



Draft Determination and interim authorisation

Application for authorisation AA1000657

lodged by

the Water Services Association of Australia Limited

in respect of

conduct for the purpose of improving the security of the supply chain of
gaseous chlorine in Australia

Authorisation number: AA1000657

15 April 2024

Commissioners: Keogh
Carver

Summary

The ACCC proposes to grant authorisation to enable the Water Services Association of Australia (WSAA) and its current and future members, to engage in conduct for the purpose of improving the security of the supply chain of gaseous chlorine in Australia.

Gaseous chlorine is the primary chemical used by Australian water authorities for water sanitization.

The ACCC proposes to grant authorisation for 5 years.

In broad terms, the conduct involves collective negotiation by WSAA members with potential suppliers of packaged gaseous chlorine along with information sharing to support these negotiations. The collective negotiations may lead to the construction of a new packaging facility in Australia and/or arrangements for the importation of packaged gaseous chlorine.

The ACCC considers that the conduct will increase the likelihood that a new source of supply may be established and that this is a public benefit. The ACCC also considers additional public benefits may arise from transaction cost savings and enhanced competition in the supply of packaged gaseous chlorine, where any new supply is from a party other than the incumbent.

The ACCC considers that the conduct is likely to result in limited, if any, public detriments, due to the possibility of reduced competition between the members for the acquisition of gaseous chlorine. In any event, the ACCC considers any such limited detriment is mitigated by the following:

- the proposed conduct must be for the purpose of improving the security of supply of gaseous chlorine in Australia
- the arrangements are voluntary for all parties
- no collective boycott is proposed.

The ACCC considers that the likely public benefits from the conduct outweigh any possible public detriments.

The ACCC has also granted interim authorisation to enable the WSAA and its members to begin negotiations and information sharing for the purpose of improving security of supply of gaseous chlorine in Australia, but not give effect to any contracts, while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 3 May 2024, before making its final decision.

The application for authorisation

- 1.1. On 13 December 2023, the Water Services Association of Australia (the **WSAA**) lodged application for authorisation AA1000657 with the Australian Competition and Consumer Commission (the **ACCC**). The WSAA is seeking authorisation on behalf of itself and current and future WSAA members¹ to engage in conduct for the purpose of improving the security of the supply chain of gaseous chlorine in Australia.
- 1.2. The WSAA seeks authorisation for 5 years.
- 1.3. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. 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 or is likely to 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 WSAA also requested interim authorisation to enable it to engage in the Proposed Conduct but to not give effect to any contract, while the ACCC is considering the substantive application. On 15 April 2024 the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act. The request for interim authorisation is discussed in section 6.

The Participants

- 1.5. The WSAA is an association with approximately 106 members. The application is made on behalf of the WSAA and current and future WSAA members who are water utilities that procure gaseous chlorine (the **Participants**).
- 1.6. A list of current Participants can be found in Schedule 1 of the application.

The Proposed Conduct

- 1.7. The WSAA is seeking authorisation for the Participants to engage in the following activities for the purposes of improving security of supply of gaseous chlorine in Australia for the Australian water authorities:
 - a) collective negotiation with suppliers to import gaseous chlorine into Australia;
 - b) collective negotiation with suppliers of chlor-alkali products to construct a new gaseous chlorine bottling and drumming facility in Australia, including collective negotiation of supply contracts;
 - c) sharing information about the volume of gaseous chlorine required by Current or Future WSAA Members or the price of acquiring gaseous chlorine for the purposes of (a) and (b) above; and
 - d) giving effect to contracts recording any terms collectively negotiated under (a) or (b) above

¹ Where current and future WSAA members are restricted to water utilities that procure gaseous chlorine. See Schedule 1 of the 'Application' for current WSAA members which are water utilities that procure gaseous chlorine, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

(the **Proposed Conduct**).²

1.8. The Proposed Conduct:

- does not prevent any individual Participant from exploring the acquisition of gaseous chlorine in their own right, and
- is not compulsory, and any Participant can opt out of the proposed collaboration under the authorisation.

