic regulation of price monitored airports and enable the emergence of effective competition between jet fuel suppliers at Sydney Airport. BARA's submission highlights the fundamental weaknesses of Part IIIA as either a 'complementary' or 'stand alone' policy instrument when being used to promote a diverse range of infrastructure objectives. Given Part IIIA can only address a very narrow range of infrastructure issues, BARA proposes that a new Infrastructure Forum be established.

Structure of the submission

- Section 2 describes the ineffective and confusing role of Part IIIA as an instrument to address poor pricing behaviour by the Operators of Australia's major international airports,
- Section 3 describes BARA's attempt to use Part IIIA to address the lack of effective competition between jet fuel suppliers at Sydney Airport,
- Section 4 outlines BARA's proposal for an Infrastructure Forum as a new way of addressing the provision and pricing of infrastructure outside the core infrastructure industries.

2 Part IIIA and Australia's major international airports

In 2002 the Australian Government accepted the Commission's recommendations to remove price controls from Australia's major international airports (Sydney, Melbourne, Brisbane and Perth among others) and implement a 'light handed' prices and services monitoring regime. The objective was to encourage commercial negotiations between Airport Operators and airlines, with the threat of re-regulation acting to deter the abuse of market power by Airport Operators.

BARA understands that the Commission has viewed Part IIIA as a 'complementary' component of the light handed economic regulation. That is, if airlines are dissatisfied with an Airport Operator's price and non-price behaviour – and no remedy can be obtained through the threat of re-regulation – then an airline(s) can seek declaration of the airport. As stated by the Commission in 2002:

...Part IIIA would continue to complement any future price regulation of airport services or, indeed, could provide an alternative to an industry-specific price-regulation regime. Prices of airport services could be regulated indirectly through regulation of the terms and conditions of access to a declared airport service.²

And:

The Commission also draws attention to the continued relevance of third-party access provisions (Part IIIA) and Part IV of the TP Act to airports. The Commission does not consider that airports have strong incentives to deny or frustrate access in order to impede competition in a way that would be likely to lead to declaration of aeronautical facilities (at least under the modified declaration criteria recommended in the Review of the National Access Regime (PC 2001a)). Nonetheless, the potential activation of this mechanism does provide users with regulation of last resort, providing additional encouragement for airports to enter into reasonable agreements regarding prices and conditions of airport use.³

In 2002 Virgin Blue (now Virgin Australia) sought declaration of the domestic airside services at Sydney Airport. Virgin Blue was eventually successful in having the domestic airside services at Sydney Airport declared for access. In doing so, Virgin Blue commented that:

I know I've [Virgin Blue] made some lawyers and some consultants very wealthy, but you know, we don't want to do that. It is costly, it is time-consuming. Four years and we still don't have a resolution.⁴

While subsequent amendments to Part IIIA have sought to limit the period of time undertaken by the National Competition Council (the Council) and the Australian Competition Tribunal (the Tribunal) in assessing applications, the process is still potentially subject to legal review by the Federal Court and High Court.

² Productivity Commission (2002) Price Monitoring of Airport Services, p. XXXIV

³ PC (2002), p. XLIII

⁴ Productivity Commission(30 October 2006) Inquiry into Airport Services, Transcripts, p. 140

2.1 Airport Operator pricing behaviour and competition between airlines

The fundamental problem with Part IIIA being a complementary component of the light handed economic regulation of airports is that it is concerned with removing bottlenecks to ‘naturally emerging’ competition. However, the actual policy issue is the abuse of market power by monitored Airport Operators in the presence of effective competition between international airlines.

The consequence of this situation is that the ability for an international airline(s) to discipline the pricing behaviour of an Airport Operator via Part IIIA depends, among other things, on its ability to demonstrate the detrimental impacts of abuses of market power by the Airport Operator on competition between international airlines.

Prior to the amendments to the Part IIIA competition test, the decision by the Federal Court in the Virgin Blue declaration potentially allowed for the ‘easier’ declaration of major international airports. This was because it lowered the threshold for satisfying the criterion that declaration would promote competition in a related market. The Commission was acutely aware of this fact during its 2007 inquiry into airport price regulation, stating that:

However, a recent Federal Court determination upholding the Part IIIA declaration of the domestic airside service at Sydney Airport has the potential to render Part IIIA a more active regulatory instrument. Specifically, a new interpretation by the Court of the meaning of the ‘promotion of competition test’ - the key criterion in determining whether a nationally significant infrastructure service should be declared - is likely to make it easier to satisfy this criterion in future declaration cases...

In turn, a more readily accessible Part IIIA regime could conceivably supplant price monitoring (and the underlying threat of re-regulation) as the operative regulatory instrument governing terms and conditions at the monitored airports. This might in practice be much the same as a reversion to explicit price regulation, meaning that there would be little point in continuing with monitoring as the information collected would be of no particular policy relevance.⁵

With the amendments to the promote competition test, the previous concerns the Commission had about the ease of its application have subsided:

The interpretation adopted by the Full Federal Court in deciding that the domestic airside services should be declared caused concerns that the threshold for declaration had been lowered to such an extent that Part IIIA could supplant the light-handed regime. However, that decision revolved around superseded declaration criteria. Since October 2006, Part IIIA has incorporated a higher threshold requirement that access promote a *material* increase in competition in a related market and also an ‘objects clause’ that emphasises economic efficiency. More recently, the Government introduced reforms to Part IIIA that streamline administrative processes (eg binding time limits and limited merits review).⁶

The issue now is that, under the new promote competition test, there is little, if any, likelihood that airlines will ever be able to satisfy the higher threshold requirement that access promotes a ‘material’ increase in competition. In effect, in seeking to address inappropriate

⁵ PC (2006), p. XIX

⁶ PC (2011), p. 30

pricing behaviour by an Airport Operator, international airlines must now demonstrate that they do not compete effectively against one another. The competition ‘bar’ is now set so high it severely limits the circumstances under which this criterion would be satisfied.

