



Draft Determination

Application for revocation of authorisation AA1000598 and
substitution of authorisation AA1000622

lodged by

Brenntag Australia Pty Ltd

in respect of

collaboration on arrangements for the supply of Diesel Exhaust Fluid,
also known as AdBlue

Date: 11 September 2023

Commissioners: Keogh
Brakey
Carver
Lowe

Summary

The ACCC proposes to revoke authorisation AA1000598 and substitute it with authorisation AA1000622. The proposed substitute authorisation is to enable manufacturers of diesel exhaust fluid (also known as AdBlue) and other industry participants to collaborate, in conjunction with the Australian Government, solely for the purpose(s) of securing sufficient supply of technical grade urea and prioritising access to technical grade urea and diesel exhaust fluid.

Technical grade urea is a key ingredient in diesel exhaust fluid. In late 2021 and early 2022, export restrictions led to a global shortage of technical grade urea and Australian diesel exhaust fluid manufacturers were facing difficulties securing supply. As diesel exhaust fluid is critical to the operation of modern diesel engines, this shortage risked disrupting Australian supply chains and the economy more broadly, including the road freight, mining, agriculture and energy sectors, and light vehicles.

The government and diesel exhaust fluid industry participants implemented a range of measures to address the shortage, including the coordination that occurred under the previous authorisation. However, Australian diesel exhaust fluid manufacturers will remain wholly reliant on importing refined technical grade urea until domestic manufacturing comes online, expected in mid-2027.

The ACCC considers that enabling coordination by diesel exhaust fluid industry participants, as necessary in the short term, is likely to continue to result in a public benefit through assisting in mitigating risks of, or managing, any diesel exhaust fluid supply shortages. The ACCC also considers that the Proposed Conduct is likely to support market confidence and reduce community concerns that could otherwise lead to panic buying and stockpiling of diesel exhaust fluid, to the extent such concerns may re-emerge in the short term.

The ACCC recognises that the coordination to manage potential or actual supply shortages is likely to result in some public detriment by reducing competition between the relevant diesel exhaust fluid industry participants for the acquisition and/or supply of technical grade urea and/or diesel exhaust fluid. The ACCC also considers that the description of the Proposed Conduct is expressed in broad terms, which increases the scope for public detriment to arise.

To mitigate this, the ACCC proposes to grant authorisation to a more narrowly defined set of Authorised Conduct. This narrowing, including the fact the Authorised Conduct can only be engaged in for one or more specific purposes related to ensuring sufficient supply of technical grade urea or diesel exhaust fluid, and only under the oversight of the government, mean that the likely public detriment will be limited. Further, the proposed conditions will provide the ACCC and the government with certainty, oversight and transparency regarding the coordination that occurs.

In these circumstances, the ACCC considers it is appropriate to grant authorisation for 4 years.

The ACCC invites submissions in relation to this draft determination, by 25 September 2023, before the ACCC makes its final decision.

The application for revocation and substitution

- 1.1. On 21 October 2022, Brenntag Australia Pty Ltd (the **Applicant**) lodged an application to revoke authorisation AA1000598 (the **previous authorisation**) and substitute

authorisation AA1000622 for the one revoked with the Australian Competition and Consumer Commission (the **ACCC**).

- 1.2. The Applicant is a manufacturer of diesel exhaust fluid (**DEF**, known commercially as AdBlue). The Applicant is seeking authorisation for itself and its related bodies corporate, other manufacturers and industry participants listed in **Appendix A**, as well as future parties who notify the ACCC, to collaborate to obtain adequate supply of technical grade urea to ensure sufficient supply of DEF, and prioritised distribution of technical grade urea and DEF should shortages emerge. DEF is an exhaust system additive used in modern diesel engines to control noxious emissions. Technical grade urea is an essential input in the manufacture of DEF.
- 1.3. This application was made under subsection 91(C) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.4. The Applicant also requested interim authorisation to enable the parties to continue to engage in the conduct covered by authorisation AA1000598 while the ACCC is considering the substantive application. On 24 November 2022, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act. Interim authorisation had the effect of suspending the operation of authorisation AA1000598 and granting interim authorisation in substitution.

The Proposed Conduct

- 1.5. The Applicant is seeking authorisation for 4 years to enable the Parties defined in paragraph 1.6 to collaborate to obtain adequate supply of technical grade urea to ensure sufficient supply of DEF, and to enable prioritised distribution of technical grade urea and DEF should shortages emerge.
- 1.6. On 19 June 2023, Brenntag amended its application to seek authorisation in relation to the following persons or classes of persons:¹
 - parties listed as current members of the DEF Supplier Working Group (i.e. the entities listed in **Appendix A**), and
 - future members of the DEF Supplier Working Group that are approved by the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) as being suitable to join the DEF Supplier Working Group and who notify the ACCC(together, **the Parties**).

