



Determination

Application for AA1000488

lodged by

Australian Institute of Petroleum

in respect of cooperation to improve the security of fuel supply

Authorisation number: AA1000488

10 September 2020

Commissioners: Keogh
Rickard
Court
Ridgeway

Summary

The ACCC grants conditional authorisation to enable the Australian Institute of Petroleum (AIP), its current members, and any future parties approved by the ACCC (collectively, the Participating Entities), to cooperate to improve the security of supply of fuel products and facilitate the efficient use of refining capacity and fuel storage capacity during the COVID-19 pandemic.

The ACCC grants conditional authorisation solely for the purpose of dealing with the effects of the COVID-19 pandemic on Australia's fuel supply chain and subject to the Participating Entities complying with three conditions.

The first condition of authorisation requires AIP to provide specified information to the ACCC about the details of conduct engaged in under the authorisation. The second condition requires the Participating Entities to provide further information about the conduct to the ACCC upon request. The third condition requires any party that wishes to engage in the conduct in the future to seek the approval of the ACCC.

On 3 April 2020, the ACCC granted interim authorisation to enable the conduct to commence while the ACCC is considering the substantive application. Following receipt of further information from AIP, on 20 May 2020, the ACCC revoked this initial interim authorisation and replaced it with an interim authorisation that more closely reflects how the Participating Entities propose to co-operate. On 13 July 2020, AIP confirmed that the Applicants are seeking substantive authorisation for the conduct described in the interim authorisation of 20 May 2020.

The ACCC considers that the conduct is likely to result in public benefit by improving the security of supply of fuel products to Australian businesses and consumers. While there is a risk that the conduct may facilitate the sharing of certain information between the Participating Entities that may dampen competition, the ACCC considers that this risk is low due to a range of factors, particularly the limited scope of the authorised conduct and the reporting conditions. Overall, the ACCC considers that there are likely to be public benefits from the conduct that outweigh any likely public detriments.

The ACCC grants conditional authorisation until 31 March 2021.

This determination is made on 10 September 2020. If no application for review of the determination is made to the Australian Competition Tribunal, the authorisation will come into force on 2 October 2020.

1. The application for authorisation

- 1.1. On 2 April 2020, the Australian Institute of Petroleum (**AIP**) and its members (the **Applicants**) lodged application for authorisation AA1000488 with the Australian Competition and Consumer Commission (the **ACCC**). This application for authorisation AA1000488 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. On 3 April 2020, the ACCC granted a conditional interim authorisation under subsection 91(2) of the Act¹, which was revoked on 20 May 2020 and replaced with a new conditional interim authorisation (see below for further details).

¹ See, ACCC decision of 3 April 2020, available at <<https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-institute-of-petroleum>>

- 1.3. On 13 July 2020, the Applicants confirmed that they are seeking authorisation for the conduct described in the interim authorisation decision dated 20 May 2020.
- 1.4. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

The Applicants

- 1.5. The Applicants are:
 - AIP, which is a representative body of Australia's petroleum industry
 - AIP's current members (and their related bodies corporate), being:
 - o BP Australia Pty Ltd
 - o Caltex Australia Limited
 - o Mobil Oil Australia Pty Ltd
 - o Viva Energy Australia Pty Ltd.