2.2 Misaligned objectives and regulatory uncertainty

The primary objective of the light handed economic regulation of airports is to promote meaningful commercial negotiations between airlines and Airport Operators, with the threat of re-regulation to discourage Airport Operators from abusing their market power. For this to occur, there needs to be the credible threat of re-regulation of Airport Operators. Part IIIA however, currently offers little, if anything, in providing a credible threat of re-regulation.

The core objective of Part IIIA is to remove bottlenecks to ‘naturally occurring’ competition in upstream and downstream markets. This objective is reflected in the promote competition test. Part IIIA’s objective (and its promote competition criterion) are, therefore, not aligned with the objective of the light handed economic regulation of Australia’s major international airports. This problem was indirectly acknowledged by the Commission in 2002, in stating that ‘The Commission does not consider that airports have strong incentives to deny or frustrate access in order to impede competition in a way that would be likely to lead to declaration of aeronautical facilities...’⁷

Should an international airline consider that an Airport Operator is abusing its market power and the prices monitoring regime has failed, then it could seek declaration of the international aeronautical services and facilities. However, in doing so, the international airline will need to spend considerable time seeking to satisfying the irrelevant requirement that declaration will promote a material increase in competition between international airlines. The situations under which it would be possible to demonstrate this outcome are likely to be extremely limited.

In BARA’s view, Part IIIA has generated considerable regulatory uncertainty and little in the way of promoting the Australian Government’s policy objective for Australia’s major international airports. This regulatory uncertainty is reflected in the fact that prior to the amendments to the promote competition test, the Commission was concerned that Part IIIA could actually supplant prices monitoring. The competition test amendments render Part IIIA an irrelevant component of the light handed economic regulation of Australia’s major international airports.

Given these problems, BARA considers that the Commission and Australian Government should no longer consider that Part IIIA represents an effective ‘complementary’ component of the light handed economic regulation of Australia’s major international airports. Only the Australian Government maintains the credible threat of re-regulation. This outcome highlights the problems of using Part IIIA to pursue policy objectives outside the narrow issue of ‘naturally emerging’ competition being suppressed due to the ownership and control of bottleneck infrastructure.

⁷ PC (2002) XLIII

3 The supply of jet fuel to international airlines at Sydney Airport

BARA's member airlines depend upon the reliable and cost competitive supply of aviation jet fuel. Jet fuel currently represents about one third of total airline operating costs. International airlines are estimated to purchase over 1.2 billion litres of jet fuel at Sydney Airport each year, costing over \$1 billion.

Improvements in the pricing and reliability of this major cost item will improve the commercial opportunities for international airlines to provide passenger and freight services to customers in Australia. Given the competitive nature of international travel, reductions in input costs are ultimately passed onto customers through lower fares and freight rates.

For a number of years many of BARA's members have raised concerns that, when they tender for the supply of jet fuel at Sydney Airport, there is little or no competition between the existing oil company suppliers. This lack of competition can be traced to difficulties faced by suppliers in obtaining access to the jet fuel infrastructure supply chain between Port Botany and Sydney Airport.

To facilitate the emergence of effective competition between jet fuel suppliers, BARA sought declaration of a pipeline owned and controlled by Caltex (the Caltex Pipeline) and the Joint User Hydrant Installation located at Sydney Airport (the Sydney JUHI). BARA was unsuccessful in obtaining recommendations from the Council to declare the infrastructure. The Minister accepted the Council's findings in not declaring the infrastructure.

BARA did not seek to test the Council's recommendations or Minister's decision with the Tribunal. This is because it became clear to BARA that Part IIIA is ineffective in promoting competition when the vertically integrated supplier controls the amount of total capacity that can be made available to rival suppliers. Consequently, a different approach to Part IIIA in dealing with this nationally significant infrastructure problem is required.

This section first provides information about the lack of effective competition between jet fuel suppliers to international airlines operating to and from Sydney Airport. A brief summary of the findings of the Council about BARA's applications is then provided. From this, BARA highlights the ineffectiveness of Part IIIA in promoting the emergence of effective competition, even when the lack of competition can be traced to issues with the ownership and control of the bottleneck infrastructure.