¹ The interim authorisation granted on 24 November 2022 provided protection for the 21 parties listed in Appendix A of the [interim authorisation decision](#), as well as RCI BiT Pty Ltd (who, on 1 December 2022, notified the ACCC that it wished to participate in the Proposed Conduct and be protected under the interim authorisation). Under the amended application for authorisation, 8 of the entities who are protected by the interim authorisation, but who are not current members of the of the DEF Supplier Working Group, are not sought to be protected under any final authorisation if granted: Greyhound Australia Pty Ltd; Ron Finemore Transport Pty Ltd and its controlled entities; IPEC Pty Ltd and TasLink Logistics Pty Ltd and its related bodies corporate; Toll Holdings Limited and its wholly owned subsidiaries; Transit Systems Ltd; Kinetic Holding Company Pty Ltd and its related entities; Airbridge Pty Ltd.

- 1.7. The Applicant seeks authorisation to enabled the Parties to propose, discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in any conduct, where the contract, arrangement, understanding or conduct:
- a. involves 2 or more of any Parties, and
 - b. has the purpose of securing adequate supplies of technical grade urea; promoting adequate production of DEF for the Australian market; ensuring security of supply of technical grade urea and DEF for Australian businesses and consumers; or prioritising access to technical grade urea and DEF as necessary, including by:
 - (i) sharing commercially sensitive information (for example, relating to stock levels, supply channels and manufacturing opportunities, but not relating to price)
 - (ii) facilitating or ensuring the acquisition and/or supply of technical grade urea or DEF
 - (iii) prioritising access to technical grade urea and DEF according to need (for example, to particular geographical areas or consumers) as directed by the Australian Government
 - (iv) collaborating on the production of DEF, or
 - (v) implementing sales limits (to be applied uniformly across all purchasers), and
 - c. arises at an Approved Meeting that occurs on or after the date that authorisation is granted.

(the **Proposed Conduct**).

- 1.8. The Applicant has not sought authorisation for any agreement on the price of DEF supplied to DEF consumers.
- 1.9. The Applicant defines an Approved Meeting as a meeting of the DEF Supplier Working Group, convened and chaired by DCCEEW, with the objective of responding to technical grade urea and DEF shortages, where:
- a party notifies the ACCC in writing, at least 2 business days before the date of any meeting (or such shorter time as the ACCC agrees to in writing), that the party intends for the meeting to be an Approved Meeting under the authorisation, invites the ACCC to attend the meeting, sets out the time and date of the meeting, proposed attendees, the purpose of the meeting, and the matters to be discussed at the meeting, and
 - more than one party has been invited to the DEF Supplier Working Group, and
 - the ACCC does not notify the party in writing at least one business day in advance of the meeting that it is not satisfied that the meeting is covered by this authorisation

(a **Proposed Approved Meeting**).

Interim authorisation

1.10. On 24 November 2022, the ACCC granted interim authorisation, with conditions, in accordance with section 91 of the Act.² The conditions are substantially the same as those imposed by the ACCC in authorisation AA1000598. In summary, the conditions:

- require that any party not named in the application must follow a procedure to notify the ACCC in writing if they wish to be covered by the authorisation
- define an Approved Meeting as a meeting convened or attended by government representatives which the ACCC must also be invited to attend, or a coordination mechanism whereby government liaises with participants, and
- require that the ACCC be provided with the minutes of Approved Meetings within 14 days and any other information requested by the ACCC in relation to the Proposed Conduct within a reasonable timeframe.

1.11. As at the date of this draft determination, no Approved Meetings have taken place under the interim authorisation.

1.12. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Variations to the application

1.13. Following the grant of interim authorisation, the Applicant requested several variations to the Proposed Conduct, summarised as follows:

- a. The parties covered by the authorisation would be limited to current and future members of the DEF Supplier Working Group. The DCCEEW will assess a proposed new member's suitability, and when doing so, will consider whether the organisation can demonstrate a proven capability in the supply of technical grade urea/DEF in the Australian market and is able to reasonably assist in a supply shortage situation. This is discussed in relation to public detriments (paragraph 4.29).
- b. To further mitigate any potential public detriment, the Proposed Conduct will only extend to:
 - conduct that arises 'at' an Approved Meeting (not conduct that 'occurs at, in preparation for, or arises out of an Approved Meeting), and
 - a narrower definition of 'Approved Meetings' which will only include meetings of the DEF Supplier Working Group convened by DCCEEW (rather than also a meeting of the National Coordination Mechanism convened by the government).

2. Background

2.1. DEF is an exhaust system additive used in some diesel engines to control noxious emissions and is critical to the operation of modern diesel engines. DEF is a non-substitutable product.

² See [ACCC interim authorisation decision](#), 24 November 2022.

