



Draft Determination and interim authorisation

Application for authorisation AA1000455

lodged by

RMIT & Ors

in respect of establishing a joint renewable energy purchasing group

Authorisation number: AA1000455

Date 21 November 2019

Commissioners: Rickard
Court
Keogh
Ridgeway

Summary

The ACCC proposes to grant authorisation to enable current and future members of a proposed joint renewable energy purchasing group to pool their demand and collectively tender for an electricity supply arrangement.

The ACCC proposes to grant authorisation for 15 years.

The ACCC has also granted interim authorisation to enable the group to conduct the joint tender, but not enter into contracts, while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 5 December 2019 before making its final decision.

1. The application for authorisation

- 1.1. On 24 October 2019, Royal Melbourne Institute of Technology (**RMIT**) on behalf of itself and the other businesses listed at paragraph 1.3 below (the **Applicants**) lodged application for authorisation AA1000455 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for 15 years to conduct a collective tender process to jointly negotiate the terms and conditions, and manage, agreements with an electricity supplier. The application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC can grant authorisation which 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.

The Applicants

- 1.3. The Applicants are:
 - RMIT University
 - Fulton Hogan Australia Pty Ltd (construction products and services)
 - Mondelez Australia Pty Ltd (food manufacturer)
 - Citywide North Melbourne Asphalt Pty Ltd (asphalt manufacturer and supplier)
 - Melbourne City Council (project facilitator)
 - Deakin University
 - ISPT Pty Ltd (superannuation property investor), and
 - Cbus Property Pty Ltd (superannuation property investor).

(the **Applicants**)

- 1.4. Although the Melbourne City Council is not a member of the tendering group and will not enter into the resulting electricity supply agreements, the Melbourne City Council is included as an Applicant as it is providing assistance to the group.
- 1.5. Melbourne City Council is a founding member of a separate energy purchasing group (**Melbourne Energy Renewable Project 1**), as discussed at paragraph 2.2.

The Proposed Conduct

- 1.6. The Applicants are seeking authorisation to conduct a collective tender process to jointly negotiate the terms and conditions of electricity supply agreements (**Melbourne Renewable Energy Project 2**). This involves establishing a joint electricity purchasing group, whereby the Applicants (other than Melbourne City Council) would pool their electricity demand and place a single tender calling for proposals for an electricity supply arrangement and an equivalent quantity of large-scale generation certificates (**LGCs**)¹ from a specific renewable energy project connected to the National Electricity Market (**NEM**). The Applicants have also requested that authorisation extend to entities which may join the group in the future, provided that the total electricity consumption of the group does not exceed 1% of Victoria's electricity consumption.
- 1.7. The Applicants expect that the successful tenderer would enter into Retail Service Agreements with each member of the group, purchasing electricity generation from the NEM. The successful tenderer would also enter into a LGC Supply Agreement with each member of the group purchasing an equivalent quantity of LGCs from a specific renewable energy project. The Applicants submit that this would collectively support the development of a new 'utility-scale' renewable-energy system connected to the NEM. The system must be capable of supplying a quantity of carbon neutral electricity into the NEM that is equivalent to the quantity purchased by the Applicants.
- 1.8. Specifically, the Applicants seek authorisation to:
 - (a) jointly conduct a tender process to identify and select an electricity retailer that will supply electricity to the Applicants and future members of the Melbourne Renewable Energy Project 2, on the basis that the supplier (individually, or with a developer) will supply LGCs from a specific renewable energy project connected to the NEM
 - (b) individually, enter into a Retail Service Agreement and LGC Supply Agreement with the successful tenderer on the same general agreed terms and conditions for the acquisition of energy from the successful retailer (who may be a sole bidder, or may be a member of a retailer and developer consortium), and
 - (c) consult with each other and make joint decisions regarding the administration and operation of some aspects of the Retail Service Agreement and LGC Supply Agreement (specifically, periodic and other price reviews, and termination for breach of project environmental conditions).

(the **Proposed Conduct**)

- 1.9. The Applicants state that their objective is to promote investment in renewable energy by aggregating their electricity supply demand into an electricity load which is sufficiently large to contract the generation output of an existing or new utility scale renewable energy generation system.
- 1.10. The Applicants seek authorisation for 15 years.
- 1.11. A copy of the application is available on the ACCC's public register for this matter.²

¹ LGCs are created annually based on the actual amount of electricity generated by a renewable energy generation system, registered with the Clean Energy Regulator under the Renewable energy (Electricity) Act 2000. LGCs are traded in an open market, and are generally bought and surrendered by RET-liable entities to fulfil their statutory surrender obligations.

² www.accc.gov.au/authorisationsregister.

Interim authorisation

1.12. The Applicants also requested interim authorisation to enable them to commence the tender process, but not to enter into contracts, while the ACCC is considering the substantive application. The request for interim authorisation is considered in section 6.

2. Background

2.1. The NEM is comprised of five interconnected regions of Queensland, New South Wales (which includes the ACT), Victoria, Tasmania and South Australia. The Applicants currently account for less than 0.05% of total electricity consumption in the NEM and less than 0.2% of Victorian consumption.

