



1 February 2024

Naomi Menon
Director, Competition Exemptions
Australian Competition & Consumer Commission
Level 27, 135 King Street
Sydney NSW 2000

Email: naomi.menon@acc.gov.au

Dear Ms Menon

Re: Water Services Association of Australia Limited (WSAA) – Application for authorisation AA1000657 (the ‘Application’)

Thank you for the opportunity to provide a submission to the Australian Competition and Consumer Commission (ACCC) in relation to the Application and the WSAA's request for interim authorisation.

It is not clear to IXOM that authorisation is required for collective negotiations by the WSAA and its members with IXOM of the terms for the supply of chlorine gas by importation, or from a new offtake and bottling facility at IXOM's Botany site. If, however, the WSAA and its members wish to have the protection of authorisation, IXOM is, subject to the submissions below concerning the description of the Proposed Conduct and the protection of IXOM's confidential information, supportive of authorisation of collective negotiations with IXOM in relation to importation and/or a new facility. IXOM has been and continues to be keen to engage with the WSAA and its members on these matters.

1. Additional relevant factual information

IXOM submits that the ACCC should have regard to the following information in its assessment of the Application, including the request for interim authorisation:

- The statement in section 3.1(e) of the Application that “Progress in relation to IXOM constructing a second plant has not materially progressed” is incorrect. IXOM is well progressed in the engineering design and pre-planning approval submission requirements of the Botany liquefaction and packaging plant project and continues to progress this project. To date IXOM has expended significant internal resources,

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engaged external consultants and committed approximately \$1 million towards the project.

- The statement in section 3.1(d) of the Application that “in 2015, two bottling and drumming plants in Botany and Kwinana, Australia operated by IXOM and Coogee Chemicals respectively” is incorrect. It was the closure of the Orica Yarwun Qld and CSPB Kwinana WA chlor alkali plants, and their respective bottling operations, that led to IXOM Laverton being the sole supplier of packaged chlorine gas in Australia.
- There is reference in section 3.1 (d) to “significant issues in relation to the transporting of gaseous chlorine around Australia (which usually occurs by train)”, but it should also be noted that, notwithstanding the South Australian rail line disruptions of 2021-22, and the impact of floods on infrastructure along the north-east coast of Australia in subsequent years, IXOM has had contingency arrangements in place and sufficient capacity in its supply chains to ensure that all users of chlorine gas continued to be supplied throughout these periods. IXOM has scale and has invested substantially in a highly developed capability in its manufacturing and supply chain operations, storage facilities and workforce, ensuring that there has not been any significant disruption to the safe supply of chlorine gas during this time despite numerous external events (such as Covid, floods and rail line breakages) that have challenged supply chains in recent years. Currently there is no capacity restriction on the supply by IXOM of gaseous chlorine for the Australian water market. IXOM’s current manufacturing and packaging capacity in Australia substantially exceeds current and forecast demand across all industries. IXOM has not added more contingent chlorine packaging to date because there is no additional market to sell this product to, and hence no return on this investment. At the water industry’s request, however, IXOM has commenced the Botany NSW chlorine packaging plant project to provide a contingent source of packaged chlorine gas. As noted above, IXOM is well progressed in the engineering and planning process, with significant internal resources and capital already committed. IXOM operates a Major Hazard Facility in every state and territory in Australia (with the exception of the ACT) for the storage of chlorine gas, as required by the applicable state safety regulator. This enables IXOM to store chlorine gas close to customers and nationally coordinate stock levels across the country. Recent weather events across Australia have reinforced the criticality of this distributed storage.

2. The Proposed Conduct or the Proposed Interim Conduct (collectively, the ‘Conduct’)

a) Intent and scope of Proposed Conduct

IXOM submits that the WSAA's identification of the mitigants of the risks to the supply of drinking water in Australia and its description of the intentions of the Proposed Conduct are key considerations in the assessment of the Application for Authorisation.



Having described the risks to the supply of drinking water in Australia which it perceives, the WSAA states in 3.1(f) that the Australian water sector wishes to diversify the sources from which it acquires gaseous chlorine. The WSAA identifies the potential supply options as: the importation of gaseous chlorine into Australia from overseas; the construction of an additional drumming and bottling facility in Australia (by IXOM or another existing supplier of chlor-alkali products), or a combination of those options.

The WSAA describes (in section 1.1) the intentions of the Proposed Conduct as being to assist the water sector to improve the resilience of the supply chain for gaseous chlorine and to ensure the fair and equitable distribution of gaseous chlorine between the WSAA Members in the event of a material shortfall. The Public Benefits claimed in section 6 reflect these intentions of improved resilience through securing imports and/or a new bottling and drumming facility in Australia and the equitable and efficient allocation of chlorine gas in the event of a Material Threat to Supply.

It is the Proposed Conduct, as described in the Application, for which the WSAA seeks authorisation because it is said to result in the claimed Public Benefits. The conduct described by the WSAA is, in short:

- Collective negotiation for the importation of gaseous chlorine [3.2(a)];
- Collective negotiation with suppliers of chlor-alkali products [3.2(b)]; and
- Negotiation among the WSAA members of emergency supply arrangements [3.2(c)].

The conduct described in sections 3.2 (a) and (b) includes exchanging information concerning:

- The volumes of gaseous chlorine required by the WSAA members;
- The amount of gaseous chlorine stockpiled or ordered by the WSAA members; and
- Supplier experience and opportunities.

The conduct described in 3.2(c) includes exchanging information which facilitates the WSAA members to allocate volumes and distribute gaseous chlorine or an acceptable alternative chlorine product between the WSAA members.

