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**Restriction of publication of Part Claimed**

2 March 2024

Naomi Menon
Director, Competition Exemptions
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By Email

Dear Ms Menon

Water Services Association of Australia – application for authorisation AA1000657

We refer to the application for authorisation lodged with the ACCC on 13 December 2023 (**Application**) by the Water Services Association of Australia (**WSAA**) on behalf of itself and Current WSAA Members and Future WSAA Members, as well as the ACCC's letter dated 7 February 2024. The purpose of this letter is to narrow the scope of conduct for which ACCC authorisation is sought, to address the queries raised in the ACCC's letter and to provide some additional background information to assist the ACCC with its review.

1 Additional background information

To assist the ACCC with assessing the Proposed Conduct (as proposed to be amended), the WSAA sets out below a summary of its concerns about the relevant market failure which the Proposed Conduct is intended to address. The WSAA would be happy to discuss this further with Commissioners if that would be useful.

- (a) Australia's water authorities manage critical infrastructure that plays an essential role in ensuring Australian communities have access to safe and reliable drinking water.
- (b) Gaseous chlorine is the preferred¹ form of disinfectant for treating Australia's water supplies. However, for safety reasons, it must be packaged in specially designed cylinders, drums and bulk tankers for transport to water authorities. A critical part of the gaseous chlorine supply chain is therefore the availability of chlorine drumming and bottling facilities, of which there is only one in Australia (at IXOM's Laverton facility). This market structure has persisted since 2015.
- (c) While there is not currently a concern about the *volumes* of packaged gaseous chlorine that IXOM can produce, WSAA and WSAA members are concerned that there is only a *single point of supply* for packaged gaseous chlorine nationally. This is because disruptions in gaseous chlorine supply (for example, due to equipment failure, force majeure events or IXOM withdrawing from the market) could risk access to safe and reliable drinking water, resulting in serious public health consequences for Australian communities. The WSAA and WSAA members therefore consider the lack of an alternative gaseous chlorine packaging plant to pose a material risk to critical water infrastructure.

¹ As noted in WSAA's application, gaseous chlorine is able to treat water more efficiently and effectively than liquid chlorine (sodium hypochlorite) and liquid chlorine cannot be stored for long periods of time without losing its potency. In addition, transitioning from a reliance on gaseous to liquid chlorine would require extensive changes to water treatment facilities and processes by water authorities across Australia.

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- (d) The WSAA applied for authorisation to engage in limited collective negotiations for the purposes of establishing an alternative source of packaged gaseous chlorine supply for Australia's water authorities. WSAA has identified that this could potentially occur through the construction of a new packaging plant by an existing Australian chlor-alkali supplier or alternatively, through imports. In addition, given these supply chain vulnerabilities, WSAA previously applied for authorisation to ensure that water authorities could cooperate to ensure an equitable distribution of packaged gaseous chlorine in the event of a material threat to supply, however, as detailed in section 2 below, this aspect of the Application is withdrawn.
- (e) The WSAA considers that *collective* negotiations by WSAA members are necessary to address the risk to critical national infrastructure that has been identified. In particular:
- (i) There has been a single gaseous chlorine packaging plant in Australia since 2015 (approximately 9 years). The WSAA believes that a number of factors have contributed to this market structure, including that there has been sufficient supply capacity to meet demand and because packaged gaseous chlorine is predominately only acquired by water authorities whose demand profile is relatively stable.² As acknowledged in IXOM's submission to the ACCC,³ this has meant that chlor-alkali suppliers have had little commercial incentive to construct a new gaseous chlorine packaging plant (expected to cost between \$12-15 million) given their requirement to achieve a return on investment.
 - (ii) In a market where demand was projected to *exceed* supply, individual buyers could negotiate foundation contracts with a supplier on a bilateral basis, with the cumulative volumes from multiple bilateral contracts supporting or underwriting the construction of a second plant over time. However, that is not the scenario in Australia currently, where IXOM has stated that it faces no capacity restrictions and that its current packaged gaseous chlorine capacity from its single plant exceeds current and forecast demand. In this context, bilateral negotiations between individual water authorities and IXOM or other prospective suppliers would be of limited (if any) utility. Instead, only collective commitments on the part of the water sector as a whole (or a critical mass of water authorities) are likely to be sufficient to support the construction of a second packaging plant in a timely manner, or at all.
 - (iii) The WSAA acknowledges IXOM's submission that it has taken some preliminary steps towards planning an additional packaging plant. However, as outlined in the Application, WSAA's members are concerned that the project has not materially progressed. Authorisation would enable WSAA members to discuss with IXOM not only the status of the project and expected time frames but also whether supply agreements or other commitments would assist to secure and/or accelerate the construction of the plant. In the event that IXOM was not able to commit to constructing a second bottling plant (or to commit to constructing it in a timely manner), authorisation would also enable WSAA members to explore the potential for an alternative Australian chlor-alkali supplier to construct a gaseous chlorine packaging plant or alternatively, to explore collectively the establishment of an import supply chain. As noted in the Application, the volumes of gaseous chlorine used by most WSAA Members individually are likely to be insufficient to explore an importation solution.
- (f) For the reasons outlined in the WSAA's application, the WSAA considers that the Proposed Conduct will give rise to significant public benefits. This is because the Proposed Conduct will enable the