3.1 Little or no competition between jet fuel suppliers

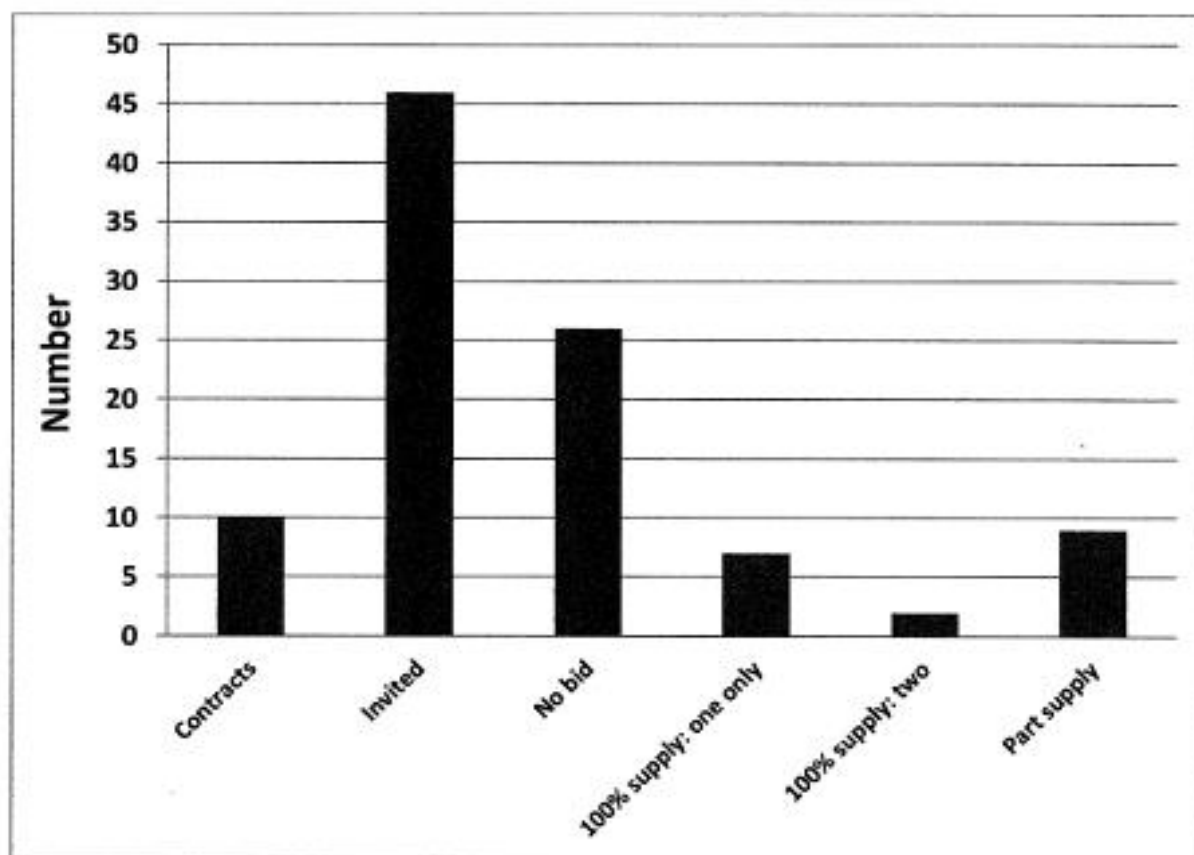
BARA's policy issue is the lack of competition between the suppliers of jet fuel to its member airlines that operate to and from Sydney Airport. As evidence of this problem, BARA requested its members to provide information on the number of suppliers that bid on their tenders for jet fuel at Sydney Airport. This information is provided by member airlines on a strictly confidential basis to BARA's legal representative (HWL Ebsworth). BARA has not sought to access the data and no data has been shared between airlines. HWL Ebsworth provides a high level summary of the information for use and publication by BARA.

The outcomes of the most recent survey (September 2012) are shown in Figure 1. In summary, when international airlines tender for jet fuel at Sydney Airport, the majority of potential suppliers choose not to bid and, usually, only one supplier can meet all of the airline's jet fuel needs. Of those airlines that responded to BARA's survey, only about 12% of the tendered jet fuel attracted bids from two suppliers that could meet all of the airline's jet fuel needs.

These tendering responses mean international airlines are generally faced with near monopoly supply for jet fuel at Sydney Airport. Box 1 contains further information about the issue of effective competition between jet fuel suppliers. Box 2 contains statements from individual airline members about the state of competition between suppliers of jet fuel at Sydney Airport.

BARA also notes that infrastructure supply capacity has not been a constraint in the recent past. International airlines have always been able to obtain increased supplies of jet fuel to meet their growing demand, albeit principally from only one supplier. This situation highlights the critical influence of the ownership and access arrangements over the available jet fuel infrastructure supply chain capacity on the level of competition between suppliers.

Figure 1 **Jet fuel tendering outcomes for international airlines (Sept 2012 survey)**



Source: Summary information supplied by HWL Ebsworth.

Box 1 What constitutes effective competition between jet fuel suppliers?

Airlines are likely to obtain prices for jet fuel consistent with effective competition when:

1. there are multiple existing suppliers able to meet the entire jet fuel needs of individual airlines, and/or
2. existing jet fuel suppliers consider that entry by new suppliers will occur if they seek to obtain excessive prices (low barriers to entry).

RBB Economics, in a report prepared for Caltex as part of BARA's applications for declaration, argued that individual airlines adopt a 'winner take all' approach to tendering for jet fuel and this form of competition is likely to encourage bids from jet fuel suppliers:

We have found that the majority of tenders for the supply of jet fuel (more than 70 per cent) are very asymmetric and usually allocated on a "winner takes all" basis. We also find less than 15 tenders account for 75 per cent of all volumes tendered in a given year. In addition, a large fraction of total volumes supplied is up for tender in any given year. This in turn implies suppliers would lose a significant share of current volumes in the event that they failed to compete effectively with rival suppliers, with consequent adverse effects for overall profitability. As a result, suppliers have an incentive to compete for the business tendered. *Source: RRB Economics (13 February 2012), Assessing the Impact of Tendering on Competition for the Supply of Jet Fuel at Sydney Airport, p. 3*

A key measure of the level of competition is, therefore, the number of suppliers that can meet 100% of an individual airline's jet fuel needs. If only one supplier can meet all of an airline's jet fuel needs, the airline effectively faces monopoly supply of this critical cost input.

Given the 'winner take all' strategy often used by airlines, bids from suppliers that can only meet part (say 25% or 50%) of an airline's jet fuel needs arguably do not constitute an effective bid. This is especially so if the part bids received cannot meet the airline's total jet fuel needs (for example, two bids that can only each supply 25% of the airline's jet fuel needs).

Box 2 Observations by individual airlines about jet fuel supply at Sydney Airport

In supporting BARA's applications for declaration, BARA's member airlines made the following observations regarding the level of competition between suppliers of jet fuel at Sydney Airport.

Emirates:

Emirates enjoys good relations with all our jet fuel suppliers in Australia. However, our experience during recent tenders at Sydney, Melbourne and Perth Airports indicates that competition for the provision of jet fuel is very limited at these Airports. It is particularly limited at Sydney Airport, which is effectively a near monopoly market. The pricing levels at Sydney, Melbourne and Perth airports remains significantly higher than prices offered at competitive markets globally.

Cathy Pacific:

Over the years, Cathay Pacific has observed an uneven playing field emerge in the Sydney Jet Fuel Market a) between fuel suppliers subject to inequitable infrastructure access terms to the main fuel infrastructure into Sydney airports and b) between local and international carriers being charged varying differential costs despite the purchased fuel being supplied through the same infrastructure.

