



23 May 2017

Mr Gavin Jones
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By Hand and Email adjudication@acc.gov.au

Dear Mr Jones

Envirospheres – notification of exclusive dealing

This is a notification by Envirospheres Pty Ltd ABN 93 077 898 849 (**Envirospheres**) of exclusive dealing (other than third line forcing) made under section 93(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Please find enclosed the following:

- 1 Form G;
- 2 Annexure A, being Envirospheres' supporting submissions;
- 3 **[Confidential – Not Included in Public Version]**; and
- 4 a cheque in the amount of \$2,500 payable to the Australian Competition and Consumer Commission.

Given the ACCC's considerable previous interest in the subject matter of this notification, Envirospheres considers it appropriate to notify the ACCC of this matter. Notification to the ACCC is also a condition of the contract to which the notified conduct relates. However, given the ACCC's Statement of Reasons dated 26 November 2015 in respect exclusive dealing notification N97609, Envirospheres is strongly of the view the conduct being notified under this notification does not substantially lessen competition. This is discussed at length in Annexure A.

Confidentiality

This letter and Annexure A may be placed on the public register.

Envirospheres would be pleased to respond to any further queries the ACCC may have after reviewing these materials.

Yours sincerely,

Anthony Caccamo
Chief Executive Officer

envirospheres

Annexure A

Supporting submissions

Background

For efficiency, the background stated below is largely taken from the ACCC's Statement of Reasons to notification N97609.

Envirospheres

- 1 EnviroSpheres is an Australian company focused entirely on the harvesting, processing and supply of the highest quality cenospheres, marketed as microspheres. Cenospheres are explained in more detail below.

Stanwell

- 2 Stanwell Corporation Limited ABN 37 078 848 674 (**Stanwell**) is a Queensland Government owned corporation with a number of electricity generating assets including coal-fired power stations.
- 3 Until Coal Reuse Pty Ltd (**Coal Reuse**) was appointed under the arrangement the subject of notification N97609, EnviroSpheres had a first right of refusal to acquire cenospheres from defined sources at Stanwell's coal-burning power plants in Nanango and the Meandu Mine in south-east Queensland, having been appointed under successive agreements over a 16-year period following competitive open tender processes.
- 4 EnviroSpheres has invested in specialist equipment to harvest cenospheres at Stanwell sites, including the Meandu mine void. It has also acquired and made significant upgrades to a factory it operates in Nanango for the processing of cenospheres, which previously provided employment in the region.

Coal combustion products (CCPs)

- 5 CCPs are by-products from the production of power within coal-fired power stations.
- 6 Coal fired power stations produce a number of different forms of CCPs, including:
 - (a) bottom ash (solid furnace ash material)
 - (b) fly ash, including both unprocessed (run of station fly ash) and cement grade fly ash (solid fly ash material extracted from the precipitators or baghouse filters that is not bottom ash), and
 - (c) cenospheres and processed by-products, including minerals and aggregates.

Cenospheres

- 7 Cenospheres are quite different to other types of CCPs. They are small, hollow, hard-shelled, ultra low-density spheres that float on the ash dam or ponds. They are a type of spherical ceramic particle in fly ash. Around 1% of fly ash may be cenospheres.
- 8 Cenospheres have a number of specialised uses that are different from other forms of CCPs. Cenospheres can be used as a lightweight filler and in the manufacture of construction,

automotive and refractories materials and specialised surface coatings. They are also used in the composites industry as they are light but extremely strong and resistant to heat and chemically inert. Cenospheres are also cheaper to transport (relative to their value) than other forms of CCPs.

- 9 Unlike fly ash, which can be readily stored at power stations for collection by third parties, the process for harvesting cenospheres is more complex. Cenospheres float on top of water and are harvested from the ash dam or mine void. As a consequence of operational and safety considerations, it is not practical to have more than one party harvesting cenospheres from a power station.
- 10 Cenospheres are harvested in the 'raw' state. They must then be transported to a processing plant to produce the end product for sale.