The Proposed Conduct for which the WSAA seeks authorisation does not include the collective negotiation by the WSAA members with IXOM of supply from IXOM's existing Laverton chlor alkali plant. That is appropriate, because such negotiations could not achieve either of the supply options identified by the WSAA. Such negotiations could not secure imports and/or the construction of a new bottling and drumming facility in Australia and they could not result in any of the claimed Public Benefits.

IXOM submits that, for the avoidance of doubt, the description of 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.



To the extent that the Proposed Conduct involves the disclosure by the WSAA members to each other of the volume of chlorine gas which a WSAA member requires and the volume it stockpiles, IXOM considers that such information is known to that WSAA member and is not confidential to IXOM. IXOM has no objection to the WSAA members disclosing to each other the volumes of chlorine gas which they require and the volumes they stockpile as part of the Proposed Conduct.

If the Proposed Conduct is intended to extend to exchanges of other information currently known to the WSAA members, such as a member's delivery point(s) and the required frequency of deliveries, IXOM does not consider such information to be confidential and does not object to the WSAA members disclosing it to each other. IXOM submits that exchange of such information should, for the avoidance of doubt, be explicitly identified in the description of the Proposed Conduct.

b) Protection of confidential Contractual Information

The disclosure of information other than that described above, is not suggested by the WSAA to be necessary to achieve the claimed Public Benefits in the Application.

The description of the Proposed Conduct should make it clear that it is only the information which is specified in the description of the Proposed Conduct which is the subject of the Application.

The WSAA does not suggest that the disclosure of the confidential terms of IXOM's individual contracts with customers is necessary to achieve the claimed Public Benefits in the Application but the ACCC should make it clear that authorisation does not override confidentiality obligations. IXOM submits that, as in other authorisation Determinations, the ACCC should include in its Interim and Final Determinations language to the following effect:

" The ACCC also notes that authorisation provides statutory protection to ICA and its current and future members from legal action for conduct that might otherwise breach the relevant provisions of the Competition and Consumer Act 2010. It does not protect parties from legal action should they breach their confidentiality obligations in any agreements with distributors. This means that ICA and its members (small, large, and vertically integrated or not) will need to ensure that any authorised information sharing does not breach confidentiality obligations in their respective agreements with distributors or they may face legal action for that disclosure." [Authorisation No A91587]

Not only can the WSAA members not be authorised by the ACCC to breach their obligations of confidentiality, but IXOM submits that, in any event, the sharing of IXOM's confidential information between members is not necessary for the parties to achieve the Public Benefits that the WSAA has stated are likely to result from the Proposed Conduct. Any potential new importer or supplier of chlorine will be able to determine their costs of importing or supplying chlorine gas if they know the potential volume requirements of purchasers and, on that basis, they can calculate their own pricing to offer to customers in a negotiation.



3. Assessment of the claimed Public Benefits

The claimed Public Benefits appear to assume that the current arrangements ensuring the safe handling of chlorine gas would simply continue. If the current market structure were to change in the way contemplated by authorisation, the current systems of safety and the impact on current supply chains and asset allocations would need to be considered closely. Any alternate arrangements for ensuring that high levels of safety continue to be maintained in the supply, storage, transportation, handling and dosage of chlorine gas in Australia may, in fact, impose additional costs on the supply chains.

The assessment of the extent to which the claimed Public Benefits may be outweighed by detriments such as increased cost and/or inefficiency should take into account the following considerations:

- a) **Chlorine is an extremely hazardous substance.** In the most extreme case, an uncontrolled chlorine release could result in casualties of people in the vicinity of the release or downwind from the release. This necessitates a very high standard in all equipment used across the entire supply chain used to manufacture, store, transport, handle, transfer and dose chlorine, a high degree of training of personnel involved in that supply chain, and continuous investment in safety systems.
- b) **IXOM safely supplies the Australian market with chlorine gas.** The specialist equipment (e.g., vehicles, cylinders, drums, cradles, valves, capping equipment) is all specific to IXOM's customer use. Any introduction of new chlorine product into the Australian market will create a level of risk where fittings may not work, items may not fit or be able to be lifted and operators will need to be trained in the management, handling, maintenance and emergency response relating to those separate systems and equipment. Mitigating the additional risk, including additional investment in training, will impose additional cost on the supply chains.
- c) **Any benefits to the market of additional sources of chlorine gas can only be realised if the current standard of safety is upheld.** The safe supply of chlorine gas requires a complex, highly specialised supply chain and supporting local technical and emergency response capability. As noted in the Application, the transportation of chlorine gas requires specially designed cylinders, drums, bulk tankers and properly trained drivers who are able to respond appropriately in an emergency situation. The filling, maintenance, interconnectivity of these chlorine assets to customer sites requires dedicated cradles, connections and capping equipment. IXOM has made and continues to make significant annual capital investment into the purchase and ongoing specialised repair and maintenance of assets to ensure the ongoing safety of chlorine gas to the Australian water industry. A supplier of



locally manufactured gas (other than IXOM) or of imported gas would need to make investments in similarly highly specialised supply chains.

- d) **The safe supply of chlorine gas to customer sites requires individual site delivery protocols and controls.** Transport drivers must be trained to carry chlorine gas and be inducted to individual customer sites and chlorine installations. Dedicated transportation assets which deliver to specific customer sites must be assigned, and emergency response procedures designed. These protocols are established prior to the first delivery and controlled via site procedures which are monitored closely to ensure ongoing safety. The ACCC's assessment of the Public Benefits said to result from the proposed 'Emergency supply arrangements' under section 3.2(c)(B) of the Conduct should include a careful consideration of the feasibility of such Emergency supply arrangements, which would require the rearrangement of dedicated geographic supply chains for the redistribution of product between the WSAA members in the event of a Material Threat to Supply in a compressed time frame.

Yours Sincerely

Penny Griffiths

Penny Griffiths
Executive Vice President - Water & Energy (Chlor Alkali)