



# Draft Determination and interim authorisation

Application for authorisation AA1000450  
lodged by  
the Large Format Retail Association  
to collectively purchase electricity  
Authorisation number: AA1000450

Date 20 September 2019

Commissioners:

Keogh

Rickard

Cifuentes

Court

Ridgeway

## Summary

The ACCC proposes to grant authorisation to enable the Large Format Retail Association and its current and future members to pool their electricity demand and collectively tender with electricity suppliers on the basis of that aggregated demand.

The ACCC proposes to grant authorisation for 11 years.

The ACCC considers that the collective arrangements are likely to result in significant public benefits, including transaction cost savings and facilitating greater competition for the supply of electricity to participating LFRA members. There is likely to be minimal detriment to the public, the combined electricity demand of the LFRA members will remain below 1% of consumption in each state or territory.

The ACCC invites submissions on the application and in relation to this draft determination by 11 October 2019, and expects to release a final determination in November 2019.

## 1. The application for authorisation

- 1.1. On 6 August 2019 the Large Format Retailing Association (**LFRA**), on behalf of itself and its current and future members (together, the **Applicants**), lodged an application for authorisation AA1000450<sup>1</sup> with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The LFRA proposes to form a buyers group comprising its current and future members that wish to participate by pooling their electricity demand (**Participating Members**). The LFRA is seeking authorisation (including interim authorisation) to enable the Participating Members to collectively invite tenders from, negotiate with, and engage in joint operation and administration activities and decisions involving, electricity suppliers, on the basis of their aggregated electricity demand (the **Proposed Conduct**). The LFRA does not propose to engage in collective boycott activity as part of the Proposed Conduct.
- 1.3. The LFRA is also seeking authorisation for future members of the purchasing group, provided aggregate demand of the purchasing group does not exceed 1 per cent of total electricity consumption in any State or Territory in Australia.
- 1.4. The LFRA is seeking authorisation for 11 years.
- 1.5. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

## 2. Background

### Electricity supply

- 2.1. States and territories in Australia are covered by three electricity regulatory arrangements in which electricity is generated and retailed:

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<sup>1</sup> This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

- National Electricity Market (**NEM**) – electricity market comprised of five interconnected regions of Queensland, New South Wales (which includes the ACT), Victoria, Tasmania and South Australia
  - Western Australian Wholesale Electricity Market (**WEM**)
  - The Interim Northern Territory Electricity Market.
- 2.2. Each of these is unconnected to the others; electricity consumed in each is generated within that system.
- 2.3. The number of electricity retailers in each market varies, with different retailers operating in each of the systems.

## Parties to the Proposed Conduct

- 2.4. The LFRA is the national peak industry association for Australia’s large format (‘Big box’) retail sector. Members of the LFRA include large format retailers, as well as owners, developers, investors and service suppliers associated with the large format retail industry.
- 2.5. Currently there are 41 Participating Members who have agreed to be part of the buyers group. The LFRA has described the Participating Members as ‘mostly large-scale users of electricity which operate in the Large Format Retail sector’. A list and short description of the current members is found at **Attachment A**.
- 2.6. New Participating Members are able to join the buyers group in the future if they are members of the LFRA and provided the total electricity demand of the group does not exceed one per cent of total electricity consumption in any state or territory.

## Industry Context and similar authorisations

- 2.7. In June 2018, the ACCC released its final report on an Inquiry into retail electricity pricing in Australia. The ACCC noted that businesses have sought authorisation to collectively bargain for electricity as a way to combat higher retail electricity prices. It also noted that it was generally supportive of buying groups for electricity, particularly where they are structured in such a way as to provide scale and a customer base that will help underwrite new investment in generation capacity.
- 2.8. The ACCC has previously granted authorisation for three collective bargaining or joint purchasing arrangements for electricity:
- Melbourne City Council & Ors (2016)
  - South Australian Chamber of Mines and Energy (SACOME) (2017)
  - Eastern Energy Buyers Group (2017).
- 2.9. In each of these cases, the ACCC found that the joint buying of electricity would be likely to result in public benefits including transaction cost savings and promoting increased competition for the supply of energy to the applicants. Little, or no, public detriment was considered likely to result.

