



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Draft Determination and interim authorisation

Application for authorisation AA1000660

lodged by

1Circle Pty Ltd & the Business Renewables Buying Group members

in respect of

Establishing a joint renewable energy purchasing group

Authorisation number: AA1000660

28 February 2024

Commissioners: Keogh

Lowe

Carver

Summary

The ACCC proposes to grant authorisation to enable the Business Renewables Buying Group to pool their electricity demand and conduct a joint procurement process for the supply of renewable energy and an equivalent quantity of large-scale generation certificates from a renewable project or projects connected to the National Electricity Market.

The Group is currently comprised of various Mercy Health entities, however further businesses are expected to join the Group from a diverse range of industries. While there is no limit proposed on the number of organisations which may join the group, authorisation is sought on the basis that total consumption of the group does not exceed 1% of electricity consumption in each State and Territory in the National Electricity Market. The joint procurement and contract management process will be administered by 1Circle, which is an energy consultancy.

The ACCC considers the pooling of the Group's electricity demand and the joint procurement process is likely to result in public benefits relative to if each organisation individually arranges their transition to renewable electricity, including from environmental benefits and transaction cost savings.

The ACCC considers there is likely to be little, if any, public detriment, particularly given that the joint electricity demand of the Group is relatively low.

The ACCC proposes to grant authorisation for 11 years.

The ACCC has also granted interim authorisation to enable the procurement process to commence while the ACCC is considering the substantive application. Interim authorisation does not extend to the Group members entering into agreements with suppliers of electricity services.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation

- 1.1. On 18 January 2024, 1Circle Pty Ltd on behalf of the Business Renewables Buying Group (the **Group**) (together, the **Applicants**) lodged an application for authorisation AA1000660 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation to establish a joint renewable energy buying group in which the Group pools their electricity demand and conducts a joint procurement and negotiation process for the supply of electricity and an equivalent quantity of large-scale generation certificates from a renewable energy project or projects connected to the National Electricity Market (**NEM**). Authorisation is also sought to enable future members to join the Group provided that the specified aggregate load threshold is not exceeded.
- 1.2. Authorisation is sought for a period of 11 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 Applicants have also requested interim authorisation to enable the Group to initiate the procurement process while the ACCC is considering the substantive application. The request for interim authorisation is considered further in section 6.

The Applicants

- 1.5. 1Circle Pty Ltd lodged the application on behalf of and for the Group in its capacity as the facilitator of the Group.

- 1.6. The Group includes:¹

- Mercy Health Australia Ltd
- Mercy Aged and Community Care Ltd
- Mercy Hospitals Victoria Ltd
- Mercy Palliative Care Ltd
- Rice Village Ltd.

- 1.7. The Applicants submit that future members of the Group may include entities from a variety of industries including but not limited to pharmaceuticals, healthcare services, manufacturing, education, property services, transport, agriculture, food processing and production, waste management, not-for-profit and others. The Applicants also submit that future members of the Group must have at least one medium to large point of electricity use in Victoria (e.g. a member can operate in multiple states/territories but at least one of the member's facilities must be located in Victoria).

The Proposed Conduct

- 1.8. The Applicants are seeking authorisation to establish a joint renewable energy buying group in which the Group pools their electricity demand and conducts a joint procurement and negotiation process for the supply of electricity and an equivalent quantity of large-scale generation certificates² from a renewable energy project or projects connected to the NEM (the **Proposed Conduct**).

- 1.9. The Group is seeking the supply of electricity from an eligible renewable energy source within the meaning of the *Renewable Energy (Electricity) Act 2000* (Cth).³

- 1.10. Specifically, the Applicants propose the following:

- The Applicants will pool their electricity demand and place a single tender into the market calling for proposals for an electricity supply arrangement and an equivalent quantity of large-scale generation certificates from a specific renewable energy project or projects connected to the NEM.

¹ Mercy Health provides hospital care, aged care, mental health programs, specialist women's healthcare, early parenting services, palliative care and home and community care in Victoria and New South Wales.

² Defined as a certificate created under Subdivision A of Division 4 of Part 2 of the *Renewable Energy (Electricity) Act 2000* (Cth). Further information on LGCs is available here: <https://www.cleanenergyregulator.gov.au/RET/Scheme-participants-and-industry/Power-stations/Large-scale-generation-certificates>.

³ Section 17 of the *Renewable Energy (Electricity) Act 2000* (Cth) provides a list of the eligible renewable energy sources. The MoU indicates that the Group wishes to exclude biomass projects with native timber as the energy source and any others agreed amongst them.

