

APPLICATION FOR AUTHORISATION FOR PROPOSED CONDUCT

Parties to the proposed conduct

1. **Provide details of the applicants for authorisation, including:**

1.1 **Name, address (registered office), telephone number and ACN**

Equinix (Australia) Enterprises Pty Ltd, on behalf of itself and the current and future entities (together, the **Applicants**) involved in the collective procurement of a contract for differences (also known as a hedge) for electricity and the physical delivery of "Green Products" (as described in **Annexure A**) from a solar or wind project connected or to be connected to the National Electricity Market (**NEM**), likely in New South Wales (**Project**). The current participants are those set out in Schedule 1 of **Annexure A**.

1.2 **Contact person's name, position, telephone number and email address**

Alyssa Phillips, Partner
Ashurst
123 Eagle Street
Brisbane QLD 4055
Tel: [REDACTED]
Email: [REDACTED]

1.3 **A description of business activities**

A description of the business activities of each of the Applicants is set out in Schedule 1 of **Annexure A**.

1.4 **Email address for services**

[REDACTED]

2. **If applicable, provide details of the other persons and/or classes of persons who also propose to engage, or become engaged, in the proposed conduct and on whose behalf authorisation is sought.**

In addition to the current Applicants, other entities may wish to participate in the Project in the future. The Applicants respectfully request that the Australian Competition and Consumer Commission (**ACCC**) extend the benefit of this authorisation to any future participants in the Project, provided that the total energy consumption of the group does not exceed 5% of electricity consumption in the NEM or any individual state within the NEM.

To the extent that it is required, authorisation is also sought for the successful tenderer(s) to engage in the proposed conduct and be a party to a separate Power Purchase Agreement (**PPA**) with each of the Applicants.

The proposed conduct

3. **Provide details of the proposed conduct, including:**

3.1 **A description of the proposed conduct and any documents that detail the terms of the proposed conduct**

The Applicants propose to pool their electricity demand and place a single tender into the market calling for proposals for the terms on which a supplier (**Seller**) will enter into a PPA with the Applicants in the form of a contract for differences (also known as a hedge) for electricity and for the physical delivery of Green Products (including large-scale generation certificates) from a renewable energy generation facility (**Facility**).

The primary purpose of the PPA is to hedge the Applicants' exposure to the wholesale (spot) price of electricity in the NEM (which exposure may be obtained by, without limitation, the Applicants entering into a spot-price pass through contract with a retailer) and to obtain Green Products for a variety of purposes (including to potentially offset any green charges payable to their retailer). The scope of the authorisation sought does not extend to pooling their electricity demand for the purpose of negotiating an electricity retail contract with an authorised/licenced electricity retailer in the NEM, and they will manage this individually.

It is expected that the Seller will enter into a separate PPA with each Applicant on the same (or substantially similar) terms and conditions.

Please see section 3 of **Annexure A** for further details.

3.2 **the relevant provisions of the *Competition and Consumer Act 2010* (Cth) which might apply to the proposed conduct**

The relevant provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**) which might apply to the proposed conduct are sections 45(1), 45AF, 45AG, 45AJ and 45AK.

3.3 **the rationale for the proposed conduct**

The Applicants wish to combine their individual demand for a hedged volume of electricity and equivalent volume of Green Products in order to collectively negotiate with a potential Seller or Sellers as a group. This will enable the Applicants to create scale, thereby improving their prospects of securing cost-efficient bundled arrangements for electricity and Green Products.

Please see section 3.7 of **Annexure A** for further details.

3.4 **the term of authorisation sought and reasons for seeking this period. By default, the ACCC will assume you are seeking authorisation for five years. If a different period is being sought, please specify and explain why.**

The Applicants seek both interim and final authorisation (**Authorisation**) from the ACCC to participate in the Project.

Final authorisation is requested for a period of 24 years based on the length of time the tender process is expected to take, the period for the Facility to reach commercial operations, and the term of the PPAs (including any extensions).

Please see section 3.3 of **Annexure A** for further details.

4. **Provide documents submitted to the applicant's board or prepared by or for the applicant's senior management for purposes of assessing or making a decision in relation to the proposed conduct and any minutes or record of the decision made.**

Not applicable.

5. **Provide the names of persons, or classes of persons, who may be directly impacted by the proposed conduct (e.g. Targets of a proposed collective bargaining arrangement; suppliers or acquirers of the relevant products or services) and detail how or why they might be impacted.**

The class of persons who may be directly impacted by the proposed conduct include electricity generators who are operating or may commence operating within the NEM. A number of electricity generators will have an opportunity to participate in the tender process.

Market information and concentration

6. **Describe the products and/or services, and the geographic areas, supplied by the applicants. Identify all products and services in which two or more parties to the proposed conduct overlap (compete with each other) or have a vertical relationship (e.g. Supplier-customer).**

The Applicants consider that the relevant markets are:

- (a) a market for the generation of electricity in the NEM, or in the alternative, in any individual state within the NEM;
- (b) a market for the retail sale of electricity to commercial and industrial customers in the NEM, or in the alternative, in any individual state within the NEM.

Please see section 4 of **Annexure A** for further details.