The Conduct

- 1.6. The Applicants have applied for this authorisation for the purpose of being able to discuss and implement measures to address the risk to the availability of diesel, unleaded petrol motor fuels, and aviation fuel (**Fuel Products**) across Australia arising from the adverse impacts of the COVID-19 pandemic.
- 1.7. The Applicants seek authorisation on behalf of themselves and any other party proposed by AIP who in future wishes to engage in the conduct the subject of the application (including importers of Fuel Products, suppliers of Fuel Product storage services and Fuel Product transport services), provided that the ACCC is notified and grants approval (collectively, the **Participating Entities**).
- 1.8. The Applicants are seeking authorisation to discuss, enter into, or give effect to, any contract, arrangement, or understanding between them (including with customers for wholesale fuel, suppliers of crude oil and finished Fuel Products, suppliers of import and storage facilities, and suppliers of trucking and delivery services) that has the purpose of:
 - (a) ensuring the security of supply of Fuel Products to Australian businesses and consumers
 - (b) minimising the risk of Fuel Product shortages by coordinating scheduling and supply chain activities including import, storage, trucking and delivery of Fuel Products (for example, by coordinating the redirection of import vessels to where they are most needed across Australia as opposed to discharging products into pre-determined locations with more than adequate supply positions)
 - (c) maintaining or increasing the supplies of Fuel Products available to Australian businesses and consumers including in remote and regional areas
 - (d) facilitating the efficient use of refining capacity and capability in Australia (for example, by ensuring that any refinery shutdowns are efficiently coordinated to ensure an orderly transition to import-only supply while maintaining ongoing supply reliability to Australian businesses and consumers in relevant locations), or

- (e) facilitating the efficient use of fuel storage capacity in Australia (for example, by coordinating the movement and storage of bulk products based on the knowledge of the availability of under- and over-utilised storage capacity across Australia).

(the **Conduct**)

1.9. The Conduct excludes:

- (a) price agreements in relation to Fuel Products
- (b) any exchange of commercially or competitively sensitive information relating to marketing or sales activities, which includes (without limitation) information about prices, costs or customers,
- (c) any discussions that occur outside of meetings of the AIP Board or a committee convened by the AIP Board (**Permitted Forum**),
- (d) any contract, arrangement or understanding that is entered into outside of a meeting of a Permitted Forum (**Excluded Agreement**), and
- (e) giving effect to any Excluded Agreement.

1.10. The Applicants submit that:

- the Conduct is intended to ensure availability of supplies of Fuel Products to Australian businesses and consumers, and will not involve the joint determination of prices of Fuel Products supplied by the Applicant fuel suppliers in competition with each other
- the Conduct is not compulsory, and any participant can opt out of the proposed collaboration under the authorisation
- the Conduct is a temporary measure to deal with risks in the Fuel Products supply chain arising from the COVID-19 pandemic, and
- material arrangements entered into by the Applicants pursuant to the Conduct will be notified to the ACCC.

1.11. The Applicants seek authorisation for 12 months from the date on which the ACCC's final determination is made.

Interim authorisation

1.12. On 2 April 2020, the Applicants requested an interim authorisation to enable them to engage in the conduct while the ACCC considered the substantive application.

1.13. On 3 April 2020, the ACCC granted conditional interim authorisation that authorised the Participating Entities to participate in the conduct described in paragraphs 1.8 and specifically excluding the conduct described in 1.9(a) above, subject to conditions which broadly required that:

- AIP must notify the ACCC of any material arrangements entered into by the authorised parties that were likely to be of commercial or economic significance or that may have a material impact on the fuel supply chain
- the ACCC may request information from AIP, and
- any other parties wishing to obtain the protection of the interim authorisation must be approved by the ACCC.

- 1.14. After further consultation, AIP clarified how the Participating Entities proposed to engage in the conduct for which authorisation was sought. To reflect this, on 20 May 2020, the ACCC revoked the initial interim authorisation and issued a new conditional interim authorisation, which expressly excluded the conduct described in paragraphs 1.9(b)-(e).
- 1.15. The ACCC also amended the reporting obligations under the interim authorisation, described in Conditions 1 and 2, to require AIP to report to the ACCC on each meeting conducted pursuant to the interim authorisation and any implementation or operational activities subsequently undertaken by Participating Entities, and to allow the ACCC to request further information from any Participating Entity.
- 1.16. The current conditional interim authorisation will remain in place until the date the ACCC's final determination comes into effect, the interim authorisation is revoked, or the application for authorisation is withdrawn.

2. Background

- 2.1. Australia's economy is heavily reliant on Fuel Products, which make up 52% of Australia's final energy consumption. The *Liquid Fuel Security Review Interim Report*, prepared by the Department of the Environment and Energy, notes:

Liquid fuel underpins every aspect of our daily life, from our groceries to our commute to work and our emergency services...