- The electricity supply and the large-scale generation certificates may be provided by a single retailer (if the retailer is vertically integrated) or by a consortium including a retailer and renewable power developer.
- 1Circle will manage the procurement process for the Group, including the contracting of energy and/or legal advisors as necessary.
- The Group members will individually enter into electricity and large-scale generation certificate supply agreements with the chosen retailer on the same (or substantially similar) terms and conditions.
- If necessary, the Applicants will enter into a further agreement to create a more detailed and binding legal framework for the delivery of the Group.

1.11. The Applicants are seeking authorisation to enable future members to join the Group provided that the specified aggregate load threshold is not exceeded. While there is no limit proposed on the number of organisations which may join the group, authorisation is sought on the basis that total consumption of the group does not exceed 1% of electricity consumption in each State and Territory in the NEM.

2. Background

- 2.1. The Business Renewables Buying Group Program was established by a group of Victorian Councils⁴ to provide a replicable procurement process for medium to large electricity consumers (from a range of industries, such as those noted at paragraph 1.7) to enter into renewable power purchase agreements.
- 2.2. The program involves the formation of multiple buying groups consisting of energy consuming businesses that have expressed an interest to transition to renewable energy. Each buying group conducts their own competitive procurement process.
- 2.3. In March 2023, the ACCC granted authorisation to the first buying group, allowing an initial 6 organisations to collectively procure renewable energy.⁵ The program has since been endorsed by Victorian Councils to form a second buying group (the subject of the current application), with 1Circle as the appointed facilitator.

3. Consultation

- 3.1. The ACCC invites submissions commenting on the application and in response to this draft determination.

4. ACCC assessment

- 4.1. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result.

⁴ The Project has over 30 Victorian Councils leading in the recruitment of businesses into the buying group and funding the Project Facilitator. Yarra City Council is the nominated Council lead to co-ordinate Council participation and work with and oversee the operation of the project facilitator (1Circle).

⁵ See authorisation [AA1000634](#), 29 March 2023. The group members included Anglicare, Uniting, the Australian Catholic University, the Melbourne Convention Centre, April Sun Farms, and Jarden Australia.

Relevant areas of Competition

- 4.2. The Applicants submit that the relevant areas of competition are:
- the generation and wholesale supply of electricity in the NEM or, in the alternative, in one or more regions of the NEM, including Victoria
 - the retail supply of electricity to commercial and industrial end consumers in Victoria.
- 4.3. In making its assessment of the Proposed Conduct, the ACCC considers that the relevant areas of competition are likely to be the acquisition, as well as the generation, wholesale and retail supply, of electricity within the NEM (in particular in Victoria and NSW) from various renewable energy sources.⁶

Future with and without the Proposed Conduct

- 4.4. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.5. The ACCC considers that absent the Proposed Conduct, it is likely that each of the Group members will individually seek to negotiate, enter into and administer individual contractual agreements for the supply of electricity with wholesale electricity retailers and that such agreements are unlikely to be on common terms. The ACCC considers that, without the Proposed Conduct, members of the Group may be unable to organise supply of electricity from renewable energy sources or may do so on less favourable terms. This is because they are unable to pool their demand and as the Applicants submit there is a lack of precedent by energy users wishing to buy renewable energy. The Group members also lack the experience in effectively buying from the market.

Public benefits

- 4.6. 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.⁷

- 4.7. The ACCC has considered the following public benefits:
- environmental benefits through a reduction in greenhouse gas emissions, an increased demand for renewable energy and an increased incentive for investment in renewable energy capacity
 - transaction cost savings arising from a collective negotiation process, and
 - increased competition for the supply of electricity to the group members.

⁶ However, the ACCC considers it is not necessary to precisely define the relevant markets for the purpose of considering the application for authorisation.

⁷ 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.

- 4.8. The Applicants submit that a project review was conducted on the performance of the first buying group (under authorisation AA1000634) which found that participants experienced lower cost of power than would have occurred by participants independently buying, lower transaction costs for procurement and increased decision confidence and likelihood of completion (in buying renewable energy).