1.9. The WSAA submits that information that might be shared between members for the purposes of collective negotiation would likely include:

- the volume of gaseous chlorine that each Participant requires and the volume of gaseous chlorine that each Participant would be willing to commit to acquire from a prospective supplier to support the establishment of a packaged gaseous chlorine plant and/or an import supply chain
- the time period for which each Participant would be willing to commit to acquire gaseous chlorine from a prospective supplier
- the price range at which each Participant would be willing to pay to acquire packaged gaseous chlorine from a prospective supplier.

1.10. For the duration of the interim and final authorisation, the Participants propose that the Proposed Conduct and Proposed Interim Conduct (as applicable) must occur at, in preparation for, or arise out of, meetings of the Working Group, which are to be observed by a representative of the Department of Climate Change, Energy, the Environment and Water.

2. Background

2.1. The information in this section is primarily taken from the WSAA's application and the submissions provided by IXOM and Coogee Chemicals.³

The Water Services Association of Australia

2.2. The WSAA submits it is the peak industry body that supports the Australian urban water industry. WSAA members provide water and sewerage services in Australia and New Zealand. The majority of WSAA members are public water authorities.

Gaseous chlorine industry

2.3. Gaseous chlorine is a chemical used to treat water for safe drinking. There are 2 forms of chlorine which are used to treat water on a large scale: gaseous chlorine and sodium hypochlorite (also known as liquid chlorine).⁴ The WSAA submits that gaseous

² WSAA, 'Supplementary submission, 2 March 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

³ The WSAA's application for authorisation and the submissions by interested parties can be found on the ACCC's public register, <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

⁴ Gaseous chlorine can be bottled/drummed as liquified compressed gas, and it is the purest form of chlorine and 8 times more potent than sodium hypochlorite.

chlorine is the water sector's preferred form of disinfectant for larger volumes of water as it is able to treat water more efficiently than liquid chlorine.⁵

- 2.4. For customers such as water authorities, gaseous chlorine is either packaged in specially designed cylinders, drums or bulk tankers for safe transportation and storage. Whilst for industrial customers, gaseous chlorine is typically piped directly to a customer.⁶
- 2.5. Chlor-alkali plants produce a range of products, which may include gaseous chlorine. The WSAA submits that in Australia there are 3 major chlor-alkali producers: Coogee Chemicals Pty Ltd (**Coogee Chemicals**), Ixom Holdings Pty Ltd (**IXOM**) and Omega Chemicals.
- 2.6. IXOM operates in the water treatment and chemical distribution market in Australia, New Zealand, Southeast Asia and North America.⁷ IXOM operates a drumming and bottling facility of gaseous chlorine in Australia, located in Laverton, Victoria.
- 2.7. Coogee Chemicals is a chlor-alkali producer located in Kwinana (WA). Coogee Chemicals is Australia's largest (by volume) manufacturer of chlorine and chlorine-based products which are supplied to industrial and water treatment customers across Australia.⁸ From its two chlor-alkali manufacturing sites in WA, Coogee Chemicals is able to supply gaseous chlorine by pipeline to industrial customers.
- 2.8. Coogee Chemicals also has a facility in Mount Isa (QLD) that stores and dispatches imported chlorine drums to meet local customer demand.
- 2.9. Coogee Chemicals does not have any installed capability for filling chlorine drums and cylinders to support supply of gaseous chlorine for water treatments. Coogee Chemicals submits that it has however made significant investment in the establishment of a chlorine drum / cylinder storage depot at its main operating site at Kwinana (WA).
- 2.10. The Kwinana (WA) site is currently used for the storage and dispatch of imported chlorine drums from Southeast Asia. However, Coogee Chemicals submits that both Mount Isa (QLD) and Kwinana (WA) import models have a high cost base due to the need to purchase chlorine from a third party.⁹
- 2.11. Chlor-alkali plants previously existed in Yarwun (QLD) (owned by Orica) and Kwinana (WA) (owned by CSPB), however these plants and their respective bottling operations closed around 2015.¹⁰ Due to their closure, IXOM's facility became the sole remaining drumming and bottling facility of gaseous chlorine in Australia.

⁵ WSAA, 'Application for authorisation', 13 December 2023, page 4, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

⁶ WSAA, 'Application for authorisation', 13 December 2023, page 5, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

⁷ See IXOM website, 'About us', available: <https://www.ixom.com/about-us>.