Australia's liquid fuel sector comprises crude oil and condensate, refined products such as petrol, diesel and jet fuels, ethanol and biodiesel. As a big country, planes, trains, trucks and cars are essential for most businesses and people. This means the transport sector uses the most liquid fuel by far, but there are other uses of liquid fuels as well.

Mining and agriculture rely on liquid fuel to power machinery. Remote parts of Australia rely on liquid fuel for power generation. Crude oil and condensate are refined into petrochemicals and used in manufacturing to make everyday household items like plastics, make-up and superglue. Diesel also provides emergency backup for many of our essential services, including water and sanitation, when other energy sources are not available.²

- 2.2. AIP submits that the COVID-19 pandemic:
 - has resulted in a significant and sharp decline in the demand profile for aviation fuel in Australia (around 90% as at the date of application) as international travel has been prohibited to and from Australia coupled with growing community concerns over travel
 - will likely result in the near term in declines for all petroleum products (including diesel and unleaded petrol motor fuels and aviation fuel) as there is less travel and interactions within the community and industries are closed, and
 - will likely result in significant instability in the demand for fuel products at the time the COVID-19 pandemic and related measures are lifted, including the potential for unpredictable demand surges.

² *Liquid Fuel Security Review, Interim Report*, Department of the Environment and Energy, April 2019, p.8.

- 2.3. AIP also submits that these developments present major oil refiners and petroleum marketers with considerable manufacturing, supply and storage challenges which may constrain the timely availability of Fuel Products to Australian businesses and consumers during the COVID-19 pandemic and immediately following its containment. Specifically, AIP submits that:
- oil refineries have a fixed configuration (typically 50% of total production capacity as petrol, 30% as diesel and 20% as jet fuel) and are not able to sufficiently reconfigure production to meet sudden and significant changes in demand.
 - oil refineries need to operate on a minimum throughput of volume to remain economically feasible (around 60% of overall capacity), below which there are incentives to source imported volumes of fuel products as opposed to locally refined volumes.
 - the potential redistribution of supply sources from locally refined sources to import sources and consequent accumulated storage of Fuel Products in certain storage facilities without an equivalent offtake, will put pressure on storage terminals and, over time, require industry to coordinate to efficiently manage the utilisation of storage capacity.
 - oil refineries take significant time both to close and to recommence production and there is a 2-3 week lag in sourcing imported Fuel Products. If oil refineries shut down due to insufficient throughput volume, or there is a surge in demand following the easing of the COVID-19 pandemic, there will need to be prompt and efficient coordination of the supply chain to flex up or down Fuel Products supply in order to appropriately meet demand.
- 2.4. Australian fuel wholesalers obtain oil-based fuels through importation and local refineries. In 2017-18, 60% of refined fuel products used in Australia were imported directly (largely from the Republic of Korea, Japan, and Singapore), while the remaining 40% was produced by one of the 4 local refineries.³ In 2017-18, this domestic refining capacity produced 62% of Australia's petrol, 33% of our diesel, and 40% of our jet fuels.⁴
- 2.5. The 4 local refineries are located in Brisbane (Caltex's Lytton refinery), Melbourne (ExxonMobil's Altona refinery), Geelong (Viva Energy), and Perth (BP's Kwinana refinery). The 4 AIP members who own and operate the 4 local refineries account for the bulk of the Australian wholesale petroleum market. The ACCC estimated their market share to be around 93% in 2016-17.⁵ The remaining market share is accounted for by independent wholesalers, of which the largest are Liberty, Puma Energy, and United.⁶
- 2.6. However, during the COVID-19 pandemic, Caltex decided to close the Lytton refinery for extended maintenance,⁷ and Viva Energy reduced its refining volume at Geelong.⁸ This has increased Australia's reliance on imported refined products. However, storage capacity around Australia remains the same as pre-COVID. As with refining, the 4 AIP members account for the bulk of Australia's fuel storage capacity, including through their conversion of recently-closed refineries into import fuel storage facilities

³ Ibid, pp.20-22.