Environmental benefits

- 4.9. The ACCC has previously recognised that establishing renewable energy buying groups can result in environmental benefits through a reduction in greenhouse gas emissions as a result of members being able to achieve a faster or more extensive transition to renewable energy at lower cost and with less risk than if they each sourced renewable electricity individually.
- 4.10. To the extent that the Proposed Conduct enables or assists the Group members in meeting their renewable energy targets and results in lower cost of electricity supply to Group members, thereby facilitating a faster or greater take-up of renewable energy by the Group members in place of fossil-fuel-generated electricity, the ACCC considers that it is likely to result in a public benefit through a reduction in greenhouse gas emissions of the Group members.
- 4.11. The Applicants submit that the Proposed Conduct will increase the demand for renewable energy generation and promote new investment in renewable energy which will promote economic, environmental and social benefits. The Applicants further submit that the combined electricity load of the Group may incentivise new generation of renewable energy capacity. The Applicants note that, if the combined electricity demand of the Group increases, the likelihood of reaching a scale sufficient to incentivise new investment increases.
- 4.12. The ACCC acknowledges that an increase in the demand for renewable energy, particularly in light of Australia's long-term plan to reduce emissions,⁸ could have the result of incentivising the generation of new renewable energy capacity by electricity generators. The ACCC also acknowledges that the greater demand for renewable electricity arising from the emergence of buying groups such as this one may result in an increased willingness and appetite of retailers to participate in these kinds of arrangements. However, the ACCC considers that the benefit from the Proposed Conduct itself will be small given the Group's electricity consumption, even at its highest, represents only a relatively small portion of electricity demand in both the NEM and any individual State or Territory.

Transaction cost savings

- 4.13. The Applicants submit that the Proposed Conduct will lead to transaction cost savings for the Group members and potential suppliers as a result of the joint tender process. This is because the costs will be shared amongst the Group members. The Applicants note that if each Group member were to individually tender and contract their electricity supply, it would take more time to negotiate each contract and greater cost to obtain technical, legal or other advice.
- 4.14. The ACCC accepts that the Proposed Conduct is likely to provide transaction cost savings, including by reducing or eliminating the duplication of administrative, technical, legal or other costs compared to if each Group member was to undertake individual negotiations with electricity suppliers.

⁸ For example, [Australia's Long Term Emissions Reduction Plan](#).

4.15. The ACCC also considers that the Proposed Conduct is likely to deliver transaction cost savings to potential electricity suppliers, including by reducing the costs of dealing with multiple Group members as part of each procurement process.

Increased competition for the supply of electricity to Group members

4.16. The Applicants submit that the Proposed Conduct will increase competition for the retail supply of electricity to the Group members; specifically, the Applicants consider that the combined electricity demand of the Group and the length of electricity supply contracts⁹ being sought are likely to encourage more competitive pricing and terms than without the Proposed Conduct. The Applicants submit that this increase in competition may also assist in ensuring reliability of supply and greater price certainty for the Group members.

4.17. The ACCC considers that the Group may be able to attract greater interest from potential electricity suppliers by pooling their electricity demand as part of the collective tender process, compared to a scenario where each of the Group members individually negotiates with suppliers.

4.18. If the Proposed Conduct stimulates more competition between suppliers to supply to the Group members, the ACCC considers that this is likely to result in better terms and conditions (including lower prices) for the Group members.

ACCC conclusion on public benefit

4.19. The ACCC considers that the Proposed Conduct is likely to result in public benefits from:

- environmental benefits through a reduction in greenhouse gas emissions as a result of the Group members being able to achieve a faster or more extensive transition to renewable energy at lower cost and with less risk than if they each sourced renewable electricity individually, and
- transaction cost savings for both the Group members and potential retail electricity suppliers as a result of the joint tender process.

4.20. If the Proposed Conduct stimulates more competition between suppliers to supply to the Group members, the ACCC considers that this is likely to result in better terms and conditions (including lower prices) for the Group members.

Public detriments

4.21. 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.*¹⁰

4.22. The Applicants submit that they do not believe there is any public detriment that is likely to result from the Proposed Conduct, noting that:

- The tender process will be open and transparent and will ensure there will be competition between electricity suppliers to secure the contracts.

⁹ While the length of these agreements will be determined as part of the procurement process, the Applicants submit that it is common for agreements to be for 5 to 7 years.

¹⁰ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- The Proposed Conduct involves a relatively small proportion of electricity demand for the NEM, Victoria and NSW, and accordingly would not have a material impact on competition.¹¹
- Any information shared between the Group members will be limited to the acquisition of electricity and the implementation of the Proposed Conduct. The Applicants submit that, given the Group members are not competitors (in the services they provide) and their alignment is centred on the purchase of renewable energy, the likelihood of public detriment from an increased risk of coordination between the Group members is considered negligible.