⁸ Coogee Chemicals, Submission, 2 February 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

⁹ Coogee Chemicals, Submission, 2 February 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

¹⁰ IXOM, Submission, 1 February 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

- 2.12. In 2020, the Australian Government released its Sovereign Manufacturing Capability Plan which, amongst other things, identified a need to improve Australia's supply chain resilience, mitigate supply chain risks and facilitate diversification of supply options for certain critical products.¹¹ Water treatment chemicals was one of the identified critical products. The program allowed manufacturing businesses to apply for grants from \$50,000 to \$2 million.
- 2.13. In 2022, both Coogee Chemicals and IXOM were granted \$2 million as part of the Supply Chain Resilience Initiative Round 2.¹² IXOM was given funding to build a 'separate contingency Australian liquified chlorine gas plant' in NSW. Coogee Chemicals was given funding to build a 'Kemerton Chlorine Bottling Facility' in WA.¹³ Decisions to proceed with new facilities are yet to be finalised.
- 2.14. With currently only one chlor-alkali drumming and bottling facility in Australia, the WSAA considers that action is required to address a national supply chain issue affecting gaseous chlorine. The WSAA considers that collective negotiations with suppliers of chlor-alkali products (domestic and international) may deliver a viable, long-term solution to help strengthen supply chain resilience.

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties including water authorities, government bodies, and chlor-alkali manufacturers. Public versions of the submissions have been published on the ACCC's public register.
- 3.2. The ACCC received 21 public submissions from interested parties.

Water Services Association of Australia members

- 3.3. The ACCC received submissions from 13 WSAA members¹⁴ of which only 1 submission was from a member who is not a Participant.¹⁵ The views expressed in these submissions strongly support authorisation of the Proposed Conduct. Submissions generally emphasised the importance of protecting the supply chain of gaseous chlorine as it is a critical product for the supply of safe drinking water.¹⁶ In summary, WSAA members were supportive of authorisation on the basis that there is

¹¹ Australian Government, 'Sovereign Manufacturing Capability Plan', 1 October 2020, available: <https://www.industry.gov.au/publications/make-it-happen-australian-governments-modern-manufacturing-strategy>

¹² The 'Supply Chain Resilience Initiative Round 2' was the second round of funding to invest in capabilities to address supply chain vulnerabilities resulting from the 'Sovereign Manufacturing Capability Plan'. See <https://business.gov.au/grants-and-programs/supply-chain-resilience-initiative-round-2>.

¹³ Australian Government, 'Supply Chain Resilience Initiative Round 2', available: <https://business.gov.au/grants-and-programs/supply-chain-resilience-initiative-round-2/grant-recipients>.

¹⁴ Suez Water Pty Ltd, Seqwater, Redland City Council, Shoalhaven Water, Toowoomba Regional Council, Icon Water Limited, Coliban Water, Water Corporation, Melbourne Water, Hunter Water Corporation, TasWater, Tweed Shire Council, and Gladstone Area Water Board, Submissions, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

¹⁵ The Queensland Water Directorate, Submission, 3 January 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

¹⁶ Shoalhaven Water, Coliban Water and DCCEEW, Submissions, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

a serious sovereign risk to the safe supply of drinking water in Australia which could be remedied by introducing a new player in the market.¹⁷

Government bodies

- 3.4. The ACCC received submissions from 5 Government bodies. These submissions were also generally in support of authorisation, particularly on the topic of increasing supply chain resilience.
- 3.5. The Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) submits that a diverse and resilient supply chain is vital to mitigate the risk of supply disruptions and ensure continuous supply, even during emergencies. DCCEEW expressed strong support for authorisation of the Proposed Conduct, noting the health, productivity, community, and national security implications associated with the dependence on a sole supplier of gaseous chlorine with no viable contingency solution.¹⁸
- 3.6. The Queensland Government's Department of Regional Development, Manufacturing and Water (**DRDMW**) submits that the recent COVID pandemic highlighted the need for the water sector to be better prepared in situations where service disruption and supply chain delivery services are impacted. DRDMW explained that the water sector relies heavily on these services to deliver water treatment chemicals to ensure that safe drinking water is supplied to communities.¹⁹
- 3.7. The Department of Home Affairs (**DHA**) submits that it supports authorisation, and urges the ACCC to consider the national security implications from reliance on one supplier. From a national security and resilience perspective, the DHA is concerned that there is a single point of failure.

