

For Public Register

Level 32
180 George Street
Sydney NSW 2000
Australia
www.quaylaw.com

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

Tel: + 61 422 800 415
E-mail: dave@quaylaw.com

14 March 2024

Dear Ms Menon

Re Water Services Association of Australia Limited- Application for authorisation AA1000657

1. Introduction

- 1.1 We act for Coogee Chemicals Pty Ltd (**Coogee**) in this matter.
- 1.2 Coogee wishes to respond to the letter from the Australian Competition & Consumer Commission (**ACCC**) dated 5 March 2024 in relation to the supplementary submission from Water Services Association of Australia Limited (**WSAA**), on behalf of itself and the Current WSAA Members and Future WSAA Members (**Applicants**), narrowing the scope of the conduct for which authorisation has been sought pursuant to the application for authorisation lodged with the ACCC on 13 December 2023 (**Application**).
- 1.3 Words defined in the Application have the same meanings when used in this submission unless the context suggests otherwise.
- 1.4 Coogee is strongly supportive of the Application, including the Applicant's request for interim authorisation as well as final authorisation, for the reasons set out in the previous correspondence from Coogee, as well as the additional reasons set out in this submission. This submission provides confirmation of certain factual matters from Coogee's perspective to assist the ACCC in its consideration of the Application.

2. The Proposed Conduct (as defined in the Application), will assist Coogee in relation to its plans for the construction of a new chlorine drum and cylinder filling facility in Western Australia by facilitating its ability to enter into long term supply contracts to provide the financial support for its business case.

- 2.1 As set on page 10 of the Application, the ability for the Applicants to discuss among themselves and seek to negotiate long term supply arrangements with parties such as Coogee, which would enable Coogee to plan the construction of a new chlorine drum and cylinder filling facility (**Facility**) in Australia, is critical. Without long term supply contracts in place, no commercial third party such as Coogee would be able to develop a business case for the construction of a new Facility. Coogee confirms that, from its perspective, negotiating

commercial agreements with relevant members of WSAA, on an individual basis would not be viable for the purposes of establishing its business case for capital investment in the Facility, nor the investment to establish a national supply chain for the output of the Facility. We now explain this in more detail.

- 2.2 For Coogee itself, being able to discuss and negotiate contracts that provide the commercial certainty of supply volumes to underpin the capital investment in a new Facility (and give Coogee certainty of economic returns on that investment) is very important. The proposed collective negotiation with WSAA members in different geographic locations throughout Australia will support not just the aggregate supply volumes, but also Coogee's proposed investment in a national distribution network.
- 2.3 As indicated in Coogee's previous correspondence with the ACCC dated 2 February 2024, Coogee was not previously prepared to invest in the construction of a new Facility or incur the considerable additional cost of establishing an associated national supply chain, without suitable national supply arrangements being put into place with customers located throughout Australia. In the absence of an ACCC authorisation permitting such negotiation with the Applicants, Coogee would not be prepared to take the commercial risk in constructing such a new Facility or the national supply chain investment.
- 2.4 Accordingly, Coogee agrees with the Applicants' position in its most recent submission that bilateral negotiations between individual water authorities would "be of limited (if any) utility" and instead, "only collective commitments on the part of the water sector as a whole (or a critical mass of water authorities) are likely to be sufficient to support the construction of a second packaging plant in a timely manner".
- 2.5 Coogee is therefore of the view that the Proposed Conduct for which authorisation is sought is directly causally connected to the ability to negotiate commercial agreements underpinning the investment in a new Facility (and associated national supply chain) as would be required by parties such as Coogee.
- 2.6 Coogee also notes for completeness it believes that the estimate in the letter from the Applicants' solicitors dated 2 March 2024 as to the cost of building a new Facility is conservative and also does not take into consideration the additional costs of developing a national supply chain. The ability of Coogee to enter into contracts with a geographically dispersed customer base of water authorities, which would be facilitated by the authorisation of the Proposed Conduct, is a necessary precondition to an investment in a national supply chain.
- 2.7 As Coogee noted in its letter dated 2 February 2024, there are aspects of the existing market dynamics akin to a "fortress" that would not be able to be overcome other than by the Proposed Conduct and, in particular, collective acquisition by the Applicants. Authorisation will allow for the establishment of a new Facility and for the operator of a new Facility to be able to compete in the market effectively on the merits.
- 2.8 Coogee has a reservation as to the Applicants' supplementary submission dated 2 March 2024 on page 2 where it is suggested at numbered subparagraph (e)(iii) that an ACCC authorisation would enable its members to discuss with the incumbent supplier the construction of an additional plant and, if that supplier could not commit, then WSAA members would explore the potential for an alternative Australian chlor-alkali supplier to construct a gaseous chlorine

packaging plant. Coogee believes that an authorisation for collective negotiations should be predicated on obtaining the best solution for the establishment of a new Facility on the merits through an open tender rather than starting from the position of negotiating with the incumbent, otherwise the Proposed Conduct may unintentionally entrench the existing “fortress” market structure, rather than facilitating conditions for increased competition through public authorities tendering on the merits.