- 2.2. Technical grade (or ‘refined’) urea is an essential input in the manufacture of DEF. Australian DEF manufacturers import technical grade urea and use it to manufacture DEF by blending it with deionised water.³
- 2.3. The Applicant submits that in late 2021, DEF manufacturers faced difficulties securing supply of technical grade urea. The global shortage of technical grade urea resulted from export restrictions imposed by China, which prompted both aggressive buy-up by some nations and limitation on exports by others.
- 2.4. On 9 December 2021, the Australian Government announced the establishment of an AdBlue Taskforce that would work across government and with industry to develop solutions to any potential future supply constraints.
- 2.5. Shortages of DEF have the potential to have serious impacts on Australian supply chains and the economy more broadly due to the disruptions they would cause to sectors reliant upon modern diesel engines, including:
 - road freight
 - mining (underground mining vehicles)
 - light vehicles (modern diesel vehicles made since 2016)
 - agriculture (modern tractors), and
 - energy (including back-up generators in South Australia).
- 2.6. On 22 December 2021, the ACCC granted urgent interim authorisation in respect of the previous application (AA1000598), with conditions, to enable DEF manufacturers and other industry participants to collaborate to obtain supply of technical grade urea, and prioritise distribution of technical grade urea and DEF should shortages emerge. On 28 April 2022, the ACCC granted final authorisation AA1000598 until 1 December 2022.
- 2.7. A number of measures were implemented between late 2021 and late 2022 to manage the shortages of technical grade urea, including:
 - In reliance on the previous authorisation AA1000598, the government intervened in the DEF market by coordinating meetings with industry to share information on supply. These largely took the form of ‘Supplier Working Group’ meetings, a forum convened under the National Coordination Mechanism of government.
 - The government reached an agreement with Australian-based fertiliser manufacturer, Incitec Pivot Limited, to secure local production of technical grade urea at its Gibson Island facility. Incitec Pivot increased its production of technical grade urea and DEF, and by early 2022, was producing over 3 million litres of DEF a week (around 75% of Australia’s DEF needs).
 - On 15 September 2022, the government committed \$49.5 million in funding over 4 years to advance 3 measures, namely:
 - a government-controlled strategic stockpile of 7,500 tonnes of technical grade urea which would provide an additional 5 weeks of supply beyond industry stock levels in case of a supply shortage

³ Urea is manufactured synthetically by reacting natural gas, atmospheric nitrogen and water together to produce ammonia and carbon dioxide. These gases are then reacted at high temperature and pressure to produce liquid urea, which is cooled and made into granules for industrial use and as an agricultural fertiliser: see Incitec Pivot Fertilisers, [Urea Fact Sheet](#), November 2021.

- a competitive grants program to support sovereign capability and manufacturing projects that will look to produce technical grade urea domestically, and
 - embedding the collection of voluntary data provided by industry to provide market awareness of technical grade urea and DEF domestic stocks.
- 2.8. In December 2022, Incitec Pivot ceased production of urea at Gibson Island.
- 2.9. The Applicant submits that domestic capability to produce technical grade urea at scale will take time to mature and DEF manufacturers will remain dependent on importing technical grade urea until domestic manufacturing projects come online, expected from mid-2027 onwards.
- 2.10. The ACCC understands that there are several large-scale urea manufacturing projects currently being developed in Australia, including:
- Perdaman Industries Pty Ltd (**Perdaman**) is building a urea manufacturing plant in Karratha, Western Australia, which is expected to commence from mid-2027.⁴ Up to 50% of the urea is expected to be marketed within Australia, with the remainder marketed to key international export destinations. While the Perdaman urea plant will produce agricultural grade urea, it has the capability to produce DEF if required. The Perdaman website states that on completion, the plant will be capable of providing security to Australia in respect of its needs for urea fertilisers and associated products such as DEF. The plant is expected to produce 2.3 million metric tonnes per annum of urea.⁵
 - NeuRizer Ltd (**Neurizer**) is developing a urea manufacturing plant at Leigh Creek in South Australia and is expected to initially produce 1 million tonnes of urea per annum with potential to increase to 2 million tonnes. The NeuRizer Urea Project is expected to significantly increase Australia's sovereign manufacturing capability for fertiliser, and, to a lesser extent, the industrial sector where urea is used as DEF.⁶
 - Strike Energy Ltd (**Strike**) proposes to develop a urea fertiliser production facility near Dongara in Western Australia, which would produce 1.4 million tonnes per annum of granular urea. Strike anticipates that the proposed facility will re-domesticate the manufacturing of urea in Australia, and will also provide feedstock for DEF. The successful development of the facility is contingent on a number of factors.⁷

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a wide range of potentially interested parties including major competitors, suppliers, customers, relevant industry associations or peak bodies, and government and relevant regulatory bodies.
- 3.3. The ACCC received 2 submissions during initial consultation on the application and request for interim authorisation:

⁴ Incitec Pivot Limited, [ASX Release](#), 21 April 2023, accessed 10 August 2023.

⁵ Perdaman Industries, [Perdaman Closes the Financing for its Significant Western Australian Urea Project](#), 26 April 2023, accessed 10 August 2023.

⁶ NeuRizer, [NeuRizer Urea Project](#), accessed 18 August 2023.

⁷ Strike Energy, [Project Haber](#), accessed 11 August 2023.