## 3. Rationale for the Proposed Conduct

- 3.1. The LFRA submits that the application for authorisation is being made in response to rapidly increasing prices for electricity faced by Participating Members. The LFRA believes that pooling their electricity demand will allow the group to achieve sufficient

scale to be able to access more competitive offers than they would otherwise achieve individually.

## 4. Consultation

- 4.1. The ACCC invited submissions from a range of potentially interested parties including industry participants, industry representative bodies, consumer advocates and government.
- 4.2. The ACCC received three submissions in support of the application for authorisation, including from:
  - Simec Energy – an electricity retailer in the NEM. Simec noted that it was one of the retailers awarded a contract through the SACOME collective tendering process (as authorised A91567 & A91568), and that the aggregate load of the SACOME participants allowed Simec to supply this demand with the introduction of new renewable generation. Simec submitted that this conduct would similarly promote and underpin more efficient market operation and more competitive energy solutions being proposed.
  - AGL – acknowledged the views of the LFRA regarding the proposed public benefits that could arise from potential transaction cost savings.
  - The Australian Retailers Association - (an industry body of which many of the Participating Members are also members) supported the application as a genuine attempt to address what is generally the third largest expense in a retail business.
- 4.3. The ACCC did not receive any submissions opposing the application.
- 4.4. The submissions are available on the public register for this matter.

## 5. ACCC assessment

- 5.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 5.2. The Applicants have sought authorisation for the Proposed Conduct on the basis that it would or might involve making or giving effect to a cartel provision within the meaning of Division 1 of Part IV of the Act, or may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 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 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 (authorisation test).
- 5.3. In making its assessment of the Proposed Conduct, the ACCC considers that:
  - the relevant areas of competition are likely to be the wholesale and retail supply of electricity in the NEM, WEM, and Northern Territory Electricity markets. The ACCC has also considered the downstream retail markets in which Participating Members operate.

- absent the Proposed Conduct, it is likely that each of the Participating Members will individually tender, enter into, and administer, contracts for the supply of electricity on a stand-alone basis.

## Public benefits

5.4. 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 the term should be given its widest possible meaning, and includes:

*...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.<sup>2</sup>*

5.5. The LFRA submits that the Proposed Conduct will lead to public benefits including:

- transaction cost savings
- increased competition for the supply of electricity
- increased incentives for investment in generating capacity
- increased competition in downstream supply of goods or services by Participating Members.

5.6. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

### Transaction cost savings

5.7. The ACCC accepts that collective tendering for, and administration of contracts regarding, the supply of electricity is likely to result in public benefits from transaction cost savings compared to the situation where individual negotiations and contract administration is conducted by Participating Members.

5.8. These savings can arise from reducing the total time of negotiation and creating the ability to share costs in obtaining legal and technical advice to inform the negotiation.

### Greater competition and investment in the supply of electricity

5.9. The ACCC considers that the combined electricity demand of Participating Members, as well as the length of the supply agreements the Applicants are seeking (3 to 5 years, with a potential extension of 3 to 5 years), are likely to encourage increased competition amongst electricity suppliers in responding to the tender requests and may underwrite investment in an innovative electricity supply project or encourage a new supplier to enter.

### Increased competition in downstream supply of goods or services

5.10. The LFRA submits that, to the extent that the Proposed Conduct results in Participating Members acquiring electricity at a lower prices, and achieving transaction cost savings, there is the potential for Participating Members to compete more vigorously in the supply of goods or services to their own customers.

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<sup>2</sup> 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.

5.11. As noted above, the ACCC considers that there is likely public benefit in greater competition in the supply of electricity to the Participating Members. The extent to which this will enable the Participating Members to compete more vigorously, to invest more in their business or to strengthen their ongoing viability depends on a many factors, not just potentially obtaining electricity at lower prices. Although the ACCC notes the ARA's submission that electricity costs are a substantial expense in a retail business.