Etihad:

At SYD market, Etihad encounters the following constraints

- 1 Not many fuel suppliers available to respond to our fuel tenders (either a monopoly market or limited competition)
- 2 If at all we received bids, in the initial phase of tendering process, bids for 100% of our required volume would be a challenging factor (product constraints)
- 3 High differential (significant high cost to our Airways)

United Airlines:

The overall lack of competition combined with supplier ownership of the fuel supply infrastructure has produced a situation of artificially high jet fuel prices in SYD combined with unreliable supply.

Korean Air:

Korean Air has not seen enough number of suppliers for soliciting fuel tenders and in consequence experienced difficulties and inability to achieve desirable outcome from negotiating with suppliers out in the field.

United Parcel Services:

Our last two jet fuel tenders for SYD occurred in 2009 and 2011. The same two jet fuel suppliers made offers each time, and no other suppliers made offers. As a result of this limited competition, we experienced a significant increase in our SYD product differential this year.

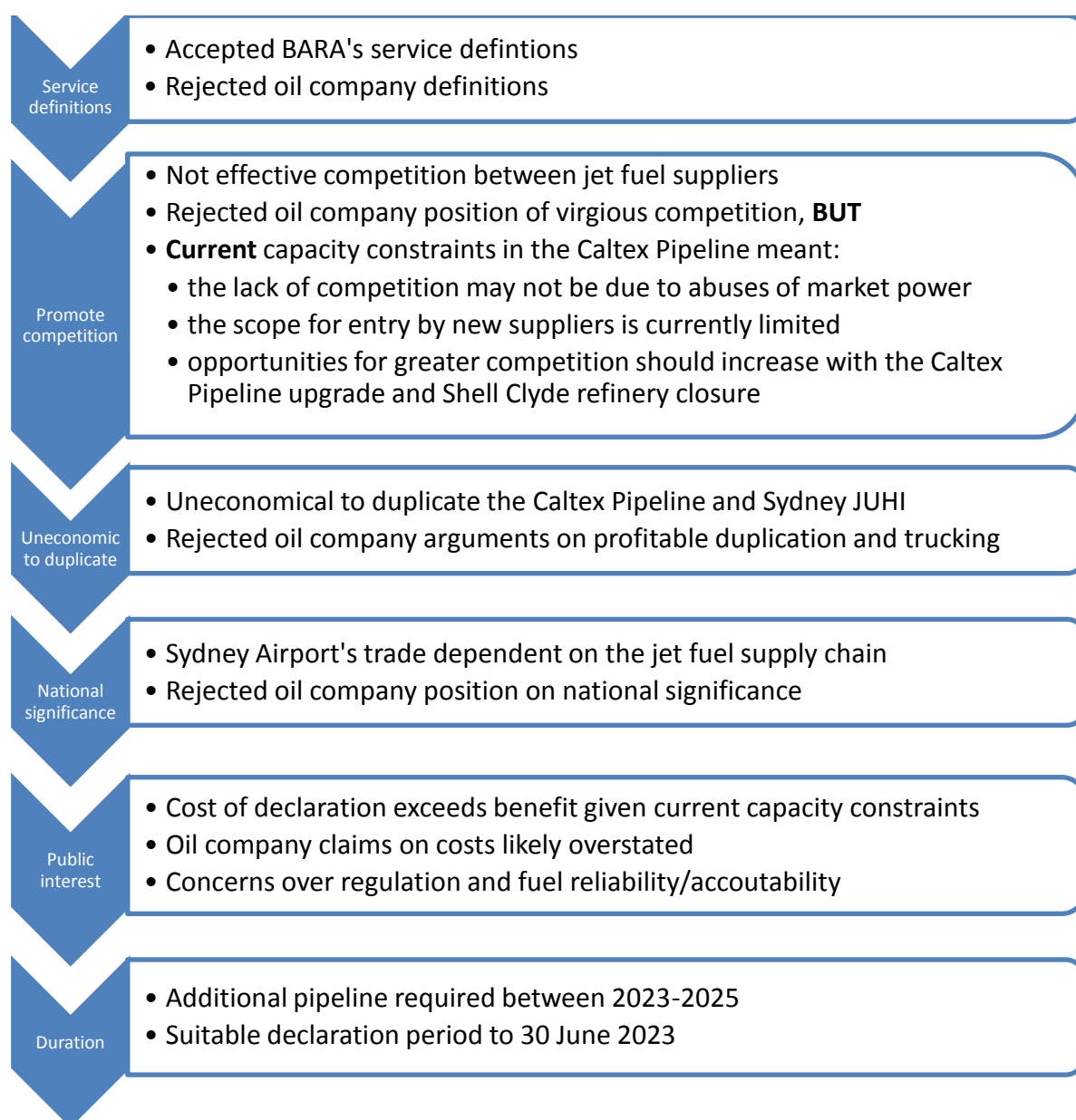
3.2 BARA applications for declaration

In September 2011, BARA sought declaration under Part IIIA of the *Competition and Consumer Act 2010* of the Caltex Pipeline and the Sydney JUHI. Declaration would have provided a mechanism for the Australian Competition and Consumer Commission (ACCC) to arbitrate the terms and conditions of access if suitable terms could not be reached between Caltex and/or the Sydney JUHI with potential jet fuel suppliers.

Details of the Sydney Airport jet fuel infrastructure supply chain is provided in Attachment A.

A summary of the key findings by the Council over BARA's applications for declaration is provided in Figure 2 below.

Figure 2 **Summary of findings by the National Competition Council**



Service definition

BARA sought declaration of the jet fuel transport service provided by the Caltex Pipeline and the jet fuel storage and distribution services provided by the Sydney JUHI.