Chlor-alkali manufacturers

- 3.8. **IXOM** is supportive of authorisation of collective negotiations with IXOM in relation to importation and/or a new facility, subject to the concerns raised in its submission.²⁰
- 3.9. IXOM raised concerns in relation to authorising information sharing and sought to clarify what information can and cannot be shared between WSAA members.
- 3.10. IXOM submits that the Proposed Conduct should make it clear that it does not include the collective negotiation by the WSAA members with IXOM of supply from IXOM's existing Laverton plant. This is because negotiations for supply from the Laverton plant do not form part of the purpose of the Proposed Conduct, as such negotiations would not improve gaseous chlorine supply chain resilience in Australia.
- 3.11. Although there is no suggestion by the WSAA that disclosure of confidential terms of IXOM's individual contracts with customers would be necessary for the purposes of the application, IXOM submits that the ACCC should make it clear that authorisation does not override confidentiality obligations.

¹⁷ Water Corporation, Submission, 25 January 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

¹⁸ DCCEEW, Submission, 18 January 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

¹⁹ DRDMW, Submission, 25 January 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

²⁰ IXOM, Submission, 1 February 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

- 3.12. IXOM also submits that it has progressed in the engineering design and pre-planning approval submission requirements of its Botany (NSW) facility and has spent around \$1 million in preliminary works for this facility.
- 3.13. IXOM submits that it has contingency arrangements in place and has invested substantially in a highly developed capability in its manufacturing and supply chain operations, storage facilities and workforce, in order to mitigate significant disruption to the safe supply of gaseous chlorine.
- 3.14. **Coogee Chemicals** provided 2 submissions in support of authorisation.²¹ Coogee Chemicals submits that in 2023 it completed a significant expansion of its chlor-alkali manufacturing capacity in Western Australia. Coogee Chemicals submits that it is prepared to use this expansion and invest in the construction of a drum and cylinder filling facility. However, Coogee Chemicals submits that without long term contracts in place, no commercial third party (such as Coogee Chemicals) would be able to develop a business case for the construction of a new facility. If suitable commercial arrangements are not achievable with the water treatment utilities, Coogee Chemicals will be looking to sell the new spare chlorine capacity to other consumers to recover this spent capital, and this opportunity for a second drumming chlorine facility in Australia will be missed.
- 3.15. In the absence of an ACCC authorisation permitting collective negotiations, Coogee Chemicals submits that it would not be prepared to take the commercial risk in constructing a new facility. Negotiating with WSAA members on an individual basis would not be viable as certainty of supply volumes is vital to underpin the capital investment in a new facility.
- 3.16. Coogee Chemicals is of the view that the Proposed Conduct should allow for 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.
- 3.17. Coogee Chemicals also provided its perspective of the counterfactual and additional information on the assessment of public benefits and detriments.

4. ACCC assessment

- 4.1. The ACCC’s assessment of the Proposed Conduct is conducted in accordance with the relevant authorisation test contained in the Act.
- 4.2. The WSAA have sought authorisation for the Proposed Conduct that would or might constitute:
 - (a) Cartel conduct (Division 1 of Part IV) (ss 45AD, 45AF, 45AG, 45AJ and 45AK of the Act) or
 - (b) Contracts, arrangements or understandings, concerted practices, exclusive dealing and other conduct that have the purpose, effect or likely effect of substantially lessening competition with the meaning of sections 45(1), 46(1) and 47(1) of the Act.

²¹ Coogee Chemicals, Submissions, 2 February 2024 and 14 March 2024, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/water-services-association-of-australia-limited>.

- 4.3. 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

- 4.4. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.5. The ACCC considers that the relevant areas of competition likely to be affected by the Proposed Conduct are:
- the supply of drummed and bottled gaseous chlorine in Australia
 - the acquisition of drummed and bottled gaseous chlorine in Australia.
- 4.6. While there are some substitutes for gaseous chlorine such as sodium hypochlorite, the ACCC understands that it is not a close substitute as it is less potent, requiring greater volumes and correspondingly higher transport costs and also requires different infrastructure. Furthermore, it has a shorter storage life than gaseous chlorine. Accordingly, the ACCC considers that competition does not extend to this market.