The notified conduct

- 11 Following an EOI process with a preference for a single off-taker of all CCPs, Stanwell ran a competitive tender process (overseen by an independent probity adviser) to instead grant separate rights to off-take individual categories of CCPs (of which cenospheres is one category). EnviroSpheres bid for the rights to off-take cenospheres and was successful. EnviroSpheres understands that there were a number of other competitive bids. Subsequently, EnviroSpheres and Stanwell will enter into a contract, the execution copy of which is set out in Annexure B (the **Contract**). **[Annexure B is not included in the Public Version.]** A copy of the executed Contract will be forwarded to the ACCC once it is signed (anticipated later this week). The Contract is conditional on the conduct being notified to the ACCC by EnviroSpheres.¹
- 12 The notified conduct relates to EnviroSpheres acquiring cenosphere harvesting rights and cenospheres from Stanwell at certain locations on condition that Stanwell not supply cenospheres or harvesting rights to any other person during the term of the agreement.^{2,3}
- 13 The initial term of the contract is until 31 March 2020. The Contract contains a mechanism to extend the term by a further period of 1 year. The maximum term of the agreement (and the exclusivity) will therefore end no later than 31 March 2021.⁴

No substantial lessening of competition

Previous notification of by Coal Reuse

- 14 Prior to EnviroSpheres being awarded the contract as Stanwell's exclusive off-taker of cenospheres⁵, Coal Reuse had previously entered in a contact with Stanwell on 13 June 2014 (the **Coal Reuse Contract**). Coal Reuse notified the ACCC of certain exclusive off-take arrangements by way of notification (notification N97609) on 25 July 2014.

¹ See clause 2 of the Contract.

² See clause 1 of the Contract.

³ See clause 5.2 of the Contract.

⁴ See clause 3 of the Contract.

⁵ EnviroSpheres understands that there were a small number of exclusions to this exclusivity to accommodate a limited number of existing suppliers.

- 15 The notified conduct in the Coal Reuse Contract (notification N97609) can be contrasted with the notified conduct in this notification in the following important ways:
- (a) the exclusivity period in the Coal Reuse Contract was for 10 year, whereas in the current Envirospheres Contract, the exclusivity period is for no more than 4 years; and
 - (b) the exclusive off-take rights granted to Coal Reuse related to all CCPs, whereas Envirospheres' off-take rights relate only to cenospheres (a small proportion of CCPs).
- 16 On 26 November 2015, the ACCC confirmed that it was **not** satisfied that the conduct notified under notification N97609 was likely to have the purpose, effect or likely effect of substantially lessening competition in any market. Accordingly, the ACCC did not object to the notification.

Relevant market

- 17 The ACCC specifically considered the relevant market for cenospheres in its Statement of Reasons in relation to notification N97609:
- 5.8 *The ACCC considers there is a separate market for the supply and acquisition of cenospheres: cenospheres have different uses to fly ash and are significantly more valuable (up to 10 times the price of cement grade fly ash).*
- 5.9 *The geographic scope of the market for cenospheres appears to be international. Cenospheres are lightweight and much more economical to transport, relative to the price they attract, than other CCPs. As noted by Envirospheres, Australian customers import cenospheres and similarly much of Envirospheres' customer base for Tarong cenospheres is international. Coal Reuse also quotes spot prices for cenospheres on its website in US Dollars whereas all other CCPs are quoted in Australian dollars, which suggests that it is marketing cenospheres to international markets.*
- 18 Envirospheres submits that there is nothing materially different in the current circumstances that would lead to a different conclusion on the relevant market.

The notified conduct compared with the counterfactual

- 19 Envirospheres is confident that while the notified conduct may constitute exclusive dealing as described in section 47(4) of the Act, it is not conduct that has the purpose, effect or likely effect of substantially lessening competition in the international market for cenospheres. The following analysis sets out how, at best, the notified conduct amounts to an increase in competition compared with the *status quo* and, at worse, is not a 'lessening' of competition because the *status quo* is being maintained.
- 20 The ACCC accepted in its Statement of Reasons to notification N97609 that it would be impractical to have more than one harvester of cenospheres at any one site. Envirospheres supports this analysis.
- 21 Envirospheres submits to the ACCC that the current Contract between Stanwell and Envirospheres represents a material increase in competition when compared to the previous arrangement with Coal Reuse for the following reasons:
- (a) the exclusivity in relation to the notified conduct under this notification is for a considerably shorter period;
 - (b) the exclusivity in relation to the notified conduct under this notification is in relation to cenospheres only (a small proportion of CCPs); and