The oil companies argued that BARA's definition of the jet fuel transport service was artificially narrow and should include any facility that transported jet fuel to the Sydney JUHI (ie include the Shell Pipeline from the Clyde refinery to the JUHI). The JUHI JV argued that many of the services it provides (eg fuel quality testing) could not be subject to declaration.

The Council concluded that BARA's service descriptions were reasonable. The Council did not agree that the jet fuel transport service was artificially narrow, or that transporting jet fuel via other pipelines should be included in the service definition.

Criterion (a) Promote a material increase in competition

The Council concluded that this criterion was not satisfied by BARA's application.

This criterion was considered in two parts. First, was there currently effective competition between the suppliers of jet fuel to the airlines operating to and from Sydney Airport. Second, if the market was not characterised by effective competition, could declaration provide for a meaningful increase in competition.

BARA, as supported by individual airline member submissions, argued strongly that the supply of jet fuel at Sydney Airport was not characterised by effective competition, as evidenced by the poor response to airline tenders. The oil companies, including numerous reports commissioned from economic consultants, argued that there was strong, effective and vigorous competition between jet fuel suppliers.

After assessing the opposing arguments, the Council stated that:

...the Council does not consider the market associated with the supply of jet fuel is effectively competitive nor that there is a vigorously competitive tender market.⁸

The Council then formed the view that, while there were capacity constraints in the Caltex Pipeline, declaration could not generate a material improvement to the existing lack of effective competition:

The key benefit of declaration under Part IIIA is that it gives third party access seekers an enforceable right to seek access to the declared service(s), by notifying an access dispute to the ACCC for arbitration. However declaration cannot create additional capacity where none exists.⁹

Given this capacity constraint, the Council did not conclude the current lack of effective competition was due to abuses of market power by Caltex and/or the JUHI JV.

The Council also stated that there should be opportunities for greater competition between jet fuel suppliers in the future:

⁸Final Recommendations Para 4.41

⁹ Final Recommendations Para 4.98

With the critical jet fuel infrastructure undergoing a degree of change and investment, the market is likely to experience opportunities for increased competition that are not dependent on access and declaration under Part IIIA.¹⁰

The Council's decision on this criterion was, therefore, based around the capacity constraints at the time of the BARA applications and assumed future outcomes. Namely, effective competition between jet fuel suppliers should emerge when Caltex completed the capacity upgrade of its pipeline and Shell closed its Clyde refinery. This conclusion is consistent with the Council's earlier observation that the current lack of effective competition may not be due to abuses of market power, but rather a lack of available capacity.

Criterion (b) Uneconomical to develop another facility

The Council concluded that BARA's application satisfied this criterion.

Recently, the 'bar' for passing this criterion was raised by requiring the application of the 'private profitability' test. Previously, the test was based on the outcomes for society as a whole. The private profitability test was recently upheld by the High Court.¹¹

BARA's application examined the financial prospects of any new rival provider of a pipeline from Vopak's storage facility at Port Botany to Sydney Airport and competing storage and distribution infrastructure at Sydney Airport. BARA found it would be unprofitable to bring forward the delivery of an additional pipeline until it was necessary, while duplicating the Sydney JUHI was impractical.

The oil companies and JUHI JV, together with supporting reports from economic consultants, argued that it would be profitable to duplicate the infrastructure.

After assessing BARA's application and opposing arguments, the Council found that it would be uneconomical to duplicate the Caltex Pipeline before an additional pipeline was necessary:

... it will be economical (in the sense of being profitable for anyone) to develop another facility to provide the Caltex Pipeline Service at some point in the future. However, the Council considers that it is unlikely to be economical to develop such a facility until such a time as demand for jet fuel at Sydney Airport approaches capacity for jet fuel to be delivered to (or, potentially, for supply to be replenished at) the Sydney JUHI.¹²

The Council also found that it would be uneconomical to duplicate the Sydney JUHI:

There are significant economies of scope (and probably scale) in providing the storage part of the Sydney JUHI Service and in providing these services in conjunction with the distribution service which is also part of the Sydney JUHI service...More generally the Council believes it is uneconomical to develop other facilities to provide the Sydney JUHI Service for which declaration is sought.¹³

¹⁰ Final Recommendations Para 4.103

¹¹ High Court of Australia: The Pilbara Infrastructure Pty Ltd & Anor and Australian Competition Tribunal & Others.

¹² Final Recommendations Para 5.21

¹³ Final Recommendations Paras 5.59 & 5.64

The Council stated that the most likely time of requiring the additional pipeline was around 2023 to 2025. There was no time constraint on the Sydney JUHI satisfying this criterion.

Criterion (c) National significance

The Council concluded that this criterion was satisfied by BARA's application.

BARA argued that the infrastructure was of national significance given the importance of Sydney Airport to the NSW and Australian economy. BARA also argued that the Council had previously concluded that Sydney Airport was of national significance (decision regarding Virgin Blue declaration of Sydney Airport) and the jet fuel infrastructure could be considered in the same way as the runways and terminals of Sydney Airport.

The oil companies argued that the infrastructure was not of national significance.

In deciding that the infrastructure was of national significance, the Council stated that:

Neither the Sydney JUHI nor the Caltex Pipeline could be removed from the range of facilities necessary to enable provision of airport services at Sydney Airport without very significantly reducing the contribution made by the airport to both constitutional trade and commerce and the national economy.¹⁴

The Council, therefore, concluded that all the infrastructure facilities necessary to provide final passenger and freight services at Sydney Airport, whether located at- or off-airport, are of national significance.

Criterion (e) Application of an effective access regime

The Council concluded that this criterion was satisfied by BARA's application, as the Caltex Pipeline and Sydney JUHI were not subject to any certified access regimes.

Criterion (f) Not contrary to the public interest/discretion not to declare

The Council concluded that this criterion was not satisfied by BARA's application.

Not contrary to the public interest was determined by assessing the overall benefits and costs of the proposed declarations.

As the Council found that declaration would not promote a material increase in competition (even though the market for the supply of jet fuel is not characterised by effective competition) given the current capacity constraints, the benefits of declaration were small. As such, any costs of declaration would exceed the benefits of declaration.