² The WSAA estimates that water authorities nationally account for approximately 80% of gaseous chlorine demand in Australia and, for gaseous chlorine that is packed at a drumming and bottling facility, an even greater proportion of demand.

³ IXOM indicated in its submission that it "has not added more contingent chlorine packaging to date because there is no additional market to sell this product to, and hence no return on this investment". See IXOM Operations Pty Ltd, 1 February 2024, p2.

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WSAA and WSAA Members to collectively explore and negotiate an alternative source of packaged gaseous chlorine, giving rise to:

- (i) **improved resilience** in Australia's packaged gaseous chlorine supply chain;
 - (ii) a **reduced risk of supply disruptions** which could threaten the access of Australian communities to safe drinking water, resulting in public health risks, a significant loss of confidence in the water sector and negative environmental impacts as members of the public turn to bottled water; and
 - (iii) greater **efficiencies and reduced transaction costs** for water utilities than if they sought to explore supply chain diversification on a bilateral basis.
- (g) As outlined in the Application, the WSAA also submits that there is limited potential for the Proposed Conduct (as amended) to give rise to any public detriment, including because:
- (i) The water industry is estimated to consume only 5-8% of the overall market for the acquisition of chlor-alkali products in Australia (despite accounting for the vast majority of demand for gaseous chlorine that is packed at a drumming and bottling facility). The Participants therefore submit that any **impact on their incumbent supplier** of gaseous chlorine is likely to be low.
 - (ii) Water authorities **do not compete** in relation to the **supply of water** as their customers are designated by legislation and regulations and there is no competitive overlap between them in respect of downstream supply. The competitive effect of the Proposed Conduct can therefore be contrasted to other authorisation applications where participants may be downstream competitors applying for authorisation for collective negotiations in relation to an input. In those circumstances, the participants may gain an insight into a competitor's cost base through such negotiations, which could potentially inform their competitive strategies in respect of downstream supply. These competitive dynamics do not apply in relation to the Application.
 - (iii) While WSAA Members may compete to *acquire* chemicals such as gaseous chlorine, the Proposed Conduct relates to collective negotiation of a **single chemical**, in circumstances where the participants themselves are public water authorities who are heavily regulated and accountable to the relevant minister for water in each state or territory and where there will be substantial government oversight of the conduct in any event through the participation of DCCEEW in the Working Group.
 - (iv) The Proposed Conduct (as varied) is limited to four prescribed activities which will only be authorised where they are engaged in for the **purposes** of improving security of supply of gaseous chlorine in Australia.

2 Revisions to Proposed Conduct

2.1 Proposed Revisions

Following the feedback received from the ACCC, the Participants seek to amend the definition of the Proposed Conduct in the Application to the following:

The Participants seek final authorisation under the CCA for the WSAA, Current WSAA Members and/or Future WSAA Members to engage in the following activities for the purposes of improving security of supply of gaseous chlorine in Australia for the Australian water authorities:

- a) collective negotiation with suppliers to import gaseous chlorine into Australia;
- b) collective negotiation with suppliers of chlor-alkali products to construct a new gaseous chlorine bottling and drumming facility in Australia, including collective negotiation of supply contracts;
- c) sharing information about the volume of gaseous chlorine required by Current or Future WSAA Members or the price of acquiring gaseous chlorine for the purposes of (a) and (b) above; and
- d) giving effect to contracts recording any terms collectively negotiated under (a) or (b) above.