## Public detriments

5.12. 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.*<sup>3</sup>

5.13. The LFRA does not believe that the Proposed Conduct will result in any material public detriment; and submits that the risk of any public detriment is minimal, including because:

- the tender process would be open and transparent and will ensure there will be competition between electricity suppliers for the contracts
- the Proposed Conduct involves relatively small proportions of electricity demand in each of the relevant electricity markets. Participating Members' combined electricity demand in calendar year 2018 amounted to less than 0.48% of total electricity consumption in the NEM, 0.48% of total consumption in the WEM, and 0.33% of total consumption in the Northern Territory<sup>4</sup> and
- any information sharing between Participating Members will be limited to the acquisition of electricity the subject of the Proposed Conduct.

5.14. The ACCC notes that the Applicants have applied for authorisation for future participating members, and that the addition of new Participating Members may increase the aggregate demand of Participating Members. However, the ACCC notes that new members can only join the buying group if the aggregate demand of Participating Members would remain below one per cent of electricity consumption in each state or territory. The ACCC considers that this means it is unlikely that the aggregate demand will achieve a large enough proportion to present competition concerns.

5.15. The ACCC also notes that a number of the Participating Members are competitors, not just for the acquisition of electricity, but in downstream retail supply. This means there is a potential risk that coordination in respect of the Proposed Conduct could lead to additional coordination between the members. However, any information-sharing authorised as part of the Proposed Conduct will be confined to discussions regarding the electricity joint tender process, and any ongoing consultation that would arise after the tender(s) is limited to aspects of the electricity supply agreements such as performance and pricing reviews. Participating Members will also continue to face discipline from competition in the downstream markets in which they participate.

5.16. Taking this into account, the ACCC considers that any likely detriment arising from the Proposed Conduct will be minimal.

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<sup>3</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>4</sup> based on the total consumption of electricity in each market during Financial Year 2017-18.

## Balance of public benefit and detriment

5.17. The ACCC is satisfied that the Proposed Conduct is likely to result in public benefits from transaction cost savings and increased competition and that these public benefits would outweigh the minimal, if any, detriment to the public from the Proposed Conduct.

## Length of authorisation

5.18. The LFRA has sought an 11 year authorisation. This period is intended to cover the length of conducting and finalising the tender process, an initial term of the supply agreements, and an additional term to cover a possible extension of the agreements.

5.19. The ACCC considers it appropriate to grant authorisation for 11 years considering its initial assessment of the public benefits and detriments likely to result from the Proposed Conduct.

## 6. Draft determination

### The application

- 6.1. On 26 June 2019, the LFRA lodged application AA1000450 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 6.2. On 23 August, the LFRA clarified that it did not consider any of the Proposed Conduct was likely to contravene the exclusive dealing provisions of the Act and, on 10 September 2019, confirmed that it was not seeking authorisation of the Proposed Conduct in relation to section 47.<sup>5</sup>
- 6.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 6.4. For the reasons outlined in this draft determination, based on the information before it the ACCC is satisfied that the authorisation test in subsections 90(7) and 90(8) of the Act is met. That is 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 would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 6.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 6.6. The ACCC proposes to grant authorisation AA1000450 to enable LFRA and its Participating Members to pool their electricity demand and collectively invite tenders from, negotiate with, and engage in joint operation and administration activities and decisions involving, electricity suppliers on the basis of that aggregated demand (the **Proposed Conduct**).
- 6.7. The Proposed Conduct may involve making or giving effect to a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

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<sup>5</sup> For correspondence regarding this amendment, see the ACCC Public Register.

6.8. The ACCC proposes to grant authorisation AA1000450 for 11 years.

6.9. This draft determination is made on 20 September 2019.

## 7. Interim authorisation

7.1. The LFRA requested interim authorisation to enable them to undertake the initial stages of the Proposed Conduct while the ACCC is considering the substantive application.

7.2. The ACCC has decided to grant interim authorisation to allow the Applicants to:

- collectively consider potential electricity supply options
- conduct the tender process and
- negotiate with preferred tenders.

7.3. Interim authorisation does not extend to the execution of any contracts.

7.4. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

## 8. Next steps

8.1. The ACCC now invites submissions in response to this draft determination **by 11 October 2019**. 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.