¹⁴ Final Recommendations Para 6.15

3.3 Part IIIA and the supply of jet fuel to international airlines at Sydney Airport

The lack of effective competition between suppliers of jet fuel to the international airlines operating to and from Sydney Airport is of national significance. International airlines pay more for jet fuel than necessary and this reduces the commercial opportunities for international airlines to provide passenger and freight services to customers in Australia.

Part IIIA, however, is not capable of remedying the lack of effective competition between jet fuel suppliers at Sydney Airport. BARA's applications for declaration were unsuccessful, even though the current situation delivers poor outcomes for international airlines and ultimately the Australian community.

BARA's applications for declaration further highlight the very narrow set of circumstances for which Part IIIA is relevant. As a consequence, Part IIIA is unlikely to usefully contribute to emerging issues with the provision and pricing of infrastructure services and facilities in Australia. In this instance, the policy issue is the capacity and availability of supply capacity made available to importers of jet fuel to Sydney Airport.

Creating an environment for greater competition between jet fuel suppliers at Sydney Airport is in the national interest. It also provides for an important 'test case' regarding the ability for Australia to secure its fuel needs at lower cost by ensuring all importers of fuel have the ability to compete effectively. While promoting competitive outcomes is in the national interest, Part IIIA is not the appropriate policy instrument. Instead, a new approach is required, which is described in BARA's proposed Infrastructure Forum.

4 A new policy direction

BARA believes that a new policy direction is required to address emerging issues with the provision and pricing of infrastructure outside the core infrastructure industries.

BARA considers that it is ultimately a decision of the Australian Government whether or not to intervene in the provision and pricing of infrastructure services and facilities in particular industries. However, what is currently lacking is an accessible and structured approach to the assessment of emerging issues, with robust recommendations on which the Australian Government can make decisions. It is first necessary to undertake this analysis before decisions about intervention are made.

Currently, the ability for users or suppliers to have emerging infrastructure issues assessed occurs on an ad hoc basis. Users or suppliers may be able to successfully lobby government for inquiries, either through established bodies, including the Commission, or specially established investigations. In most instances, however, these inquiries are limited to ‘high profile’ issues or the core infrastructure industries. For example, the Australian Government has established inquiries into petrol pricing and the Commission and its predecessors have undertaken inquiries into all the core infrastructure industries over time.

BARA considers that if an infrastructure supplier or user has established that there is a legitimate issue(s) of national significance that has emerged in their industry, then there should be some accessible forum for the issue(s) to be examined and recommendations made for consideration by the Australian Government. It is then ultimately the decision of the Australian Government about whether it will intervene, based on the information and recommendations provided.

4.1 BARA’s proposed Infrastructure Forum

BARA proposes the creation of an Infrastructure Forum, where users or suppliers can submit infrastructure issues for assessment, with the Forum undertaking the assessment then making formal recommendations to the Australian Government. Additionally, parties to a dispute could seek non-binding recommendations from the Forum, which should prove useful in resolving particular infrastructure issues without the need for direct government intervention.

Some suggested key components of the proposed Infrastructure Forum would be:

- Simple overarching objectives –
Issues assessed should be examined in the context of the productivity of the Australian economy and the welfare of Australians.
- Applying party(s) required to clearly state the nature of their issue(s), and attempts to resolve it with the infrastructure provider (or seeker) –
General guidance should be provided on the form and information of the application submitted. However, it should not be the rigid information requirements as occurs under Part IIIA access applications.
- Statement as to why the issue(s) warrants some form of government intervention –
The current national significance test of Part IIIA would remain suitable.

- Statement of why the intervention is sought by the applying party(s) and how the benefits of the intervention outweigh likely costs.
As an example, BARA's proposal for the Sydney Airport jet fuel supply chain, which is far broader than only allowing for arbitrated terms and conditions of access, is provided in Box 3.

Box 3 BARA's proposed solution for jet fuel supply at Sydney Airport

BARA considers that the Australian Government should play an active role in developing an environment that encourages effective competition between jet fuel suppliers at Sydney Airport. BARA's proposed solution for the supply of jet fuel at Sydney Airport is as follows.

The Sydney JUHI

One key outcome necessary to promote greater competition is open access to the Sydney JUHI. The underlying problem with the JUHI is not the capacity of infrastructure, but rather its ownership arrangements. BARA considers that a change of ownership is necessary to enable open access to the Sydney JUHI.

The need for open access is demonstrated by the length of time it is taking for new suppliers to join the JV after an application is made. Two applicants have been waiting 23 months and 15 months, respectively, for a decision by the JUHI JV about their equity participation applications. BARA has been advised by those fuel companies that similar applications at overseas ports typically take 3 months to be resolved.

BARA considers that open access can best be achieved by Sydney Airport Corporation Limited (SACL):

1. ending the lease over the JUHI with the current JUHI JV participants, then
2. re-leasing the facilities to a party(s) that does not supply jet fuel to the airlines (eg Vopak or airlines) or, alternatively, operate and maintain the facilities themselves (with the assets included as 'aeronautical assets' for prices monitoring purposes).

To promote this outcome, the Australian Government should require SACL to include plans for the competitive supply of jet fuel as part of its current review of its Master Plan.

A competing jet fuel transfer pipeline

The preferred solution for suppliers other than Caltex to transfer jet fuel to the Sydney JUHI is a competing pipeline from Vopak's storage facilities to the Sydney JUHI, rather than obtaining additional access to the Caltex Pipeline. However, it is not 'privately profitable' for another party to build a competing pipeline to the Caltex Pipeline before about 2023.

BARA, therefore, considers that government intervention is needed to facilitate the delivery of a competing pipeline. As a start, the Australian Government can facilitate the planning approvals for the competing pipeline. This would reduce the time and cost for another party to deliver the project.