⁴ Ibid, p.27.

⁵ ACCC, *Retail and wholesale petrol market shares in Australia – September 2018*.

⁶ Ibid.

⁷ Caltex, 'Caltex Refiner Margin update', ASX release, 14 May 2020.

⁸ Viva Energy, 'Geelong Refinery operational update', ASX release, 27 April 2020.

(like BP's Bulwer Island refinery in Brisbane, Caltex's Kurnell refinery, and Viva Energy's Clyde refinery – both in Sydney). However, smaller storage operators like Vopak Terminals (in Sydney and Darwin), Puma Energy, and United (mentioned above) also play a part.

- 2.7. On 14 August 2020, the Department of Industry, Science, Energy and Resources released its latest monthly *Australian Petroleum Statistics*⁹, which included data to June 2020. It demonstrates the impact of COVID-19 on production of fuel products at Australia's refineries. Production of aviation fuel at refineries in June 2020 was 93% lower than in June 2019, with automotive gasoline production down 37%.
- 2.8. The data also shows the volatility in demand for fuel products caused by the pandemic. In April 2020 report (i.e. RULP, PULP and E10) sales in Australia were 44% lower than average monthly petrol sales in 2019. By June 2020, petrol sales had somewhat recovered and were 15% lower than average monthly petrol sales in 2019.
- 2.9. The impact varied across the States and Territories. In April 2020, the decline in petrol sales was largest in Tasmania (51%) and smallest in the Northern Territory (27%). The data does not reflect the situation in Victoria following stage four restrictions.
- 2.10. Finally, the ACCC also notes that the Australian Government has implemented some measures designed to support Australia's fuel security during and after the COVID-19 pandemic, including the Request for Information process around increasing Australia's domestic fuel storage capacity,¹⁰ and amendments to fuel standards during the COVID-19 pandemic.¹¹

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. Prior to the draft determination, the ACCC invited submissions from a range of potentially interested parties, including major fuel wholesalers and retailers, airports, industry and motoring associations, terminal operators, and government departments.
- 3.3. The ACCC did not receive any submissions from interested parties in relation to the application during this consultation period.
- 3.4. Following the release of the draft determination, the ACCC received one submission, from the RACQ, which is available on the ACCC's Public Register for this matter.
- 3.5. The RACQ submits that it is concerned about the potential implications of the Conduct on competition and consumer welfare, but did not specify the exact nature of these concerns. The RACQ further submits that in its view, the terms of the draft determination are reasonable and sufficient to address any immediate competition, pricing and consumer welfare concerns.

⁹ <https://www.energy.gov.au/government-priorities/energy-data/australian-petroleum-statistics>

¹⁰ Department of Industry, Innovation and Science, 'Opportunities to increase Australia's domestic fuel storage capacity', request for information, June 2020.

¹¹ Minister for Energy and Emissions Reduction, C2020G00476 Notice under section 17A of the *Fuel Quality Standards Act 2000* concerning a decision under section 13 of that Act for an approval for a variation of the Fuel Quality Standards (Automotive Diesel) Determination 2019, 28 May 2020 (BP Australia Pty Ltd, Viva Energy Australia Pty Ltd).

Minister for Energy and Emissions Reduction, C2020G00472 Notice under section 17A of the *Fuel Quality Standards Act 2000* concerning a decision under section 13 of that Act for an approval for a variation of the Fuel Quality Standards (Automotive Diesel) Determination 2019, 4 June 2020 (Caltex Australian Petroleum Pty Ltd, Mobil Oil Australia Pty Ltd).