- The National Heavy Vehicle Regulator (the **NHVR**) submitted that it does not object to authorisation provided the Participants and Other Participants are subject to similar supervisory conditions that mitigate against anti-competitive behaviour. The NHVR submitted that authorisation is likely to be beneficial to the industry.⁸
 - The Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) and the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (**DITRDCA**) made a joint submission in support of a 4-year authorisation. They submitted that the government has worked closely with Australia's DEF sector through the DEF Supplier Working Group and industry collaboration through this group was only possible due to ACCC authorisation. This collaboration allowed industry coordination, which was critical in managing and reducing shortages at locations across Australia.
- 3.4. Following the grant of interim authorisation, DCCEEW provided a further submission. DCCEEW submits that an authorisation enabling industry coordination will support market confidence while the supply situation remains uncertain and other measures to support supply (such as domestic manufacturing and voluntary industry reporting) mature. The DCCEEW also submits that bilateral engagement between government and industry will be less effective and will delay government's response time.
- 3.5. These submissions are discussed further in the ACCC's assessment, below.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicant has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, may substantially lessen competition within the meaning of sections 45 and 46 of the Act, and may constitute exclusive dealing within the meaning of section 47 of the Act. Consistent with 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 be likely to result.

Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. Having regard to the nature of the Proposed Conduct and the range of buyers and sellers that could be affected by it, the ACCC considers that the relevant areas of competition likely to be affected by the Proposed Conduct is the manufacture and/or importation into Australia of technical grade urea and DEF and the supply of technical grade urea and DEF in Australia, through distributors, wholesalers or retailers, to commercial, industrial and retail customers.

⁸ [National Heavy Vehicle Regulator submission](#), 3 November 2022.

Future with and without the Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.6. As detailed in paragraph 4.16, DCCEEW submits that bilateral engagement between the government and industry will be less effective and unlikely to produce the coordination of stocks needed to prevent locations running out of DEF, and would delay government's response time.
- 4.7. The ACCC considers that in the future with the Proposed Conduct, the Parties will be able to share information and coordinate to effectively manage any potential or actual supply shortages of technical grade urea and DEF that may arise, with the oversight and assistance of the government, as has occurred under the previous authorisation.
- 4.8. The ACCC considers that in the future without the Proposed Conduct, the Parties may not be able to share information nor work collectively as effectively or quickly to respond to any DEF shortages and logistical challenges that may occur. Without the Proposed Conduct, DEF manufacturers and other industry participants would need to work individually with the government and/or local and overseas suppliers of technical grade urea and DEF in a series of bilateral discussions in respect of at least some of the arrangements that may be necessary to manage any future supply shortages or issues arising out of the previous shortages.

Public benefits

- 4.9. 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 in considering public benefits:

... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.⁹

Mitigating risk of, or managing, supply shortages of technical grade urea/DEF

- 4.10. The Applicant submits that under the previous authorisation, the government intervened in the DEF market by coordinating meetings with industry participants to share information on supply. Industry largely took the lead, working with the government to prioritise the distribution of DEF along priority transport routes.¹⁰
- 4.11. The Applicant submits that if the Parties cannot collaborate to ensure domestic DEF supply during a crisis, the Australian economy may lose hundreds of millions of dollars per day. Authorisation would assist to mitigate these effects. In particular, given DEF manufacturers will remain dependent on importing technical grade urea until domestic projects come online, authorisation would help DEF market participants overcome difficulties accessing DEF through already unstable international supply chains for

⁹ *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.

¹⁰ [Brenntag application for revocation and substitution](#), 17 October 2022, p 14.

technical grade urea. Authorisation would also allow for the prioritised distribution of DEF to occur again should a severe shortage occur.¹¹

- 4.12. DCCEEW's submission outlines the following regarding the current status of, and ongoing risks of a supply shortage in, the Australian DEF market, and why authorisation would assist in mitigating the risk of, or managing, future supply shortages:¹²
- 4.13. DCCEEW submits that the supply situation remains uncertain and a 4-year authorisation will give industry time to mature and align with the government's package of measures designed to build DEF market resilience. Specifically:
- Following Gibson Island's closure in December 2022, Australia is wholly reliant on imports to produce DEF. Around 8% of Australia's DEF is imported and the rest is produced domestically by blending imported technical grade urea. There has been some import diversification following the 2021-22 supply crisis. However, this reliance on imports, and the fact that technical grade urea is still predominantly sourced from one country (71% from China), creates an underlying risk of a DEF shortage in the domestic market.
 - Despite the current availability of Chinese urea, Chinese export inspections have continued to impact Australian supply chains in 2023, with export departures reportedly delayed by up to 30 days.
 - Australia's DEF industry reports the domestic DEF market is well supplied, and concerns over rising gas prices and the Northern Hemisphere 2022-2023 winter impacting technical grade urea supplies were not realised. Australia's technical grade urea stocks now equate to around 14 weeks of supply. However, DCCEEW expects these stocks to begin to return closer to 2021 levels (i.e. 3 weeks' of supply) as manufacturers and distributors shift from 'just in case' to 'just in time' models, seeking to optimise inventory levels and reduce storage costs and overheads.
 - The government's 7500-tonne stockpile of technical grade urea will only be used as a last resort in a severe disruption event, following an industry-wide depletion of stocks. The authorisation will allow for industry-wide coordination with government to inform government's decision about stockpile release.
 - The government's 'Maintaining Our Supply of Diesel Exhaust Fluid' competitive grant program aims to support domestic DEF manufacturing in the immediate to short term and will be considering projects looking to produce DEF from means other than relying on imported technical grade urea. Potential large-scale future urea manufacturing projects have been announced, but are expected to come online from 2027 at the earliest (see paragraph 2.10). Authorisation will provide a safety net to address any supply crisis before (and even once) domestic manufacturing capability comes online.
- 4.14. DCCEEW submits that data-gathering from industry will take time to mature. It submits that the government is improving market transparency via voluntary industry reporting on technical grade urea stocks and DEF production. Government is doing so by building an online data collection and reporting mechanism for the DEF market; although accurate and consistent reporting will take time to mature.