Box 3 BARA's proposed solution for jet fuel supply at Sydney Airport (cont.)

Another potential option is for the Australian Government to encourage SACL to build a competing pipeline. To the extent that part of this investment is unprofitable, that amount, possibly, could be included in the asset base used in setting aeronautical prices charged to airlines. That is, the international airlines could be inclined to support the profitability of the pipeline by accepting higher aeronautical prices to cover an agreed amount of pipeline costs. BARA would be prepared to consider facilitating the necessary commercial negotiations with SACL.

The Forum should be resourced with expert staff to examine issues put before it, seeking information from interested parties, which would of course include the other party(s) to the disputed issue. The Forum would need appropriate inquiry and information gathering powers, such as those available under section 95R-95W of the *Competition and Consumer Act 2010*.

The Forum should publish a draft report and recommendations for consideration and then issue final report and recommendations for consideration by the Australian Government. The final report and recommendations should be publicly available. BARA supports the current legislative requirements for Part IIIA that issues should be addressed within a six month timeframe.

If both parties to a dispute are seeking non-binding recommendations from the Forum, then the dispute could be held in private. However, final recommendations should be publicly available.

BARA considers it unlikely that the Forum would be assessing issues on a continual basis requiring dedicated staffing. Instead, the Forum could be established within the Council, and a small group established on an as needs basis as issues are submitted for consideration.

Compared to Part IIIA, BARA's proposal provides for a far more focussed, efficient and cost effective way of addressing emerging issues with the provision and pricing of infrastructure outside the core infrastructure industries. The proposed Infrastructure Forum can actually address the issue in question, rather than assess whether the issue is consistent with the narrow objective of Part IIIA, as currently occurs with applications for declaration.

Assuming that it is unlikely that any infrastructure access issues consistent with the objective of Part IIIA will arise in the foreseeable future, the merits of retaining Part IIIA are questionable. However, BARA considers that the Infrastructure Forum should first be established, used and its effectiveness assessed before considering repealing Part IIIA.

Attachment A Sydney Airport's jet fuel infrastructure supply chain

The lack of effective competition between jet fuel suppliers at Sydney Airport can be traced back to problems with access to key components of the jet fuel infrastructure supply chain. This appendix provides details about Sydney Airport's jet fuel infrastructure supply chain.

The supply chain is summarised in Figures 1 and 2 and may be briefly described as follows:

Figure 1 **Jet fuel infrastructure supply chain**

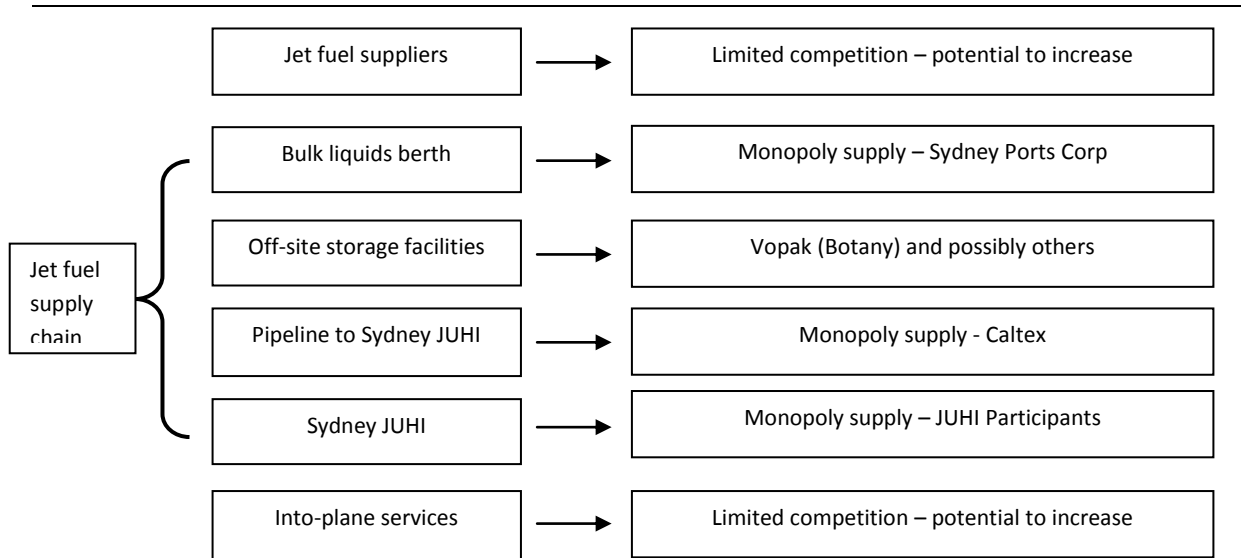
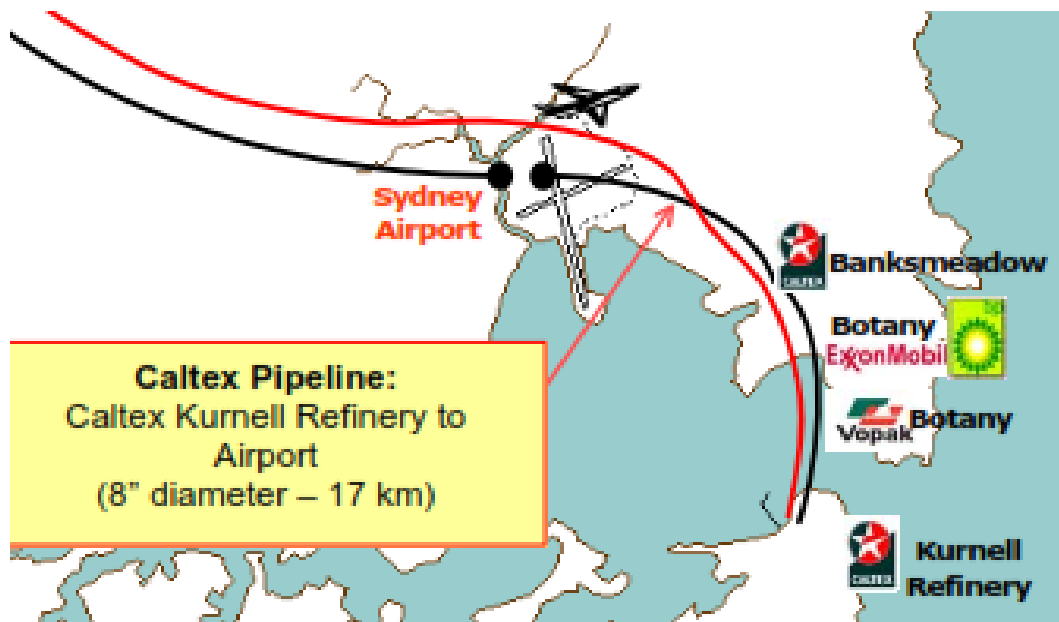