- 3.6. The RACQ submits that the authorisation should be in place for as brief a period as appropriate and suggested that the authorisation should no longer remain in place once the demand for petroleum products returns to close to pre-COVID-19 levels. The RACQ also submits that the pandemic has affected the aviation and automotive fuel markets in differing ways, and these markets should be analysed separately.
- 3.7. On 18 August 2020, the ACCC requested further information from AIP, including whether AIP or its members had engaged in the Conduct under the interim authorisation and whether AIP remains of the view that there is a need for the Conduct to be authorised.
- 3.8. On 21 August 2020, AIP advised that Participating Entities had not engaged in any conduct under the interim authorisation as the industry has been highly successful to date in managing supply and demand challenges from the COVID-19 pandemic via normal commercial activities. AIP stated that during the pandemic, individual fuel suppliers have reorganised supply, shipping logistics and refinery production rates to address quarantine restrictions, very major falls in fuel demand, inventory management difficulties, and to protect workforces under pandemic plans.
- 3.9. AIP submits that the authorisation is still necessary given there remain significant uncertainties related to the pandemic's ongoing impact on domestic and international fuel markets. AIP submits that the industry continues to expect unpredictable demand spikes and week-to-week volatility in petrol, diesel and jet fuel demand in the coming months with changes to restrictions. AIP pointed to the recent outbreak in Victoria as an example of the continuing volatility in the market.
- 3.10. AIP submits that this volatility creates major refinery, supply, storage and distribution challenges for industry during the recovery and the potential for supply issues to emerge at short notice. If these challenges are beyond the capability of individual operators to manage, then the Participating Entities can rely upon the authorisation to address these issues by engaging in the Conduct. AIP submits that authorisation of the Conduct would enable the Participating Entities to respond to supply issues and shortages more quickly and efficiently than they would otherwise.
- 3.11. At a meeting on 1 September 2020 and in a follow up submission on 2 September 2020, AIP submitted that the current operational environment for the industry is unprecedented, not just for demand reduction and volatility, but also in terms of impact on normal supply, freight logistics and timetables. In the early stages of the pandemic, individual market operators formulated strategies and took actions to manage these impacts. AIP submits that these strategies and supply planning will need to be unwound or reversed to meet rapidly escalating fuel demand and spikes at short notice with restrictions being eased, creating a new, and potentially higher, level of risk for supply reliability compared to the onset of the pandemic.
- 3.12. AIP submits that in this uncertain environment and period of transition, a major new supply disruption event or confluence of events could be expected to present a greater challenge for individual market operators to manage themselves. AIP submits that the events in late 2012, when two Victorian refineries experienced outages over a three week period, are an example of this risk. The confluence of a number of events resulted in parts of Victoria experiencing shortages. Due to lack of understanding of the breadth of the supply problem (because each operator did not have visibility over the circumstances of other operators), individual market operators were not in position to help manage the Victorian supply shortfall in a timely way.
- 3.13. AIP submits that, depending on the nature of the supply disruption, the process to address the disruption would typically need to be determined and executed urgently

within 24 hours. Therefore, AIP submits there is a need for the Conduct to be authorised in advance of the occurrence of any potential disruption event or series of events.

- 3.14. Correspondence between AIP and the ACCC is available on the ACCC's Public Register for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.
- 4.3. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the conduct (**authorisation test**).

Relevant areas of competition

- 4.4. To assess the likely effects of the Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be the wholesale and retail supply of liquid fuels (including petrol, diesel, jet fuel, and biofuels) as well as the refining, importing, storage and transportation of these fuels.

Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.7. As set out in paragraphs 2.2, 2.3, 3.9 and 3.10, the Applicants submit that COVID-19 pandemic has caused a significant disruption to demand for Fuel Products in Australia, which will cause the major oil refiners and petroleum marketers in Australia to experience considerable manufacturing, supply and storage challenges.
- 4.8. Based on available information, the ACCC considers that in the future without the Conduct, there is a potential for rapid changes in domestic demand for Fuel Products in different jurisdictions around Australia, as COVID-19 public health restrictions are imposed and subsequently lifted. This may create logistical challenges that could constrain the supply of Fuel Products to Australian consumers.
- 4.9. The ACCC considers that in the future with the Conduct, the Participating Entities would be able to share certain short-term operational information and co-ordinate the logistics to ensure security of supply of Fuel Products in Australia, as well as facilitate the efficient use of refining, transportation and storage capacity in Australia.

