

13 October 2023



General Manager
Competition Exemption Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By Hand and Email exemptions@acc.gov.au

Dear Sir or Madam

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 Annexure A, being a Notification of proposed exclusive dealing including Declaration by Notifying Party;
- 2 Annexure B, being Envirospheres' supporting submissions;
- 3 **Annexure C, [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, and the ACCC's confirmation in respect of exclusive dealing notification N99687 that it did not object to the notification, 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 B.

Confidentiality

This letter and Annexures A and B 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

Notification of proposed exclusive dealing including Declaration by Notifying Party

See attached.



Notification of proposed collective bargaining with or without a boycott or exclusive dealing or resale price maintenance

Guidance in completing your notification to the ACCC

To lodge a notification of proposed:

- collective bargaining with or without a boycott or
- exclusive dealing or
- resale price maintenance

(the **notification**), you should include the information, data and documents outlined in this form. Where possible, each question should be answered fully and be substantiated with evidence. If a question is not relevant or where information is not available and cannot be reasonably estimated, please provide a brief explanation.

If the ACCC is not satisfied that the statutory test is met, it cannot allow the notification.

It is an offence to knowingly provide false or misleading information to the ACCC. Refer to section 137.1 of the *Criminal Code* (Cth).

Key points for lodging your notification

- We encourage you to consult the relevant guidelines and contact the ACCC at exemptions@accc.gov.au for a pre-lodgement discussion to clarify what information and evidence may be needed to assess your notification.
- Failure to provide sufficient information may render the notification invalid or otherwise impact the ACCC's ability to assess your notification.
- You should provide all relevant information and evidence you intend to rely on.
- Less weight will likely be given to a statement or submission that is not supported with corroborating evidence.
- A valid notification **must** contain:
 - a public version of your notification for publication on the public register. You should provide a clearly marked confidential version if you wish to claim confidentiality for parts of your notification. All confidentiality claims must be substantiated. The public version must contain sufficient information to enable public consultation on your notification
 - a signed declaration by the notifying party
 - payment of the relevant fee (\$1,000 collective bargaining; \$2,500 exclusive dealing; \$1,000 resale price maintenance).

Information

Notifying party

1. Provide details of the notifying party, including:

1.1 name, address (registered office), telephone number, and ACN

Envirospheres Pty Ltd ABN 93 077 898 849

Suite 9, 12-18 Tryon Road

Lindfield, NSW, 2070

+61 2 9416 5644

1.2 contact person's name, telephone number, and email address

c/o

Alex Hutchens

McCullough Robertson Lawyers

Level 32

25 Martin Place

Sydney NSW 2000

1.3 a description of business activities

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

1.4 email address for service of documents in Australia.

[REDACTED]

Details of the notified conduct

2. Indicate whether the notified conduct is for:

2.1 exclusive dealing (s. 47 of the *Competition and Consumer Act 2010* (Cth) (the **Act**);

~~2.2 resale price maintenance (s. 48)~~

~~2.3 collective bargaining (s. 93AB). If the notified conduct is for collective bargaining, whether the notified conduct includes a collective boycott.~~

3. Provide details of the notified conduct including:

3.1 a description of the notified conduct

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.

Please see Annexure B at paragraphs 1-11 for background, and 12-16 for further detail regarding the notified conduct.

3.2 any relevant documents detailing the terms of the notified conduct

The notified conduct is set out in an agreement between Envirospheres and Stanwell. Confidentiality is claimed over the contract between Envirospheres and Stanwell.

3.3 the rationale for the notified conduct

As a consequence of operational and safety considerations, it is not practical to

9. In assessing a notification, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously. For example, describe:

- 9.1 existing competitors
- 9.2 likely entry by new competitors
- 9.3 any countervailing power of customers and/or suppliers
- 9.4 any other relevant factors.

Envirospheres notes that in addition to it being impracticable for there to be more than one offtaker for cenospheres, there is significant competitive pressure as a result of the relevant market being, in the ACCC's own historical assessment, international. Additionally, the introduction of synthetic substitutes further increases competitive pressure.

See further at Annexure B paragraphs 17, 18, 21 and 30-38.

Public benefit

10. Describe the benefits to the public that are likely to result from the notified conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.

See Annexure B paragraphs 21-28.

Public detriment (including likely competitive effects)

11. Describe any detriments to the public that are likely to result from the notified conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments.

In light of the various public benefits identified, Envirospheres submits that there are none. See Annexure B paragraph 29.

Contact details of relevant market participants

12. Identify and/or provide names and, where possible, contact details (phone number and email address) for likely interested parties, such as actual or potential competitors, customers and suppliers, trade or industry associations and regulators.

As identified in connection with notification N99687, the likely interested parties are acquirers and potential acquirers of raw and processed cenospheres and downstream products. The number and identity of all such persons is unknown but Envirospheres expects that it is more than 100 and so contact details are not provided. Envirospheres is happy to discuss further.