Future with and without the Proposed Conduct

- 4.7. 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.

Submissions by applicant & interested parties

- 4.8. The WSAA submits that in the future without the Proposed Conduct, there may be a material limitation on the ability of the WSAA to explore supply chain diversification in respect of gaseous chlorine due to insufficient demand volumes of individual members and/or the cost being prohibitive. Where an individual member was able to explore alternate supply options individually, the WSAA submits this would occur in a less timely and efficient manner and costs of alternative supply would likely be higher. The WSAA submits that the ability to collectively negotiate with chlor-alkali manufacturers is critical to a second bottling and drumming facility being built or being built in a timely manner. Accordingly, in the future without the Proposed Conduct, it is less likely that effective steps can be taken to improve the resilience of the gaseous chlorine supply chain.
- 4.9. IXOM submits that at the water industry's request, it has "... commenced the Botany NSW chlorine packaging plant project to provide a contingent source of packaged chlorine gas". IXOM also notes that its existing manufacturing and packaging capacity in Australia substantially exceeds current and forecast demand across all industries.
- 4.10. As discussed above (see paragraph 3.15-3.16), Coogee Chemicals submits that without certainty of supply and long term contracts, no commercial third party would be prepared to take the commercial risk in constructing a new facility.

ACCC view

- 4.11. The ACCC considers that in the future with the Proposed Conduct, the Participants will collectively share information and explore supply chain resilience options through

collective negotiation. The information that Participants intend to share as described at paragraph 1.9 will give potential suppliers demand information that would be difficult or not feasible to obtain via bilateral negotiations. This will increase the likelihood that a second bottling and drumming facility will be built and/or facilitate imports of gaseous chlorine, thereby increasing the likelihood of improving the security of supply of gaseous chlorine in Australia.

4.12. The ACCC considers that in the future without the Proposed Conduct, the WSAA and its members would likely continue individual negotiations with chlor-alkali suppliers and importers. However, the ACCC considers that such bilateral discussions would be limited to those parties with sufficient volume demand and resources and that such discussions may take longer or be less likely to successfully deliver improved security of supply than what would result from collective negotiations.

Public benefits

4.13. 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.²²

4.14. The WSAA submits that the Proposed Conduct is likely to result in the following public benefits:

- Improve the resilience of Australia's gaseous chlorine supply chain
- Reduce the risk of supply disruptions
- Efficiencies and reduced transaction costs
- Avoid prohibitive costs for smaller water authorities and higher costs of individual importation.

4.15. The ACCC has considered these public benefits under the following headings:

- Increased likelihood of improving supply chain resilience of gaseous chlorine
- Transaction cost savings.

4.16. The ACCC has also considered the following public benefit:

- Potential for enhanced competition in the supply of packaged gaseous chlorine.

Increased likelihood of improving supply chain resilience of gaseous chlorine

4.17. The WSAA submits that the Proposed Conduct will enable the Participants to improve the resilience of Australia's gaseous chlorine supply chain which is currently supplied by a single supplier.

²² 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.

- 4.18. The WSAA submits that the pooled demand of the Participants is sufficient to successfully support importation of gaseous chlorine from an overseas supplier and/or to collectively negotiate with suppliers of chlor-alkali products to build a new bottling and drumming facility in Australia.
- 4.19. The WSAA further submits that a more resilient supply chain reduces the risk of supply disruptions which could threaten the access of Australian communities to safe drinking water. This may give rise to significant public health risks, a significant loss of confidence in the water sector and may result in negative environmental impacts due to an increased reliance on plastic bottled water.

ACCC view

- 4.20. The ACCC considers that there is an increased likelihood of improving supply chain resilience by (A) construction of a new bottling facility; and/or, (B) the importation of packaged gaseous chlorine. The ACCC notes that these 2 options are not mutually exclusive and could be complementary in some circumstances, such as in managing timeframes around the construction of a new facility. The ACCC notes that previous attempts to improve supply chain resilience have not been successful thus far. These options are discussed in turn below.