Public benefits

- 4.10. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹²

- 4.11. The ACCC has considered whether the Conduct is likely to result in a public benefit by improving security of supply of Fuel Products to Australian businesses and consumers.

Improving security of supply of Fuel Products

- 4.12. The Applicants submit that the Conduct will result in significant public benefits by ensuring the security of supply of Fuel Products to Australian businesses and consumers.
- 4.13. The ACCC considers that security of fuel supply is important to many Australian businesses and consumers. The COVID-19 pandemic has caused a significant decline in the demand for Fuel Products in Australia. In some jurisdictions, demand has at least partly rebounded, but there remains uncertainty as to how quickly and strongly this demand will rebound across Australia.
- 4.14. As mentioned earlier, there is a potential for rapid changes in domestic demand for Fuel Products that could result in logistical challenges for Fuel Product suppliers. If these are not addressed, they could create fuel supply shortages and/or lead to higher fuel prices, adversely impacting Australian businesses and consumers at a time when many of them are already suffering the effects of the pandemic.
- 4.15. The recent 'second wave' in COVID-19 cases in Victoria shows the unpredictable nature of the pandemic and how rapidly the situation can change. While the Participating Entities have successfully managed to deal with both the Victorian second wave and the pandemic more generally to date through normal commercial arrangements, a supply issue could arise in the next 6 months that requires a more coordinated approach. As submitted by AIP, this may occur if there is a confluence of factors affecting supply.
- 4.16. The Conduct allows the major suppliers of Fuel Products in Australia to collectively identify logistical challenges and any actual or potential supply shortages, and to coordinate a response in a timely manner to minimise any material disruption of supply to Australian businesses and consumers. This extends to the wholesale and retail supply of Fuel Products, the use of refining capacity, and the use of fuel storage capacity in Australia.
- 4.17. AIP submits that action to address potential supply shortages may be required urgently, within 24 hours, to reduce the likelihood or extent of supply shortfalls. Coordinated action by Participating Entities is likely to be a faster and more efficient method of addressing these issues and implementing responses, compared to Participating Entities developing these solutions independently and in the absence of all the relevant information.

¹² *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

4.18. The ACCC considers that while material risks to the Fuel Products supply chains associated with the COVID-19 pandemic remain, the Conduct is likely to be of significant public benefit.

Public detriments

4.19. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹³

4.20. RACQ submits that it is concerned about the potential implications on competition and consumer welfare arising from the Conduct. However, RACQ also submits that the terms of the draft determination are reasonable and sufficient to address any immediate competition, pricing and consumer welfare concerns.

4.21. The ACCC has considered whether the sharing of certain information between Participating Entities under the Conduct may dampen competition during and/or following expiration of the authorisation, thereby resulting in a public detriment.

Information sharing between Participating Entities

4.22. The ACCC considers that there is a risk that the Conduct may facilitate information sharing between Participating Entities that may detrimentally affect the competitive dynamics in the fuel industry during, and/or after the expiration of, the authorisation.

4.23. The Conduct allows the Participating Entities to meet and exchange certain information for the purpose of dealing with the effects of COVID-19 pandemic. These types of information may include Participating Entities' fuel import schedules, current available fuel levels in particular locations, future refining intentions, or other current and forward-looking types of operational information.

4.24. If this information is not available to non-Participating Entities, this could detrimentally affect their ability to compete during, or after expiration of, the authorisation. For example, it may allow the Participating Entities to organise the supply of Fuel Products to relevant markets more efficiently (and potentially at less cost), than non-Participating Entities. This may then impact on the extent to which non-Participating Entities can compete in the wholesale petroleum market.

4.25. As discussed above, the current Participating Entities (i.e. the major oil refiners) make up around 93 per cent of the Australian wholesale petroleum market. Independent wholesalers have increased their market share in recent years, so any change to industry dynamics that undermines their ability to effectively compete would adversely impact competition in the market.