4.23. The ACCC considers that:

- The aggregate electricity consumption of the Group, inclusive of any future members, will be limited to 1% in each State and Territory and will not achieve a large enough proportion of electricity consumption in either the NEM or an individual State or Territory to create competition issues.
- While some of the current and future members of the Group may compete downstream, the ACCC considers there is a low risk that coordination as part of the Proposed Conduct could lead to broader coordination between the Group members. Any information-sharing authorised as part of the Proposed Conduct is confined to discussions regarding the joint electricity tender process and any consultation that may arise after the tender will be limited to aspects of the ongoing management of the contracts.
- 1Circle (in its role as the facilitator of the Group and with responsibility for managing legal issues) will have oversight of the Group and act as an intermediary between Group members, which will further mitigate any risk of unauthorised coordination between the Group members.

4.24. Taking these factors into account, the ACCC considers that any likely public detriment arising from the Proposed Conduct will be minimal.

Balance of public benefit and detriment

4.25. 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 the minimal, if any, likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.26. The Act allows the ACCC to grant authorisation for a limited period of time.¹² 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.

4.27. In this instance, the Applicants seek authorisation for 11 years.

¹¹ The Applicants submits that the Group's combined electricity demand in the financial year 2023 amounts to less than 0.265% of total electricity consumption in the NEM, 0.46% of total consumption in Victoria, 0.22% of total consumption in New South Wales, 0.092% of total consumption in Queensland, 0.43% of total consumption in South Australia and 0.45% of total consumption in Tasmania.

¹² Subsection 91(1).

- 4.28. The Applicants submit that this period would cover the expected term of the tender process and the maximum term of each electricity supply agreement.¹³ The Applicants submit that agreements are commonly for 5 to 7 years, however 10-year offers are not uncommon and can provide attractive conditions.
- 4.29. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC proposes to grant authorisation for 11 years.

5. Draft determination

The application

- 5.1. On 18 January 2024, 1Circle Pty Ltd on behalf of the Business Renewables Buying Group lodged application AA1000660 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicants seek authorisation to establish a joint renewable energy buying group in which the Group pools their electricity demand and conducts a joint procurement and negotiation process for the supply of electricity and an equivalent quantity of large-scale generation certificates from a renewable energy project or projects connected to the NEM (the **Proposed Conduct**).
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 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 proposes to grant authorisation AA1000660 to enable the Applicants to engage in the Proposed Conduct described in paragraphs 1.8 to 1.11 and defined as the Proposed Conduct.
- 5.8. The ACCC proposes to grant authorisation AA1000660 in relation to Division 1 of Part IV of the Act and section 45 of the Act for 11 years.
- 5.9. This draft determination is made on 28 February 2024.

¹³ The Applicants note that this represents their best estimate as to the minimum period of purchasing commitment by each Group member that would be required to secure pricing.

6. Interim authorisation

- 6.1. At the time of lodging the application, the Applicants requested interim authorisation to enable the Group to initiate the electricity procurement process while the ACCC is considering the substantive application.¹⁴ The Applicants submit that granting interim authorisation will encourage retailer confidence, ensuring an equitable process and providing further credibility to the Proposed Conduct.
- 6.2. The ACCC has decided to grant interim authorisation to enable the Applicants to initiate the joint electricity procurement process (for example, to prepare and release a joint invitation to tender for the supply of electricity services and jointly evaluate tenders, including negotiating with potential suppliers, on behalf of the Group members). Interim authorisation does not extend to the Group members entering into agreements with suppliers of electricity services.
- 6.3. In granting interim authorisation, the ACCC considers that:
- Granting interim authorisation would not permanently alter the competitive dynamics of any markets or inhibit the markets from returning to their current state if the ACCC later denies final authorisation. The Group members would not have entered into any supply agreements and could return to individual bargaining if necessary.
 - Interim authorisation would facilitate commencement of the joint tender process and negotiation of the terms and conditions of the electricity supply agreements and, if the ACCC grants final authorisation, would allow the arrangements to be established earlier than would otherwise be the case.
 - As outlined in paragraphs 4.6 to 4.25, the ACCC has formed the preliminary view that the Proposed Conduct is likely to result in public benefits, with minimal public detriments and that it is not likely to materially impact competition nor confer any significant market power to the Group members.
 - Potential electricity suppliers, and competitors to the individual businesses in the Group, are unlikely to be harmed if the ACCC grants interim authorisation.
- 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 authorisation is withdrawn.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination. 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.

¹⁴ The Applicants advise that activities conducted under the interim authorisation will include pricing requests, electricity load forecasting, cost evaluation, market testing and legal review of terms and conditions.