(A) Construction of a new packaging facility for gaseous chlorine

- 4.21. Existing chlor-alkali producers, IXOM and Coogee Chemicals have engaged with the ACCC as part of its assessment. The ACCC notes IXOM's submission outlining some preliminary activities towards constructing a new facility in Botany, NSW. The ACCC also notes the submissions from Coogee Chemicals about the possibility of it constructing a new facility in WA. While IXOM and Coogee Chemicals appear best placed to construct a new facility, there may be others, and the Proposed Conduct does not preclude the Participants from negotiating with any such party.
- 4.22. The ACCC considers that securing contracts to underwrite investment in a new packaging facility may be difficult, particularly for a new entrant, as demand can be met by IXOM's existing Laverton facility.
- 4.23. The ACCC accepts that the motivation for Participants to support a new facility is connected to improving supply chain resilience, rather than meeting unmet demand for packaged gaseous chlorine. The ACCC considers also that a 'free rider' problem might be inhibiting construction of a new facility. An individual water authority is likely to value having the alternative (or 'backup') source of gaseous chlorine that a second domestic facility would provide. It would also likely prefer that one or more other water authorities rather than itself incur any costs associated with setting up such a facility – that is, an individual water authority may prefer to wait for one or more other water authorities to invest in a second facility and then 'free ride' on the improved security of supply that the second facility's existence creates. This might be a barrier to establishment of a second facility that could be overcome by collective negotiation under the Proposed Conduct. Specifically, collective negotiation could result in:
- a sufficiently large number of water authorities jointly committing to a second facility such that the costs to be incurred by each individual water authority are acceptably low; and

- the contractual commitments to that second facility being entered into at the same time, to reduce the risk that one or more water authorities ‘pull out’ once one or more other water authorities have contractually committed.

4.24. Further, the ACCC considers that the level of investment risk for a party wishing to construct a new facility is likely to be reduced by – prior to beginning construction – securing contracts that will allow the party to recoup a greater proportion of facility cost. The ACCC notes Coogee Chemicals’ submission in this regard, and considers that the Proposed Conduct is likely to facilitate contracts for greater quantities of packaged gaseous chlorine than in the absence of the Proposed Conduct, thereby increasing the likelihood that a new facility would be built.

(B) Importation of packaged gaseous chlorine

4.25. The ACCC notes that a limited quantity of packaged gaseous chlorine is currently imported for use by water authorities in Australia. The ACCC understands that there are a range of challenges associated with importing gaseous chlorine, including the following:

- Gaseous chlorine is classed as a dangerous good – this has implications for regulatory and safety standards and the costs of transport and storage.
- Importation of gaseous chlorine requires a buyer to secure capacity at an overseas production and packaging facility, and may include supplying the drums/cylinders to that facility which in themselves require considerable capital investment.

4.26. In light of these factors, the ACCC accepts that it may not be feasible for some water authorities to independently arrange for the importation of gaseous chlorine. This is particularly likely to be the case for smaller water authorities. As such, the ACCC considers that under the Proposed Conduct, there may be economies of scale realised which could make the importation of gaseous chlorine more likely to be feasible. However, the ACCC notes that it has not been provided with any evidence of the specific economies of scale which may be realised.

Conclusion on likelihood of improving supply chain resilience

4.27. The ACCC considers that the possibility of a new facility or importation exist in both the future with and without the Proposed Conduct, however the ACCC accepts that the Proposed Conduct increases the likelihood that a new bottling facility will be built and/or that new access to imports will be established. The ACCC considers that the Proposed Conduct is therefore likely to result in a public benefit by improving the likelihood of improving supply chain resilience of gaseous chlorine.

Transaction cost savings

4.28. The WSAA submits that the Proposed Conduct will ensure that supply chain diversification can occur in an efficient and timely manner, giving rise to greater efficiencies and reduced transaction costs for water utilities than if they sought to explore supply chain diversification on a bilateral basis.

4.29. The WSAA submits that whilst some larger water authorities may have the resources and ability to import required volumes, any such acquisition would likely result in higher costs and that the costs would be prohibitive for smaller water authorities.

4.30. Coogee Chemicals submits that the Proposed Conduct in collective negotiations not only reduces transaction costs for the Participants but also for any counter party such, as Coogee Chemicals, in engaging with WSAA members. Coogee Chemicals estimates that the Proposed Conduct would reduce costs of negotiation for it with multiple parties between \$100,000 to \$150,000 in legal costs by reducing the need to negotiate multiple contracts.