4.26. In addition, the sharing of information between the Participating Entities may increase the risk of coordinated effects. These coordinated effects, or concerted practices, could arise from the sharing of information about the quantities and timings of arrival of imported fuel; the volumes, compositions, or locations of stored fuels; or estimates of aggregate (including state or regional) demand for each type of fuel. This information sharing could facilitate withholding of supply that could lead to consumers paying higher prices for Fuel Products than in the absence of coordination.

¹³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

4.27. However, the ACCC considers that these anti-competitive risks are low due to the following factors:

- the authorisation is limited to 6 months
- the Conduct is authorised for the sole purpose of dealing with the effects of COVID-19 pandemic
- the Conduct expressly excludes any exchange of commercially or competitively sensitive information relating to marketing or sales activities, which includes (without limitation) information about prices, costs, or customers
- the reporting obligations set out in Conditions 1 and 2 (see below) will allow the ACCC to monitor the information being exchanged, and
- the authorisation allows parties other than AIP's current members to be included in any discussions under the Conduct, subject to Condition 3 of the authorisation being satisfied (see below).

4.28. The ACCC therefore considers that there is likely to be minimal, if any, detriment from the Conduct.

Balance of public benefit and detriment

4.29. Given the extraordinary and uncertain circumstances of the COVID-19 pandemic, the ACCC considers that the Conduct is likely to result in a public benefit by improving the security of supply of Fuel Products to Australian businesses and consumers. While material risks to the Fuel Products supply chains associated with the COVID-19 pandemic remain, the ACCC considers this public benefit is likely to be significant.

4.30. The ACCC also considers that there is a risk that the Conduct could result in a public detriment if information sharing between the Participating Entities detrimentally affects the competitive dynamics in the fuel industry. The detriment could arise if non-Participating Entities are disadvantaged as a result of not having access to the same information as Participating Entities or if the information sharing leads to any coordinated effects or concerted practices between the Participating Entities. However, the ACCC considers that this risk is low, particularly due to the limited scope of the Conduct and the conditions of authorisation.

4.31. Overall, and subject to the compliance with the conditions, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Conditions of authorisation

4.32. The ACCC may specify conditions in an authorisation.¹⁴ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹⁵

4.33. In its interim authorisation of 20 May 2020, the ACCC imposed conditions requiring, in broad terms, the Participating Entities to provide information concerning the Conduct engaged in under the authorisation to the ACCC, and to seek approval from the ACCC for additional participating parties. These conditions provide important transparency in relation to the Conduct and the parties protected by the interim authorisation.

¹⁴ Section 88(3) of the Act.

¹⁵ Section 88(3) of the Act.

4.34. The ACCC considers that the transparency gained through compliance with the conditions placed on the interim authorisation of 20 May 2020 minimises the likelihood and/or extent of the public detriment discussed above. Therefore, the ACCC has included these conditions as part of the authorisation (see section 6).

Length of authorisation

4.35. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁶ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.36. The Applicants seek authorisation for 12 months from the date of the ACCC's final determination. However, the ACCC is not convinced that such a long period is required. While there remains uncertainty about the potential effects of the COVID-19 pandemic on the fuel sector, the Participating Entities have managed to deal with supply and demand challenges to date without relying on the interim authorisation. RACQ has also submitted that while it supports the draft determination as an interim measure, in its view the arrangement should be as brief as possible.

4.37. The ACCC grants authorisation until 31 March 2021. At this time, the ACCC considers that this will be sufficient for the COVID-19 related threats to fuel security to dissipate and for markets to return substantially to their pre-COVID state, or alternatively, for the Applicants to gain sufficient information about the likely future state of fuel markets to be able to determine appropriate next steps.

5. Determination

The application

5.1. On 2 April 2020, the Applicants lodged application AA1000488 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

5.2. The Applicants seek authorisation for the Conduct described in paragraph 1.8.

The authorisation test

5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the Conduct.