Any other information

13. Provide any other information you consider relevant to the ACCC's assessment of the notified conduct.

Envirospheres submits that the notified conduct does not have the purpose, effect or likely effect of substantially lessening competition. See Annexure B at paragraphs 30-38.

~~Additional information for collective bargaining (with or without a collective boycott) conduct only~~

have more than one party harvesting cenospheres from a power station. Please see Annexure B at paragraphs 8-10.

3.4 any time period relevant to the notified conduct

The initial term of the contract is until October 2028 (subject to this notification). The Contract contains a mechanism to extend the term by a further period of 2 years. The maximum term of the agreement (and the exclusivity) will therefore end no later than October 2030.

- 4. Provide documents submitted to the notifying party's board or prepared by or for the notifying party's senior management for purposes of assessing or making a decision in relation to the notified conduct and any minutes or record of the decision made.¹**

As this is a proposed continuation of an existing arrangement, there are no such documents.

- 5. Provide the names and/or a description of the persons or classes of persons who may be directly impacted by the notified conduct (including targets in collective bargaining or boycott conduct) and detail how or why they might be impacted.**

As identified in connection with notification N99687, the affected classes of persons are acquirers and potential acquirers of raw and processed cenospheres and downstream products. The number and identity of all such persons is unknown but Envirospheres expects that it is more than 100 and so contact details are not provided. Envirospheres is happy to discuss further.

Market information and concentration

- 6. Describe the products and/or services, and the geographic areas, supplied by the notifying parties. Identify all products and services in which two or more parties to the notified conduct overlap (compete with each other) or have a vertical relationship (e.g. supplier-customer).**

As part of its consideration of notification 97609 (and subsequently N99687), the ACCC has considered in depth the market definition.

Please see Annexure B at 1-11, and 17-18.

- 7. Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.**

As part of its consideration of notification 97609 (and subsequently N99687), the ACCC has considered in depth the market definition.

Please see Annexure B at 1-11, and 17-18.

- 8. In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.**

None readily available beyond what is already described in Annexure B at 1-11, and 17-18.

¹ Notifying parties are encouraged to consult with the ACCC prior to lodgement to discuss the scope and range of documents needed in the context of the proposed conduct the subject of the notification.

14. ~~Confirm that the notifying party is not a trade union, an officer of a trade union or acting at the direction of a trade union.~~
15. ~~Provide details (name, phone number, email address) of the persons who are current members of the group (contracting parties) on whose behalf the notification is lodged. If relevant, identify the classes of persons who may become contracting parties in the future and on whose behalf the notification is lodged.~~
16. ~~Confirm each contracting party:
 - 16.1 — reasonably expects to make one or more contracts with the targets for the supply or acquisition of the relevant goods or services and
 - 16.2 — the value of each contract will not exceed A\$3 million (or any other amount prescribed by regulation) in any 12 month period.
 - 16.3 — Provide details of the basis for that expectation.~~
17. ~~If the contracting parties propose to engage in a collective boycott with respect to the targets, provide details of:
 - 17.1 — the event/s that would trigger a collective boycott
 - 17.2 — the process that would be followed
 - 17.3 — any proposed notice period to be given to the target/s prior to commencing a collective boycott and
 - 17.4 — any proposed dispute resolution procedure between the contracting parties and the targets.~~

Declaration by notifying party

Authorised persons of the notifying party must complete the following declaration.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code (Cth)*.



Signature of authorised person

Chief Executive Officer

Office held

Anthony Caccamo

(Print) Name of authorised person

This 12th day of October 2023

Note: If the Notifying Party is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Notifying Party, this fact must be stated.

Annexure B

Supporting submissions

Background

For efficiency, the background stated below is largely taken from the ACCC's Statement of Reasons to notification N97609. It is substantially similar to that contained in notification N99687.

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 Historically, 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.
- 5 As a result of the re-appointment of EnviroSpheres to acquire cenospheres from defined sources at Stanwell's coal-burning power plants in Nanango and the Meandu Mine in south-east Queensland (under the arrangement the subject of notification N99687), EnviroSpheres has been acquiring cenospheres from those sources since 2017 and is seeking to be re-appointed to continue to do so pursuant to a new agreement with Stanwell, the subject of this notification.

Coal combustion products (CCPs)

- 6 CCPs are by-products from the production of power within coal-fired power stations.
- 7 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

- 8 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.
- 9 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.
- 10 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.
- 11 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

- 12 In 2017 following an EOI process with a preference for a single off-taker of all CCPs (that is, fly ash, bottom ash and cenospheres), 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 was one of several bidders for the rights to off-take cenospheres and was successful.
- 13 Envirospheres understands that agreements have been put in place with separate off-takers in respect of the fly ash and bottom ash categories of CCPs. Subsequently, Envirospheres and Stanwell entered into a contract for the acquisition by Envirospheres of cenospheres from defined sources, which was conditional on the conduct being notified to the ACCC by Envirospheres, and which was subject to notification N99687.
- 14 The notified conduct related to Stanwell's grant of an exclusive right in favour of Envirospheres (including to the exclusion of Stanwell) to remove and/or facilitate the removal of cenospheres from the Tarong Ash Dam and Mine Voids.
- 15 The parties now wish to renew that arrangement pursuant to a new agreement. The material aspects of the new agreement are:
 - (a) Envirospheres is the exclusive off-taker of all CCPs;
 - (b) the initial term is for 5 years, with an option to extend for 2 years;
 - (c) the agreement is conditional on the conduct being notified to the ACCC by Envirospheres.
- 16 **[Confidentiality claimed].**