2.2. The ACCC has previously granted authorisation for four collective bargaining or joint purchasing arrangements for electricity:

- Melbourne City Council & Ors – Melbourne Renewable Energy Project 1 (2016)
- South Australian Chamber of Mines and Energy (SACOME) (2017)
- Eastern Energy Buyers Group (2017), and
- Large Format Retail Association (2019).

2.3. 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. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

3.2. The ACCC invited submissions from a range of potentially interested parties including major suppliers, relevant industry associations, consumer groups, state and federal government and relevant regulatory bodies.³ No submissions were received.

4. ACCC assessment

4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. 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 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 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).

³ A list of the parties consulted is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 4.3. 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 this respect, the ACCC considers that precise identification of the geographic scope of these areas of competition (Victoria or the broader NEM) is not required for the purpose of assessing this application.
 - Absent the Proposed Conduct, it is likely that participating members of the group will individually tender, enter into, and administer, contracts for the supply of electricity on a stand-alone basis.

Public benefits

- 4.4. 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.*⁴

- 4.5. The ACCC has considered the following public benefits:
- transaction cost savings
 - greater competition and investment in the supply of electricity
 - environmental benefits through a reduction in greenhouse gas emissions.
- 4.6. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

Transaction cost savings

- 4.7. 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 of the group.
- 4.8. 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

- 4.9. The ACCC considers that the combined electricity demand of the Applicants, as well as the length of the supply agreements the Applicants are seeking (approximately 15 years), are likely to encourage increased competition amongst electricity suppliers in responding to the tender requests and may encourage a new supplier to enter or underwrite investment in an innovative electricity supply project.

Environmental benefits

- 4.10. The ACCC notes that the Applicants claim the project will promote environmental benefits by reducing greenhouse gas emissions by 100,000 tonnes per year. The

⁴ 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.

ACCC accepts that any reduction in greenhouse gas emissions over and above what would be achieved in the absence of the conduct and at a lower cost per GW/h will be a public benefit.

Public detriments

4.11. 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.⁵

4.12. The Applicants submit that the risk of any public detriment arising from the Proposed Conduct is minimal since the Proposed Conduct involves a relatively small proportion of electricity demand compared to that of Victoria (0.2%) or the NEM as a whole (0.05%).

4.13. The ACCC notes that the Applicants have applied for authorisation for future participating members, and that the addition of new participants in the joint buying group may increase the aggregate demand. However, the ACCC notes that new members can only join the buying group if the aggregate demand of the joint buying group would remain below 1% of electricity consumption in Victoria. The ACCC considers that this means it is unlikely that the aggregate demand will achieve a large enough proportion to create competition concerns.

4.14. The ACCC also notes that some current and future members of the joint buying group may be 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 is limited to aspects of the electricity supply agreements such as periodic and other price reviews, and termination for breach of project environmental conditions.

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

Balance of public benefit and detriment

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

5. Draft determination

The application

5.1. On 24 October 2019, the Applicants lodged application AA1000455 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

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

- 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. 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.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000455 to enable current and future members of the proposed joint renewable energy purchasing group to pool their demand and collectively tender for an electricity supply arrangement as described in paragraphs 1.6 to 1.8 and defined as the Proposed Conduct.
- 5.7. The Proposed Conduct may involve 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.
- 5.8. The ACCC proposes to grant authorisation AA1000455 for 15 years.
- 5.9. This draft determination is made on 21 November 2019.

6. Interim authorisation

- 6.1. At the time of lodging the application, the Applicants requested interim authorisation to conduct the joint tender, but not to enter into any contracts for the supply of electricity.
- 6.2. In support of interim authorisation the Applicants submit that:
 - (a) Carrying out the joint tender process is unlikely to have any impact on any relevant market, as it will not result in any change in the purchasing behaviour of, or the entry into any final contracts by, the Applicants.
 - (b) They are ready to move into the joint tender phase, and any further delay to progressing through the tender process phase will have significant flow-on delay to the commencement of a renewable energy project (which, in the case of windfarms and solar farms, would be likely to take between 2 to 3 years to build), and the achievement of each Applicant's renewable energy policies and targets. This may make it more difficult for the Applicants to remain committed to the proposed joint tender proposal, as they may need to explore alternative ways to meet those policies and targets within their relevant timeframes.
 - (c) Each of the Applicants also have existing ongoing electricity supply agreements, which are due to expire on or before the June 2020. If the

successful bidder or bidders is not ready to supply electricity by June 2020 or offer a short term bridging solution, then the cost savings and other benefits of the proposed joint tender proposal may be diluted.

- 6.3. The ACCC has decided to grant interim authorisation for the Applicants to conduct the tender process (the conduct outlined at paragraph 1.8(a)). Interim authorisation does not extend to entering into any supply agreements.
- 6.4. The ACCC has decided to grant interim authorisation for the following reasons:
 - For the reasons outlined in this Draft Determination, the Proposed Conduct, including the conduct the subject of the request for interim authorisation, is likely to result in public benefits that would outweigh the minimal, if any, likely detriment to the public from the Proposed Conduct.
 - There is public benefit in granting interim authorisation insofar as it will allow the joint purchasing group to commence the tender process and negotiate with the successful tenderer(s) and, if the ACCC grants final authorisation, allow the benefits from the joint purchasing to be realised earlier than would otherwise be the case.
- 6.5. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by 5 December 2019. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.