¹¹ [Brenntag application for revocation and substitution](#), 17 October 2022, pp 16, 18.

¹² [Department of Climate Change, Energy, the Environment and Water submission](#), 19 June 2023.

- 4.15. DCCEEW submits that demand for Australian DEF is set to grow strongly, for reasons including the replacement of older, more polluting vehicles, growth in total vehicle numbers, and tightening of noxious emissions standards.
- 4.16. Regarding why industry coordination is required, DCCEEW submits that in a rapidly evolving crisis, bilateral engagement between government and industry will be less effective and unlikely to produce the coordination of stocks needed to prevent locations running out of DEF, including because of panic buying and hoarding. Bilateral engagement with industry would delay government's response time from days to weeks, particularly given industry data is collected 1 or 2 months in arrears, and factoring in the time involved in consulting and testing outcomes. A more practical approach (which proved successful during the 2021-22 crisis) would see DCCEEW convene the DEF Supplier Working Group if its data forecast a significant shortfall; industry would then confirm the shortfall in real-time and discuss how to remedy the problem; and then, if the situation deteriorated, the DEF Supplier Working Group would meet at least weekly for acute crisis management.¹³

ACCC view

- 4.17. The ACCC considers that conduct engaged in under the previous authorisation resulted in significant public benefits by assisting to manage a technical grade urea/DEF supply shortage, including by enabling the Parties to:
- coordinate discussions within the DEF supply chain and develop and implement strategies to assist to maintain the continued supply of DEF
 - provide more effective advice to the government and relevant agencies regarding the supply of DEF, including by identifying and assisting to address supply shortages and constraints that arose, and
 - maximise the efficient use of supply channels and reduce strain on the DEF supply chain, including by implementing measures to ensure the prioritised distribution of technical grade urea and DEF in response to supply constraints.
- 4.18. The ACCC considers that the risk of supply shortages has abated somewhat since the previous authorisation due to a number of factors. These include the current availability of Chinese urea and some increased diversification of import sources; the government's technical grade urea stockpile providing 5 weeks' supply, for use as a last resort; and industry and official data providing the government with some foresight of potential supply issues. In the longer term, domestic manufacturing projects are expected to come online starting from mid-2027.
- 4.19. However, the ACCC considers that the supply situation with respect to technical grade urea and DEF remains uncertain. This is due to factors including:
- Australia's high reliance on imports (in particular, 71% sourced from China)
 - a relatively small and immature market which has approximately 20 participants (engaged as smaller-scale DEF manufacturers/importers, as well as wholesalers and retailers)
 - decreasing industry stock levels due to industry reverting to the 'just in case' model
 - a data collection system that will take time to mature and currently lags 1 to 2 months behind

¹³ [Department of Climate Change, Energy, the Environment and Water submission](#), 19 June 2023, p 6.

- increasing demand for DEF in future, and
- the prospect of, and timeframe for, domestic manufacturing capability coming online being uncertain.

4.20. Should the risk of a supply shortage re-emerge, the ACCC considers that bilateral information sharing and coordination between the government and the Parties would likely be less efficient and effective in mitigating this risk, as compared to information sharing and coordination that would be enabled under the authorisation. The ACCC notes the importance of industry and government being able to convene and coordinate rapidly (even in a matter of hours) and make decisions based on the most fulsome and up to date industry data – particularly given a DEF supply disruption could result in losses to the Australian economy in the hundreds of millions of dollars per day.

4.21. Consequently, the ACCC considers that the Proposed Conduct is likely to continue to result in a public benefit through assisting to mitigate the risk of further supply shortages and managing any that arise. The ACCC considers that this will maximise the likelihood of Australian businesses and consumers continuing to have access to sufficient quantities of DEF during any further supply disruptions that may occur.

Reducing community concerns that could lead to stockpiling behaviour

4.22. The Applicant submits that if the Proposed Conduct is not authorised, the Parties will no longer be able to convene in a forum with the government to distribute supply to priority locations. This would have a negative impact on market confidence and could result in hoarding and panic buying, putting additional pressure on a fragile market.¹⁴

4.23. DCCEEW similarly submits that in the event of a future supply shock, authorisation will allow a more effective response through government and industry coordination. Along with government's other measures, authorisation would support confidence in the market, lowering the risk of panic buying by consumers as seen during the last crisis, which might otherwise cause a relatively small disruption to spiral into a crisis.¹⁵

ACCC view

4.24. By enabling improved information sharing, discussions and coordination between the government and the Parties, the ACCC considers that the previous authorisation has been effective in assisting to not only manage any supply issues but also in reducing concerns that could lead to stockpiling of DEF. While such concerns have now largely abated, the ACCC considers that panic buying and hoarding is a key risk to the security of the market and the ability to rapidly respond via the Proposed Conduct is likely to assist in mitigating these concerns.