3. **Counterfactual with Proposed Conduct**

- 3.1 If the Applicants were authorised by the ACCC to negotiate collective commitments and sought to engage with Coogee, Coogee would be prepared to provide its pricing to the Applicants in order for them to provide contractual certainty to Coogee to invest in the Facility. Coogee appreciates that pricing transparency on a tender for a new Facility is likely to be required in order for the Applicants to understand the pricing considerations for supply across Australia and particularly in terms of the national distribution cost.
- 3.2 By facilitating the construction of a new Facility and entry of a new competitor, the Applicants as public authorities would be mindful of their own commercial interests in maintaining competition between the builder and operator of that new Facility and the existing incumbent in order to achieve the security of supply that they and the various Australian Federal Government agencies have sought. Accordingly, it is anticipated that commercial self interest would see the Applicants seek to maintain competition for the supply of packaged gaseous chlorine and that after the establishment of a new Facility that normal competitive processes would occur.
- 3.3 In summary, if the ACCC were to authorise the Proposed Conduct there would be a real and substantive change in the underlying structure of the relevant market in Australia that would provide supply security for the Applicants and the Australian public. That change in market dynamics would also bring additional competition to benefit the Applicants and increased competition should accordingly also benefit the Australian public who are provided services by those public authorities.
- 3.4 Accordingly, in Coogee’s view the ACCC should be able to be satisfied that the nature and extent of competition afforded by the Proposed Conduct would be considerably improved compared to the future without the Proposed Conduct.

4. **Additional Information on the assessment of Public Benefits and Detriments**

- 4.1 Coogee wishes to address some issues raised as to the impact of the Proposed Conduct on cost and safety matters. Accordingly, Coogee notes the following:
 - (a) the Proposed Conduct in collective negotiations not only reduces transaction costs for the Applicants, but also any counter party such as Coogee in engaging with WSAA members. Coogee estimates that the Proposed Conduct would reduce costs of negotiation for it with multiple parties by between \$100,000 to \$150,000 in legal costs by reducing the need to negotiate multiple contracts;
 - (b) the Proposed Conduct would allow a party such as Coogee to understand individual site delivery requirements for WSAA members that would not otherwise be possible in developing a national supply chain that is efficient for both Coogee and WSAA member customers, thereby improving the efficiency of the national distribution network;

- (c) Coogee has a track record of dealing with chlorine drum imports and distribution in a safe manner and therefore there would not be any compromise in safety standards. Indeed, Coogee has significant experience in dealing with many different types of chemicals and is well placed to not only maintain current standards but bring new insights to improve current standards; and
 - (d) Coogee would be willing to work constructively with WSAA member customers to ensure that specialist equipment that would be required for national distribution matches that required by the Applicants to allow seamless alternative supply options for the industry.
- 4.2 Accordingly, while it is a matter for the Applicants who they select as a provider of a new Facility, if a decision is made by the Applicants to proceed with a new Facility and a supplier such as Coogee, not only would the Proposed Conduct result in a new meaningful competitor and supplier, but would also result in a situation where the Applicants would not face a diminution in safety of supply but would be able to enjoy additional security of supply.
- 4.3 In relation to a consideration of any public detriments arising from the Proposed Conduct, it is difficult to see any meaningful detriment to competition in the relevant time period given that at the moment the Applicants face a domestic supply monopoly and any diminution in competition for the purchasing of the relevant product arising from the collective acquisition would be outweighed by the increased competition brought by the establishment of a new Facility and supplier competing on the merits with the current incumbent monopoly.
- 4.4 In any event, in a matter such as this, it is submitted that the ACCC should be able to be satisfied, taking into account the practical and factual submissions by Coogee, that authorising the Proposed Conduct is likely to lead to conditions that would facilitate the establishment of an alternative Australian owned and operated Facility. In so doing the Proposed Conduct provides substantial public benefits in relation to safeguarding a supply chain for a product where Australian Government agencies have clearly indicated the importance of establishing additional security of supply.
- 4.5 Finally Coogee notes the submission from the Sovereign Capability and Supply Chain Division of the Department of Industry, Science and Resources dated 5 February 2024 that:
- “Noting that water treatment chemicals are a critical and vulnerable supply chain, the Department is supportive of industry led efforts to strengthen supply chain resilience and Australia’s capability to manufacture water treatment chemicals”.*
- 4.6 Coogee notes its own experiences in the difficulty of importing and distributing drums in a cost effective manner without very substantial scale and such importation may not achieve the same resilience in domestic supply that building a new Facility and distribution network would provide.

If the ACCC has question on this submission, Coogee would be pleased to answer them. Thank you for the opportunity to make this submission on this important Australian industry.

Yours sincerely

Dave Poddar

Partner
Quay Law Partners