Interim authorisation is also sought for the Proposed Conduct, except that it would be limited to (a) to (c) above. Current and Future WSAA Members would not give effect to any contracts recording collectively negotiated terms until it received final authorisation.

2.2 Explanation of Proposed Revisions

The Proposed Conduct is intended to facilitate collective negotiations by Current or Future WSAA Members with individual suppliers for the purposes of establishing an alternative source of packaged gaseous chlorine supply. As noted above, this could be a second bottling and drumming facility *within* Australia, constructed either by IXOM or another existing supplier of chlor-alkali products. Alternatively, if Australian suppliers do not consider there to be a sufficient return on investment to commit to building a second plant within a time frame that is acceptable to Australian water authorities, the Proposed Conduct would also allow Current or Future WSAA Members to collectively negotiate with suppliers to *import* gaseous chlorine into Australia. To the extent Current or Future WSAA Members collectively negotiated terms with a supplier, the Proposed Conduct would also allow them to give effect to contracts containing those collectively negotiated terms

In relation to information sharing,

it is not intended that WSAA Members would share information about the terms of their existing supply contracts with IXOM except with the consent of IXOM. In addition, such information sharing could only occur if it was for the purposes of improving security of supply of gaseous chlorine in Australia for the Australian water sector (ie, if it was shared for the purposes of securing the construction of a second bottling plant). For the avoidance of doubt, it is not intended or contemplated that WSAA Members would share information about the terms of their existing supply contracts with other chlor-alkali suppliers.

Although WSAA maintains that there would be a significant net public benefit in authorising water authorities to cooperate to ensure an equitable distribution of gaseous chlorine in the event of a material threat to

supply, this aspect of the Proposed Conduct and Proposed Interim Conduct has been withdrawn with a view to focusing the application on the immediate risk to critical water infrastructure.

3 Clarifications requested in the ACCC Letter

3.1 Confidential information

[REDACTED]

[REDACTED] Information that might be shared between members for the purposes of collectively negotiating with a potential supplier of a second bottling and drumming facility would likely include:

- the **volume of gaseous chlorine** that each Participant requires, and the volume of gaseous chlorine that each Participant would be willing to commit to acquire from a prospective supplier to support the establishment of a packaged gaseous chlorine plant and/or an import supply chain;
- the **time period** for which each Participant would be willing to commit to acquire gaseous chlorine from a prospective supplier (eg, if they are willing to commit to a multiple year contract term, in order to provide certainty to the prospective supplier);
- the **price range** at which each Participant would be willing to pay to acquire packaged gaseous chlorine from a prospective supplier.

WSAA expects that collective negotiations would most likely be conducted by a representative group of water authorities and that these WSAA members would therefore require the above information from all participating water authorities (noting that the Proposed Conduct is voluntary) in order to negotiate on behalf of the group.

As noted above, from the outset, [REDACTED]

the WSAA acknowledges that disclosure of any confidential terms of existing supply contracts with IXOM could only occur with the consent of IXOM. It is not intended or contemplated that WSAA Members would share information about the terms of their existing supply contracts with other chlor-alkali suppliers.

3.2 Safety of gaseous chlorine distribution is paramount

As noted above, WSAA previously applied for authorisation to ensure that water authorities could cooperate to ensure an equitable distribution of gaseous chlorine in the event of a material threat to supply, however, this aspect of the Application is withdrawn. In any event, WSAA confirms that in the event of an emergency, it would not expect that IXOM (or any other supplier) would deviate from the stringent safety obligations required for the distribution of packaged gaseous chlorine. WSAA notes that it does not consider that authorisation from the ACCC would reduce the statutory and regulatory safety obligations on participants in the gaseous chlorine supply chain.

WSAA also expects that any new supplier of gaseous chlorine would be required to adhere to the same stringent safety obligations as existing suppliers (for example, requiring investment in specialised equipment and safety systems, and a high degree of training in personnel involved in the supply chain).

3.3 Relevance of National Coordination Mechanism

As noted above, WSAA previously applied for authorisation to ensure that water authorities could cooperate to ensure an equitable distribution of gaseous chlorine in the event of a material threat to supply, however, this aspect of the Application is withdrawn. In any event, WSAA confirms that in the event of an emergency /

shortfall of gaseous chlorine, the WSAA would expect the matter to be escalated through state and/or federal governments and that, depending on the scale of the shortfall, the NCM may also be activated.

Yours sincerely



Rosannah Healy
Partner
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Will Sommers
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