Public detriments

4.25. 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.*¹⁶

¹⁴ [Brenntag application for revocation and substitution](#), 17 October 2022, p 17.

¹⁵ [Department of Climate Change, Energy, the Environment and Water submission](#), 19 June 2023, p 6.

¹⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.26. The Applicant submits that it is aware of the potential for some public detriment and has taken steps to mitigate such detriment by narrowing the Parties and the Proposed Conduct (see variations at paragraphs 1.13) and by ensuring adherence to the conditions set by the ACCC.
- 4.27. The ACCC considers there is likely to be some public detriment in the form of reduced competition between DEF importers or manufacturers for the acquisition of technical grade urea or DEF and/or the supply of DEF, as well as between DEF retailers/distributors for the acquisition and/or supply of DEF. Allowing competitors, including DEF manufacturers, distributors and other approved parties, to share information and coordinate the supply of DEF may reduce competition relative to a situation where each business makes its own decisions. The relevant DEF industry participants are, in most cases, each other's closest competitors and the ACCC considers it vital that they should only be enabled to coordinate in relation to a potential or actual supply shortage for as short a period as necessary.
- 4.28. The ACCC recognises that arrangements that involve prioritising access to DEF according to need (such as to geographical areas or classes of customers), even though at the direction of the government, may disadvantage other classes of customers who are not prioritised.
- 4.29. There is also likely to be public detriment to some degree in the form of additional anti-competitive coordination between the Parties. However, the ACCC considers that any ongoing anti-competitive impact is likely to be limited by the following factors:
- The Parties to the authorisation have been narrowed to members of the DEF Supplier Working Group who are currently listed at **Appendix A** and new members who have been assessed as suitable by DCCEEW. This will help ensure that the Proposed Conduct is limited only to parties who can demonstrate proven capability in the supply of technical grade urea/DEF and an ability to reasonably assist in a supply shortage situation.
 - There has been, and will continue to be, transparency around any coordination as a result of the involvement of government agencies and the reporting and information provision conditions that the ACCC proposes to impose. In particular, the Proposed Conduct is restricted to conduct that arises at a Proposed Approved Meeting, each of which must be convened and chaired by DCCEEW. The ACCC also has advance notice of any Proposed Approved Meeting being held, is able to attend the meetings and, under proposed Condition 3, has oversight over the outcomes of meetings. The ACCC notes that as it understands, no DEF Supplier Working Group meetings have been convened under the current interim authorisation.
 - The Proposed Conduct is a temporary measure to ensure sufficient supply of technical grade urea/DEF while the supply situation remains uncertain, particularly while existing measures to mitigate future supply disruptions (such as the government's voluntary reporting system) are being refined and longer-term domestic manufacturing projects are being developed.
 - The Proposed Conduct only enables the Parties to prioritise access to technical grade urea and DEF according to need as directed by the government, rather than the Parties being able to coordinate wholly amongst themselves. Further, in such circumstances it is likely that regardless of whether the Parties were able to jointly make decisions about prioritising supply, some customers would face reduced, or possibly no, availability of DEF. The ACCC also understands that decisions by government to prioritise certain industries have not been considered necessary to date.

- The Proposed Conduct only applies to arrangements and conduct engaged in for specific purposes, namely securing adequate supplies of technical grade urea; promoting adequate production of DEF for the Australian market; ensuring security of supply of technical grade urea and DEF for Australian businesses and consumers; or prioritising access to technical grade urea and DEF as directed by the government. The ACCC is satisfied that information exchanged and arrangements made at Approved Meetings under the previous authorisation focused on short-term responses to the DEF shortage and were unlikely to have longer-term impacts on competition.
- Participation in the Proposed Conduct is not compulsory.
- The Proposed Conduct does not extend to sharing commercially sensitive price information or any coordination in relation to price.

4.30. Despite the factors in paragraph 4.29, the ACCC considers that the scope of the Proposed Conduct, as sought by the Applicant and outlined in paragraph 1.7, is broad and imprecise regarding the specific conduct that could be engaged in. It therefore considers that the nature and extent of the coordination that could occur under the Proposed Conduct is unclear. Consequently, it considers that the nature and extent of the likely public detriment under the Proposed Conduct could be significant.

Balance of public benefit and detriment

4.31. The ACCC's assessment of whether it is satisfied that the likely public benefits of the Proposed Conduct would outweigh the likely public detriments requires a balancing exercise.¹⁷

4.32. The ACCC considers that in the event of a potential or actual supply shortage, the Proposed Conduct is likely to result in significant public benefits by assisting to mitigate the risk of, or managing, a DEF supply shortage, and by reducing community concerns that could lead to stockpiling behaviour.

4.33. The ACCC also considers that the Proposed Conduct is likely to result in some public detriment by reducing competition between the relevant DEF industry participants while managing any potential or actual DEF supply shortages. The ACCC notes that the public detriment is likely to be limited for the reasons detailed above at paragraph 4.29, including the conditions of authorisation the ACCC proposes to impose and that the Proposed Conduct will only be engaged in for specific purposes related to ensuring sufficient supply.