5.4. For the reasons outlined in this determination, and subject to compliance with the conditions, the ACCC is satisfied that, in all the circumstances, the Conduct would be likely to result in a benefit to the public, and the benefit to the public would outweigh the detriment to the public that would result, or be likely to result, from the Conduct, including any lessening of competition.

5.5. Accordingly, the ACCC grants authorisation, subject to the conditions at paragraph 6.1. These conditions are necessary to ensure that the ACCC is able to effectively monitor the Conduct and take any action necessary, in a timely manner, to minimise

¹⁶ Section 91(1) of the Act.

any likely detriment from the Conduct or to take steps to revoke the authorisation if there is a relevant material change of circumstances after the authorisation is granted.

Conduct which the ACCC authorises

- 5.6. The ACCC grants conditional authorisation AA1000488 to the Participating Entities in relation to the Conduct, only in so far as the Conduct is for the sole purpose of responding to the COVID-19 pandemic, and subject to the Participating Entities complying with the conditions set out in section 6.
- 5.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC grants conditional authorisation AA1000488 until 31 March 2021.
- 5.9. This determination is made on 10 September 2020.

6. Conditions

- 6.1. The ACCC grants authorisation subject to the following conditions (which are the same as those that apply to the interim authorisation granted on 20 May 2020):

Condition 1 – reporting of relevant meetings

- Within 6 business days after each meeting of a Permitted Forum at which this conditional authorisation, or a matter related to it, is discussed (**Relevant Meeting**), AIP must provide to the ACCC:
 - (a) detailed minutes of that Relevant Meeting, including:
 - i. copies of documents tabled at the meeting, and
 - ii. a summary of any implementation or operational activities in relation to the authorised conduct which have been engaged in by a Participating Entity and not previously reported to the ACCC, and
 - (b) if not already included in those minutes, details of each contract or arrangement made and each understanding arrived at by Participating Entities at the Relevant Meeting as part of the authorised conduct, including:
 - i. an explanation of the nature and purpose of the contract, arrangement or understanding
 - ii. the protocols and guidelines for the steps to be taken pursuant to the contract, arrangement or understanding
 - iii. the Participating Entities which have agreed to the contract, arrangement or understanding, and
 - iv. the timing of the proposed implementation of the provisions in the contract, arrangement or understanding.

Condition 2 – provision of information to ACCC on request

- The ACCC may request any information or clarification from AIP or a Participating Entity in relation to the authorised conduct and any implementation or operational activities engaged in by a Participating Entity in relation to the authorised conduct, and AIP or the Participating Entity must provide such information in a timely

manner (including by making available appropriate representatives to discuss questions, if requested by the ACCC).

Condition 3 – approval of future parties

- The following process applies to any party (other than the Applicants) that wishes to obtain the protection of this conditional authorisation:
 - (a) AIP must seek the approval of the ACCC by sending an email to adjudication@acc.gov.au, identifying the proposed party, including a description as to the conduct of that party, and the reasons why such participation is desirable to achieve the purposes of the Conduct (set out in paragraphs 1.8 and 1.9 of this determination).
 - (b) If the ACCC approves the party to engage in some or all of the conduct the subject of the notification, that party will receive the protection of this conditional authorisation, subject to any conditions imposed by the ACCC, from the time that AIP is notified of the ACCC's decision.
 - (c) When considering the inclusion of a proposed party, the ACCC may in its absolute discretion, refuse to approve the inclusion of the proposed party or impose conditions which restrict the type or extent of the Conduct in relation to the proposed party.
 - (d) Unless the ACCC approves the party, it will not have any protection under this conditional authorisation.

6.2. The ACCC may authorise the ACCC Adjudication Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under the conditions of this authorisation on its behalf and that authorisation may be subject to any conditions which the ACCC may impose.

7. Date authorisation comes into effect

7.1. This determination is made on 10 September 2020. If no application for review of the determination is made to the Australian Competition Tribunal, the authorisation will come into force on 2 October 2020.