ACCC View

4.31. The ACCC notes that the Participants have not quantified the transaction cost savings or provided further detail of the efficiency claims.

4.32. However, the ACCC accepts that the Proposed Conduct is likely to provide a public benefit of transaction cost savings achieved through collective negotiation, including by reducing administrative and other costs compared to if each Participant was to undertake individual negotiations with chlor-alkali suppliers or importers, however in the absence of quantification of this public benefit, the ACCC has weighted this claim accordingly.

4.33. The ACCC also considers that the Proposed Conduct is likely to deliver transaction cost savings to a potential chlor-alkali supplier, including by reducing the costs of dealing with multiple Participants throughout the collective negotiation.

Potential for enhanced competition in the supply of packaged gaseous chlorine

4.34. The ACCC considers that to the extent the Proposed Conduct facilitates construction of a new packaging facility by a supplier other than IXOM, or more ready access to imports, it is likely to enhance competition in the supply of packaged gaseous chlorine.

4.35. While there are some substitutes for gaseous chlorine such as sodium hypochlorite, the ACCC understands that it is not a close substitute as it is less potent, requiring greater volumes with correspondingly higher transport costs and also requires different infrastructure. Furthermore, it has a shorter storage life than gaseous chlorine.

4.36. The ACCC notes gaseous chlorine is the primary chemical used by water authorities to sanitize water supplies. Given the geographically dispersed demand for gaseous chlorine across Australia, the sanitizing agent needs to be transportable, which is achieved through drums and cylinders and to a lesser extent, tankers.

4.37. Gaseous chlorine can also be transported by pipeline. However, in practice this is only useful for large industrial applications which are proximate to a chlor-alkali facility rather than for water sanitization owing to the economics associated with the cost of pipelines and the volume of gaseous chlorine demanded by geographically disparate water authorities.

4.38. The ACCC considers that an increased likelihood of improved supply options may enhance competition in the supply of packaged gaseous chlorine and this is a public benefit. However, the ACCC notes that there would not be any increase in competition if the only result of the collective negotiation was construction of an additional facility by the incumbent, IXOM and has therefore weighted this benefit accordingly.

Public detriments

4.39. 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.²³

4.40. The WSAA submits that there is limited potential for the Proposed Conduct and the Proposed Interim Conduct to give rise to public detriments, noting that:

- WSAA members do not compete in relation to the supply of any product or service as the customers they serve are designated by legislation and regulations and there is no competitive overlap between them
- whilst Participants may compete to acquire chemicals such as gaseous chlorine, the Proposed Conduct relates to collective negotiation of a single product
- the impact on the incumbent supplier is likely to be low
- a representative from the Department of Climate Change, the Environment, Water and Energy (DCCEEW) will observe meetings of the working group.

4.41. The ACCC has considered the possibility of reduced competition between the Participants for the acquisition of gaseous chlorine as a public detriment.

Possibility of reduced competition between the Participants for the acquisition of gaseous chlorine

4.42. The ACCC acknowledges that gaseous chlorine is the preferred form of disinfectant for treating Australia's water supplies and that for safety reasons, it must be packaged in specially designed cylinders, drums and bulk tankers for transport to water authorities. The ACCC notes that the Participants currently have only one domestic source of supply of packaged gaseous chlorine, IXOM.

4.43. The ACCC considers that the Participants are competitors for the acquisition of packaged gaseous chlorine and that the opportunity to collectively negotiate, rather than compete, may result in the Participants not competing to the same extent as they would in the future without the Proposed Conduct.

4.44. However, the ACCC considers that the Proposed Conduct is likely to result in limited, if any, public detriment, because:

- the proposed conduct must be for the purpose of improving security of supply of gaseous chlorine in Australia
- the arrangements are voluntary for all parties
- no collective boycott is proposed.

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

Balance of public benefit and detriment

4.45. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- increasing the likelihood of improving the supply chain resilience of gaseous chlorine by the construction of a new bottling facility and/or establishing importation of packaged gaseous chlorine
- some transaction cost savings for both the Participants and potential chlor-alkali manufacturers as a result of collective negotiation
- enhanced competition in the supply of gaseous chlorine, however only to the extent that the Proposed Conduct results in an additional supplier of packaged gaseous chlorine other than IXOM.