4.34. However, because the ACCC considers that Proposed Conduct as currently drafted is broad and imprecise, and therefore the nature and extent of the likely public detriment could be significant, it cannot be satisfied that the authorisation test is met with respect to the Proposed Conduct. The ACCC therefore considers it appropriate to propose granting authorisation for a more narrowly defined and simplified set of Authorised Conduct, which is outlined in paragraph 5.1 below.

4.35. The ACCC also proposes to include a new condition (Condition 2) which it considers necessary to sufficiently reduce the risk of detriment and to ensure that the Authorised Parties (as defined in paragraph 5.3 below) have clarity as to what specific conduct has been agreed. Where the conduct described in paragraph 5.1 will involve a contract, arrangement or understanding between the Authorised Parties, then authorisation is only granted to give effect to such a contract, arrangement or

¹⁷ *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341, at [7] (Besanko, Perram and Robertson JJ).

understanding to the extent it falls within the scope of a contract, arrangement or understanding recorded in a record made by one of the Authorised Parties (or via another nominated party) in accordance with Condition 2 below.

- 4.36. The conditions the ACCC proposes to impose, which are slightly different to those imposed with the interim authorisation,¹⁸ are intended to provide the ACCC and the government with sufficient certainty, oversight and transparency regarding any coordination agreed between the Authorised Parties. This enables the ACCC to be satisfied that any coordination does not result in unintended public detriments or extend beyond the terms of the authorisation.
- 4.37. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the narrowed Authorised Conduct defined below, with the proposed conditions, is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Authorised Conduct.

5. Authorised Conduct

5.1. The ACCC proposes to grant authorisation for the Authorised Parties to:

- (a) engage in discussions during Authorised Meetings, and make contracts, arrangements or understandings during Authorised Meetings (**Authorised Agreements**), that are solely for one or more of the following purposes:
- (i) securing adequate supplies of technical grade urea
 - (ii) promoting adequate production of DEF for the Australian market
 - (iii) ensuring security of supply of technical grade urea and DEF for Australian businesses and consumers, or
 - (iv) prioritising access to technical grade urea and DEF as directed by the Australian Government, and

(b) give effect to Authorised Agreements.

(the **Authorised Conduct**).

5.2. The Authorised Conduct does **not** permit the Authorised Parties to discuss, enter into or give effect to, any contracts, arrangements or understandings, or engage in any other conduct, that has the purpose or effect of fixing, controlling or maintaining prices for DEF or any other product or service.

5.3. For the purposes of paragraph 5.1 above:

- (a) 'Authorised Parties' are defined as:
- (i) the entities listed in **Appendix A** to this draft determination, and
 - (ii) entities **not** listed in **Appendix A** to this draft determination, but who wish to engage in the Authorised Conduct and who:
 - o have been approved by DCCEEW as a new member of the DEF Supplier Working Group, and

¹⁸ The changes to the conditions reflect the Applicant's variations described at paragraph 1.13 and also reflect the ACCC's minor changes for simplification purposes, which include integrating certain elements of the interim authorisation conditions into the definition of the Authorised Conduct.

- have notified the ACCC in writing by sending an email to exemptions@accc.gov.au that they wish to be covered by the authorisation and attaching evidence that DCCEEW has approved the entity as a new member of the DEF Supplier Working Group. Once an entity notifies the ACCC in this manner, that entity will become an Authorised Party for the purposes of this authorisation.
- (b) An 'Authorised Meeting' is a meeting of the DEF Supplier Working Group, convened and chaired by the Department of Climate Change, Energy, the Environment and Water.

Length of authorisation

- 5.4. The Act allows the ACCC to grant authorisation for a limited period.¹⁹ 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.
- 5.5. In this instance, the Applicant seeks authorisation for 4 years.
- 5.6. Whilst the ACCC notes that the supply situation has improved since the previous authorisation, including via the government implementing a 5-week stockpile of technical grade urea, the potential for a supply disruption event will remain a risk to supply until domestic manufacturing projects come online.
- 5.7. The ACCC considers that in light of the narrower Authorised Conduct for which the ACCC proposes to grant authorisation, and the conditions it proposes to impose, the period of authorisation sought by the Applicant is likely to be appropriate.
- 5.8. The ACCC also notes that the Authorised Conduct will only be engaged in for specific purposes related to ensuring sufficient supply of technical grade urea or DEF, and only under the oversight of the government.
- 5.9. The ACCC therefore proposes to grant authorisation for 4 years.

6. Draft determination

The application

- 6.1. On 21 October 2022, Brenntag Australia Pty Ltd (**the Applicant**) lodged an application to revoke authorisation AA1000598 and substitute authorisation AA1000622 for the one revoked. The application for authorisation AA1000622 was made under subsection 91(C) of the Act.
- 6.2. The application is lodged by the Applicant on behalf of itself and members of the DEF Supplier Working Group listed in **Appendix A** and their related bodies corporate. The Applicant proposes that authorisation also apply to future members of the DEF Supplier Working Group that notify the ACCC in accordance with the process set out at Part 5(c) of its application (together, the **Parties**).
- 6.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

¹⁹ Subsection 91(1) of the Act.