- (c) the Contract was awarded after a competitive tender process in which Envirospheres competed with other potential offtakers of cenospheres to be the successful tenderer.
- 22 If the reasons described above were to be disregarded, Envirospheres would submit that the change from Coal Reuse’s exclusive appointment, to the appointment of Envirospheres, simply represents a 1:1 substitution. Accordingly, the *status quo* has been maintained and there has been no ‘lessening’ of competition.
- 23 The alternative counterfactual is that there was no exclusive off-taker appointed. This would mean that Stanwell is responsible for the harvesting and sale of cenospheres. As the ACCC noted in its Statement of Reasons to notification N97609:
- 5.16 *The ACCC considers that if Stanwell was unable to appoint a single third party to harvest and sell cenospheres from its Sites, it would likely need to undertake this task itself. Given that Stanwell has shown no interest in doing so to date this may involve Stanwell contracting out the harvesting of cenospheres but retaining responsibility for their sale.*
- 5.17 *In these circumstances Stanwell may choose to offer raw cenospheres for sale or, as the ACCC understands to be the case with almost all harvesters of cenospheres, it may choose to process the cenospheres itself for retail sale. Alternatively, Stanwell could choose not to harvest cenospheres for sale to third parties in any form. Stanwell would likely choose whichever of these options it considers to be profit maximising.*
- 24 Envirospheres understands that Stanwell has expressed no interest in harvesting or processing cenospheres itself. Even if Stanwell did accept this responsibility, it would still be a 1:1 substitution when compared with Envirospheres’ exclusive off-take rights. Again, this would not be a ‘lessening’ of competition. The ACCC recognised this in its Statement of Reasons to notification N97609:
- 5.44 *The ACCC considers that without the notified conduct in place there is some question about whether Stanwell would make raw cenospheres available to third parties in any event. Further, even if Stanwell did offer raw cenospheres for sale, how effectively Coal Reuse, or another new entrant, would be able to compete with Envirospheres is also open to question. In particular, the competitive effects of the notified conduct appear unlikely to differ in any material way from the effects that would occur in a future without the notified conduct.*

Public detriments and benefits

Downstream supply

- 25 Envirospheres submits that during the duration of the Coal Reuse Contract, Coal Reuse only harvested a very small amount of cenospheres. This meant that demand for Tarong cenospheres was not met throughout the duration of the Coal Reuse Contract and downstream customers’ ability to compete was impacted in the markets in which they supplied using Tarong cenospheres as an input.
- 26 Envirospheres now understands that the Coal Reuse Contract has been terminated by Stanwell.
- 27 Under its previous exclusive off-take arrangements, Envirospheres has an established track-record in supplying cenospheres into secondary markets; realising public benefits. Under the Contract, and by virtue of the notified conduct, Envirospheres intends to re-establish itself as a supplier into these downstream markets.

- 28 EnviroSpheres will also shortly begin hiring additional staff to accommodate the additional work that the Contract will represent. EnviroSpheres is of the view that its activities with Tarong cenospheres contribute to it being the largest single employer in CCP-related industries in the area surrounding Stanwell's Tarong Power Stations. EnviroSpheres has continued to provide employment during the duration of the Coal Reuse Contract, though at reduced levels.
- 29 EnviroSpheres currently has the necessary boats, barges, excavators and booms on standby and awaiting access to the site, and it has everything in place to commence site preparations. Once it is granted site access, EnviroSpheres anticipates that it will be 1 week until it commences harvesting raw cenospheres and then a matter of weeks until that material is processed, bagged and ready for supply.
- 30 It should be noted that EnviroSpheres is a company that is solely committed to the harvesting and processing of cenospheres for onward supply. It has no use for cenospheres with regards to internal consumption or use. Accordingly, EnviroSpheres has no incentive to withhold the onward supply of cenospheres and will be subject to normal market forces in so far as EnviroSpheres' competitors (including suppliers of competing technologies) create downward price pressure.
- 31 For all of these reasons, the recommencement of harvesting and supply of Tarong cenospheres by EnviroSpheres will have a net public benefit compared to previous arrangements, on the competitiveness of downstream markets and on regional employment, with flow-on impacts for the regional economy.