Market Information and Concentration

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 while this analysis is still accurate, there has been in recent years an introduction of greater competition in the market for cenospheres and other lightweight additives. This is because of the increased availability of man-made substitutes for cenospheres such as hollow or foamed glass microspheres and expanded perlite and vermiculite microspheres with similar and competing physical properties to cenospheres. This has led to an increase in competition for cenospheres relative to the circumstances that prevailed when notification N99687 was made, not only through increasing supply-side volumes but also by putting downward pressure on prices for cenospheres as customers are able to access man-made substitutes more cheaply.

Previous notification by Coal Reuse

19 EnviroSpheres notes that the ACCC has previously confirmed that it was **not** satisfied that the conduct notified under notification N97609, and N99687, respectively, was likely to have the purpose, effect or likely effect of substantially lessening competition in any market. Accordingly, the ACCC did not object to either of those two notifications.

20 EnviroSpheres submits that the circumstances of this notification support the same conclusion, in particular, because under either likely counterfactual, there would be a 1:1 substitution of an exclusive processor or offtaker, and because of the increase in competition in the market for cenospheres (and their substitutes) due to the market entry of various providers of synthetic substitutes to cenospheres.

Public benefits

Downstream supply

21 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 maintain itself as a competitive supplier into these downstream markets, against an increased level of competition from the suppliers of synthetic alternatives to cenospheres.

22 EnviroSpheres maintains a committed workforce to support the 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.

- 23 EnviroSpheres currently has the necessary boats, barges, excavators and booms in place and will, subject to this notification, be able to harvest raw cenospheres almost immediately subject to conditions precedents being met and site conditions allowing harvesting operations.
- 24 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.
- 25 For all of these reasons, the continuation 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

- 26 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, potentially causing a detrimental ecological and environmental impact if steps are not otherwise taken to address dust. Harvesting cenospheres and supplying them into downstream markets creates a comparatively ecological and environmentally-friendly solution for what is otherwise, a waste product.
- 27 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, the resource capacity of cenospheres will be lost. Avoiding this outcome by resuming harvesting of Tarong cenospheres without delay is a clear public benefit.

Generation of public-sector revenue

- 28 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

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

Additional information relevant to the ACCC's assessment

No substantial lessening of competition

The notified conduct compared with the counterfactual

- 30 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 the notified conduct is not a 'lessening' of competition because the *status quo* is being maintained.
- 31 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.

- 32 Envirospheres submitted to the ACCC in the context of notification N99687 that the Contract between Stanwell and Envirospheres represented a then-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 that notification was for a considerably shorter period;
 - (b) the exclusivity in relation to the notified conduct under that notification was 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.
- 33 Envirospheres submits that the re-appointment of Envirospheres now is simply an extension of what was already a 1:1 substitution. In present circumstances, the re-appointment of Envirospheres as exclusive offtaker merely maintains the *status quo* and does not result in a 'lessening' of competition.
- 34 Given the reasons that led to Stanwell's desire to appoint an exclusive offtaker (and in particular, the practical reality that for safety and operational reasons there can be only one offtaker operating on site), the alternative counterfactual is either that Stanwell appoints a different exclusive offtaker (which again, would result in a 1:1 substitution rather than a change in the number of offtakers), or alternatively, that Stanwell opts not to appoint an off-taker at all. This would mean that Stanwell is responsible for the harvesting and sale of cenospheres.
- 35 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.*
- 36 Envirospheres understands that Stanwell has expressed no interest in harvesting or processing cenospheres itself. Even if Stanwell did accept this responsibility, again, that would also result in a 1:1 substitution when compared with Envirospheres' exclusive off-take rights. Therefore, the re-appointment of Envirospheres as exclusive offtaker would not have the purpose, effect or likely effect of 'lessening' 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.*
- 37 Given the ACCC's historical acceptance of the need for an exclusive offtaker, the likelihood of only a 1:1 substitution under either counterfactual, and the increased competition in the market as a result of the introduction of synthetic substitutes for cenospheres by other suppliers globally, Envirospheres submits that it is necessary for it to be an exclusive offtaker to maximise its efficiencies of scale to effectively compete, and that there is no lessening of competition as a

result. Indeed, the level of competition in the market for cenospheres is higher than it has ever been.

38 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.

39 Accordingly, EnviroSpheres submits that this notification should be allowed to stand.

Annexure C (CONFIDENTIAL)

The Contract

Restriction of Publication Claimed