The authorisation test

- 6.4. 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 Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 6.5. For the reasons outlined in this draft determination and with the conditions below, the ACCC is satisfied, in all the circumstances, that the Authorised 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 Authorised Conduct, including any lessening of competition.
- 6.6. Accordingly, the ACCC proposes to grant authorisation with conditions.

Conduct which the ACCC proposes to authorise

- 6.7. The ACCC proposes to grant authorisation AA1000622 for the Authorised Parties to:
- (a) engage in discussions during Authorised Meetings, and make contracts, arrangements or understandings during Authorised Meetings (**Authorised Agreements**), that are solely for one or more of the following purposes:
 - (i) securing adequate supplies of technical grade urea
 - (ii) promoting adequate production of DEF for the Australian market
 - (iii) ensuring security of supply of technical grade urea and DEF for Australian businesses and consumers, or
 - (iv) prioritising access to technical grade urea and DEF as directed by the Australian Government, and
 - (b) give effect to Authorised Agreements.
- 6.8. For the purposes of paragraph 6.7 above:
- (a) 'Authorised Parties' are defined as:
 - (i) the entities listed in **Appendix A** to this draft determination, and
 - (ii) entities **not** listed in **Appendix A** to this draft determination, but who wish to engage in the Authorised Conduct and who:
 - have been approved by DCCEEW as a new member of the DEF Supplier Working Group, and
 - have notified the ACCC in writing by sending an email to exemptions@acc.gov.au that they wish to be covered by the authorisation and attaching evidence that DCCEEW has approved the entity as a new member of the DEF Supplier Working Group. Once an entity notifies the ACCC in this manner, that entity will become an Authorised Party for the purposes of this authorisation.
 - (b) An 'Authorised Meeting' is a meeting of the DEF Supplier Working Group, convened and chaired by the Department of Climate Change, Energy, the Environment and Water.

- 6.9. The ACCC proposes that authorisation AA1000622 be granted with the conditions detailed in paragraphs 6.16 to 6.19.
- 6.10. The ACCC proposes to grant authorisation in relation to Division 1 of Part IV of the Act, and sections 45, 46 and 47 of the Act.
- 6.11. The Authorised Conduct does **not** permit the Authorised Parties to discuss, enter into or give effect to, any contracts, arrangements or understandings, or engage in any other conduct, that has the purpose or effect of fixing, controlling or maintaining prices for DEF or any other product or service.
- 6.12. The ACCC proposes to grant authorisation AA1000622 for 4 years.
- 6.13. This draft determination is made on 11 September 2023.

Conditions of authorisation

- 6.14. The ACCC may specify conditions in an authorisation. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.²⁰
- 6.15. The ACCC proposes to grant authorisation with the following conditions.
- 6.16. **Condition 1 – Notification of Authorised Meetings:** An Authorised Party must notify the ACCC in writing, at least 2 business days before the date of every Authorised Meeting (or such shorter time as the ACCC agrees to in writing), invite the ACCC to attend the meeting, set out the time and date of the meeting, and provide a proposed agenda of the matters to be discussed at the meeting.
- 6.17. **Condition 2 – Parties to make and keep a record:** Prior to or at the time the Authorised Parties give effect to any Authorised Agreement, an Authorised Party must (either directly or via another nominated party) make and keep a contemporaneous record of:
- the parties to the Authorised Agreement
 - the nature and scope of the conduct the parties will engage in pursuant to the Authorised Agreement, and
 - the anticipated or agreed duration of the conduct the parties will engage in pursuant to the Authorised Agreement
- and make it available to the Authorised Parties as soon as practicable.
- 6.18. **Condition 3 – Reporting:** An Authorised Party must (either directly or via another nominated party), provide the ACCC with:
- the minutes of any Authorised Meeting that is convened under this authorisation, within 14 days after the meeting (or such other time as the ACCC agrees to in writing), including a description of any contracts, arrangements or understandings made at that Authorised Meeting; and
 - all information requested by the ACCC in relation to the Authorised Conduct, within a reasonable timeframe.
- 6.19. The ACCC may authorise a Committee or Division of the ACCC, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under the conditions of authorisation on its behalf.

²⁰ Subsection 88(3) of the Act.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination, by 25 September 2023. In addition, consistent with section 90A of the Act, the Applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Table 1: Parties on whose behalf the Applicant has applied for authorisation (amended application)

Name of DEF Supplier Working Group member listed in the amended application for authorisation
Brenntag Australia Pty Ltd
DGL AUSBlue Pty Ltd
Mammoth Pty Ltd (EcoBlue)
Spectrum Analytical Pty Ltd (Spectrum Fluid Technologies)
Green Emissions Australia Pty Ltd
Bluenox Pty Ltd
BP Australia Pty Ltd and its related bodies corporate
Ampol Limited
Viva Energy Australia Pty Ltd
Australasian Convenience and Petroleum Marketers Association (ACAPMA)
Suhara Logistics Australia Pty Ltd
IOR Pty Ltd
BGI DEF Pty Ltd t/a Blue Gold Industries
Global Chemical (ANZ) Pty Ltd