Ecological and environmental benefits

- 32 If cenospheres are not promptly harvested, there is a risk that they will dry on the surface of the dam (and mine voids) and then blow off the site causing a detrimental ecological and environmental impact. Harvesting cenospheres and supplying them into downstream markets creates a comparatively ecological and environmentally-friendly solution for what is otherwise, a waste product.
- 33 In addition to servicing downstream markets for the supply of cenospheres, the notified conduct will ensure that the cenospheres from Tarong are once again being utilised. If the cenospheres are not harvested before the mine void and ash dam are full, they will be closed off as waste and no longer able to be harvested or utilised. Avoiding this outcome by resuming harvesting of Tarong cenospheres without delay is a clear public benefit.

Generation of public-sector revenue

- 34 Stanwell is placed to extract considerable revenue from EnviroSpheres over the life of the Contract. Since Stanwell is a Queensland Government owned corporation, this represents revenue for the public-sector that would otherwise not be realised.

Public detriment

- 35 In light of the issues listed above, EnviroSpheres does not anticipate that the notified conduct will create any material public detriment.

Conclusions

- 36 Accordingly, EnviroSpheres submits to the ACCC that the notified conduct in question:

- (a) does not have the purpose, effect or likely effect of substantially lessening competition in any market; and
- (b) will result in considerable benefit to the public that will outweigh any public detriment that is likely to result from the notified conduct.

37 Accordingly, Envirospheres submits that this notification should be allowed to stand.

Annexure B (CONFIDENTIAL)

The Contract

[This Annexure is excluded from the Public Version.]

Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of person giving notice:
(Refer to direction 2)

N99687 *Envirospheres Pty Ltd ABN 93 077 898 849*

- (b) Short description of business carried on by that person:
(Refer to direction 3)

Envirospheres is an Australian company focused entirely on the manufacture and supply of the highest quality cenospheres, marketed as microspheres.

- (c) Address in Australia for service of documents on that person:

*Paul McLachlan
McCullough Robertson Lawyers
Level 32, MLC Centre
19 Martin Place
Sydney NSW 2000*

2. Notified arrangement

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

This notice refers to the supply of cenospheres. Cenospheres are a class of coal combustion products that are by-products from the production of power within coal-fired power stations.

- (b) Description of the conduct or proposed conduct:
(Refer to direction 4)

The notified conduct relates to Envirospheres acquiring cenosphere harvesting rights and cenospheres from Stanwell at certain locations on

condition that Stanwell not supply cenospheres or harvesting rights to any other person during the term of the agreement.

The initial term of the contract is until 31 March 2020. The Contract contains a mechanism to extend the term by a further period of 1 year. The maximum term of the agreement (and the exclusivity) will therefore end no later than 31 March 2021.

Please see Annexure A.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

- (a) Class or classes of persons to which the conduct relates:
(Refer to direction 5)

Acquirers and potential acquirers of raw and processed cenospheres and downstream products

- (b) Number of those persons:

- (i) At present time:

Unknown, but EnviroSpheres expects that it is more than 100

- (ii) Estimated within the next year:
(Refer to direction 6)

200

- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable

4. Public benefit claims

- (a) Arguments in support of notification:
(Refer to direction 7)

Please see Annexure A.

- (b) Facts and evidence relied upon in support of these claims:

Please see Annexure A.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 8)

The ACCC specifically considered the relevant market for cenospheres in its Statement of Reasons in relation to notification N97609. Please see Annexure A.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:
(Refer to direction 9)

Please see Annexure A.

- (b) Facts and evidence relevant to these detriments:

Please see Annexure A.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

*Paul McLachlan
McCullough Robertson Lawyers
Level 32, MLC Centre
19 Martin Place
Sydney NSW 2000*

Telephone – 02 8241 5606

Dated... 25 MAY 2017

Signed by/on behalf of the applicant


.....
(Signature)

PAUL MC LACHLAN
.....
(Full Name)

.....
MCCULLOUGH ROBERTSON
.....
(Organisation)

.....
PARTNER
.....
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.