Figure 2 **Map of the supply infrastructure for imported jet fuel**



Jet fuel suppliers

The supply chain starts with suppliers of jet fuel. They include domestic producers (currently Shell and Caltex) and suppliers of imported fuel. The importers of jet fuel include the existing suppliers (Caltex, Shell and BP) and Q8 Aviation, which has arrangements with Qantas for its self supply. However, other reputable jet fuel suppliers have advised BARA they would welcome the opportunity to tender for fuel supply contracts at Sydney Airport if they could gain access to the Caltex Pipeline and the Sydney JUHI.

Common-user bulk liquids berth

All imported jet fuel is first received by a liquids berth or import terminal. A common-user bulk liquids berth is available at Port Botany on the northern side of Botany Bay, approximately 9 km from Sydney Airport. The berth is owned and managed by Sydney Ports Corporation.

BARA notes that both Caltex and Shell intend to develop their existing refinery assets into fuel import terminals, allowing them to maintain a strong presence in NSW.

Off-site storage facilities

Jet fuel is initially stored off-airport before being transferred to the Sydney JUHI. Vopak owns and operates a petroleum product storage facility at Port Botany on land leased from Sydney Ports Corporation. Currently 91 million litres (ML) of the total 350 ML storage capacity is used for jet fuel. ExxonMobil and BP jointly own a terminal that is also connected to the bulk liquids berth at Port Botany, but from some time subsequent to the exit of ExxonMobil from the market this has not been used for the supply of jet fuel. BARA understands that BP and Shell have secured storage capacity at the Vopak facility.

Pipeline to the Sydney JUHI

Imported jet fuel and Caltex's domestic production is transferred to the Sydney JUHI via a pipeline owned and controlled by Caltex. The Caltex Pipeline, therefore, transfers fuel from two interconnection points: the Caltex refinery and Vopak's storage facilities. Shell also transports jet fuel from its Clyde Refinery to the Sydney JUHI via the Shell Pipeline.

Sydney JUHI

The Sydney JUHI comprises the Sydney Airport Jet Fuel Storage Facility and Jet Fuel Hydrant Pipeline Network. Once jet fuel arrives at Sydney Airport, it enters the jet fuel infrastructure network on-site, owned and managed by the Sydney JUHI. Jet fuel initially enters the JUHI Jet Fuel Storage Facility and is then transported through the JUHI Jet Fuel Hydrant Pipeline Network Facility, or via refuelling trucks, to the aircraft refuelling points.

The Sydney JUHI is owned and operated by an unincorporated joint venture comprising the Shell Company of Australia Limited, BP Australia Limited, Mobil Oil Australia Pty Ltd, Caltex Australia Petroleum Pty Limited and Qantas Airways Limited (together the JUHI Joint Venture (JV)). Control of the Sydney JUHI is delegated to an operating committee comprised of representatives of each JV participant. Shell operates the Sydney JUHI on behalf of the JUHI JV.

Into-plane services

Into-plane services involve delivering the jet fuel into the wing of the aircraft via the Sydney JUHI's hydrant system or a refuelling truck.

Requirements for jet fuel importers

For there to be vigorous competition between jet fuel suppliers at Sydney Airport, potential suppliers (importers) of jet fuel to the airlines operating at Sydney Airport will currently need access to:

1. the common-user bulk liquids berth at Port Botany provided by Sydney Ports Corporation,
2. off-airport storage facilities at Botany, currently provided by Vopak,
3. the Caltex Pipeline to transport the jet fuel from Vopak's storage facility to the Sydney JUHI (at least until a competing pipeline is available for use), and
4. the Sydney JUHI.

The Caltex Pipeline and Sydney JUHI

BARA considers that open, non-discriminatory access is currently available through Sydney Ports Corporation and the off-site storage facilities provided by Vopak. BARA, however, considers that gaining access to the Caltex Pipeline and the Sydney JUHI on reasonable terms and conditions represent major barriers to new suppliers of jet fuel.

The Caltex Pipeline and Sydney JUHI represent monopoly supply infrastructure to any potential importer of jet fuel. The ownership of the pipeline is also characterised by vertical integration. Caltex is vertically integrated throughout the supply chain. It produces and imports jet fuel, owns and controls the main jet fuel pipeline to Sydney Airport, is a member of the Sydney JUHI and, finally, provides 'into-plane' services. Through its ownership of the jet fuel pipeline, BARA considers that Caltex can exert considerable influence over the level of competition between suppliers.

Jet fuel suppliers must also become a member of the JUHI JV, including equity participation in the venture, so that they can sell jet fuel to airlines operating at Sydney Airport. BARA understands that the existing JUHI JV retains the right to refuse participation by a new member. While BARA is not aware of the JUHI exercising this option, BARA is particularly concerned about the length of time it is taking for new suppliers to join the JV after an application is made. Two applicants have been waiting 23 months and 15 months, respectively, for a decision by the JUHI JV about their equity participation applications. BARA has been advised by those fuel companies that similar applications at overseas ports typically take 3 months to be resolved.