4.46. The ACCC considers that the Proposed Conduct is likely to result in limited, if any, public detriment due to reduced competition between the Participants for the acquisition of gaseous chlorine. The ACCC further considers that any limited detriment is further mitigated by the following:

- the proposed conduct must be for the purpose of improving the security of supply of gaseous chlorine in Australia
- the arrangements are voluntary for all parties
- no collect boycott is proposed.

4.47. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.48. The Act allows the ACCC to grant authorisation for a limited period of time.²⁴ 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.

4.49. In this instance, the WSAA seeks authorisation for 5 years. The WSAA submits this period will enable it to improve security of supply of gaseous chlorine in Australia, noting that negotiating and giving effect to agreements to acquire gaseous chlorine from overseas or to construct an additional bottling and drumming facility in Australia is expected to take several years.

4.50. The ACCC considers that the time period sought is appropriate for negotiating and giving effect to such agreements.

²⁴ Subsection 91(1)

5. Draft determination

The application

- 5.1. On 13 December 2023, the WSAA lodged application AA1000657 with the ACCC, seeking authorisation under subsection 88(1) of the Act for the Proposed Conduct (as defined in paragraph 1.7).
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. 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.
- 5.4. The application is made on behalf of WSAA and its current and future members who are water utilities that procure gaseous chlorine (the Participants). A current list of Participants is available in Schedule 1 of the application.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed 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 Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC understands the Participants are seeking authorisation to both make and give effect to contracts recording terms collectively negotiated. The ACCC proposes to amend the Proposed Conduct to include 'the making' of contracts, to clarify this.
- 5.8. The ACCC proposes to grant authorisation AA1000657 to enable the Participants to engage in the following activities for the purposes of improving security of supply of gaseous chlorine in Australia:
 - a) collective negotiation with suppliers to import gaseous chlorine into Australia;
 - b) collective negotiation with suppliers of chlor-alkali products to construct a new gaseous chlorine bottling and drumming facility in Australia, including collective negotiation of supply contracts;
 - c) sharing information about the volume of gaseous chlorine required by Participants or the price of acquiring gaseous chlorine for the purposes of (a) and (b) above; and
 - d) the making and giving effect to contracts recording any terms collectively negotiated under (a) or (b) above

(Proposed Authorised Conduct).
- 5.9. The ACCC proposes to grant authorisation in relation to:

- Division 1 of Part IV of the Act
- section 45 of the Act
- section 46 of the Act, and
- section 47 of the Act

5.10. The ACCC proposes to grant authorisation AA1000657 for 5 years.

5.11. This draft determination is made on 15 April 2024.

Conduct which the ACCC proposes not to authorise

5.12. The proposed authorisation does not extend to protect the WSAA and the Participants from legal action should they breach any confidentiality obligations in existing agreements. This means that the Participants will need to ensure that any authorised information sharing does not breach confidentiality obligations in their respective agreements with IXOM or they may face legal action for that disclosure.

6. Interim authorisation

6.1. The ACCC has decided to grant interim authorisation.

6.2. On 2 March 2024, the WSAA requested interim authorisation for the Proposed Conduct (as defined in paragraph 1.7), except that it would be limited to (a) to (c) and would not give effect to any contracts recording collectively negotiated terms until it received final authorisation. The ACCC has decided to grant interim authorisation for the following reasons:

- The ACCC considers that because no contracts will be given effect, interim authorisation is unlikely to permanently alter the market.
- The competition in the Australian supply and acquisition of drummed and bottled gaseous chlorine market is unlikely to be negatively altered as this market is currently served almost entirely by a single domestic supplier.
- For the reasons set out in this draft determination, the ACCC considers the Proposed Interim Conduct is likely to result in public benefits, which would outweigh the likely limited public detriments.

6.3. The ACCC has decided to grant interim authorisation to the Proposed Authorised Conduct, to allow the making of contracts but not to give effect to any contracts, until the ACCC has completed its substantive assessment (**Proposed Interim Conduct**).

6.4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for re-authorisation is withdrawn.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 3 May 2024. 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.