



# Determination

Application for authorisation AA1000455

lodged by

RMIT & Ors

in respect of establishing a joint renewable energy purchasing group

Authorisation number: AA1000455

Date 18 December 2019

Commissioners: Rickard  
Ridgeway

## Summary

**The ACCC has decided 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 has decided to grant authorisation until 8 January 2035.**

### 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**)<sup>1</sup> 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.<sup>2</sup>

## Interim authorisation

- 1.12. On 21 November 2019, interim authorisation was granted under subsection 91(2) of the Act.<sup>3</sup> Interim authorisation was granted to enable the Applicants to commence the tender process, but not to enter into contracts, while the ACCC considered the

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<sup>1</sup> 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.

<sup>2</sup> [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>3</sup> See ACCC decision of 21 November 2019 available at <<https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/melbourne-renewable-energy-project-2>>.

substantive application. 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.

## 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.<sup>4</sup>
- 3.3. On 21 November 2019, the ACCC issued a draft determination proposing to grant authorisation for 15 years. A pre-decision conference was not requested following the draft determination.
- 3.4. No submissions were received in relation to the application or the draft determination.

## 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

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<sup>4</sup> A list of the parties consulted is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

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).

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.*<sup>5</sup>

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.

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<sup>5</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.

## 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 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.<sup>6</sup>*

- 4.12. The Applicants may be considered to be each other's competitors for the acquisition of electricity. By conducting their procurement jointly rather than individually, the Applicants are agreeing to no longer compete. The Proposed Conduct therefore will lessen competition in the acquisition of electricity.
- 4.13. 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%).
- 4.14. 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.
- 4.15. 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.
- 4.16. 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

- 4.17. 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.

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

## 5. 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.

### The authorisation test

- 5.2. 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.
- 5.3. For the reasons outlined in this 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.
- 5.4. Accordingly, the ACCC has decided to grant authorisation.

### Conduct which the ACCC has decided to authorise

- 5.5. The ACCC has decided 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.
- 5.6. 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.
- 5.7. The ACCC has decided to grant authorisation AA1000455 for 15 years, until 8 January 2035.

## 6. Date authorisation comes into effect

- 6.1. This determination is made on 18 December 2019. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 9 January 2020.