7. **Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.**

A description of the relevant industry is set out in **Annexure A**.

8. **In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.**

The Applicants' combined load committed to the Project is less than [0% - 5%] of the total consumption in the NEM, and [0% - 5%] of the total consumption in the New South Wales market (the state where the highest proportion of the total combined load is located).

9. **In assessing an application for authorisation, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously. For example, describe:**

9.1 **existing competitors**

9.2 **likely entry by new competitors**

9.3 **any countervailing power of customers and/or suppliers**

9.4 **any other relevant factors.**

The Applicants and their respective corporate groups comprise a diverse group of entities involved in various business activities in Australia. There is very little overlap between the activities of the Applicants and their related bodies corporate (save for a limited overlap in activities undertaken by the Goldman Sachs and HSBC corporate groups that are unrelated to this Project). The Project is unlikely to enable the Applicants or any of their related bodies corporate to raise prices, reduce quality or choice, reduce innovation or coordinate in respect of the supply or acquisition of goods or services in any market in Australia, save for the conduct the subject of the authorisation application.

The Project is instead aimed at increasing competition for the generation of electricity in the NEM by also hedging the exposure of the Seller to the wholesale (spot) price, which is a key bankability concern in the development of new renewable energy generation projects. This will:

- (a) enable the Applicants to obtain electricity at cost-effective prices which in turn will result in increased efficiency and cost savings (including transaction costs);

- (b) increase environmental benefits by supporting the development and operation of renewable energy generation ;
- (c) promote new investment in renewable energy generation; and
- (d) result in job creation.

Please see section 6 of **Annexure A** for details.

Public Benefit

10. **Describe the benefits to the public that are likely to result from the proposed conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.**

Please see section 6 of **Annexure A** for details.

Public detriment (including likely competitive effects)

11. **Describe any detriments to the public likely to result from the proposed conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments.**

The Applicants do not believe that any detriments to the public are likely to result from the proposed conduct.

Please see section 7 of **Annexure A** for further details.

Contact details of relevant market participants

12. **Identify and/or provide names and, where possible, contact details (phone number and email address) for likely interested parties such as actual or potential competitors, key customers and suppliers, trade or industry associations and regulators.**

The Applicants have not identified any likely interested parties.

Additional information

13. **Provide any other information or documents you consider relevant to the ACCC's assessment of the application.**

A detailed submission in support of the Applicants' application for interim and final authorisation is attached as **Annexure A**.

Declaration by Applicant(s)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).

**Signature of authorised person**

Partner, Ashurst: acting on behalf of the Applicants

Office held

Alyssa Phillips

(Print) Name of authorised person

This 15 day of June 2021

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.

Equinix (Australia) Enterprises Pty Ltd
and others

Submission in support of an application
for interim and final authorisation

15 June 2021

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1. EXECUTIVE SUMMARY

This application is made by Equinix (Australia) Enterprises Pty Ltd, on behalf of itself and the other entities set out in Schedule 1, together with any potential future participants (together, the **Applicants**) who are or will be involved in the collective procurement of a contract for differences (also known as a hedge) for electricity and the physical delivery of "Green Products"¹ from a solar or wind electricity generation facility (**Facility**) connected or to be connected to the National Electricity Market (**NEM**), likely in New South Wales (**Project**).

The Applicants seek interim and final authorisation from the Australian Competition and Consumer Commission (**ACCC**) to participate in the Project. The Applicants wish to undertake a tender process seeking proposals for the terms on which a supplier (**Seller**) will enter into a contract for differences for electricity and for the physical delivery of Green Products to the Applicants from a Facility.

It is expected that the Seller will enter into a Power Purchase Agreement (**PPA**) with each Applicant reflecting these arrangements. Specifically the Applicants seek:

- (a) interim and final authorisation to jointly conduct a tender process to identify and select a Seller, including the joint evaluation of tender responses and the negotiation of PPA terms;
- (b) final authorisation for each Applicant to enter into a PPA with the Seller on the same general agreed terms and conditions; and
- (c) final authorisation for the Applicants to consult with each other and make joint decisions regarding the ongoing administration and operation of certain aspects of the PPA during the term of the contract. Without limiting the matters that the Applicants may ultimately wish to communicate with each other and with the Seller about in respect of the PPA during the terms of their respective contracts, this may include matters such as: performance reviews, periodic and other pricing reviews, the exercise of contract options, any potential expansion of the Facility, events that materially impact the performance of the PPA, changes to the terms and conditions of the PPA, and breach of the PPA.

The primary purpose of the PPA is to hedge the Applicants' exposure to the wholesale (spot) price of electricity in the NEM (which exposure may be obtained by, without limitation, the Applicants entering into a spot-price pass through contract with a retailer) and to obtain Green Products for a variety of purposes (including to potentially offset any green charges payable to their retailer). The scope of the authorisation sought does not extend to pooling their electricity demand for the purpose of negotiating an electricity retail contract with an authorised/licenced electricity retailer in the NEM, and they will manage this individually.

The Applicants consider that their joint participation in the Project will provide significant public benefits by:

- (a) increasing competition. If the facility to be contracted remains under development by the Seller, the effect of the Project is to provide several bankable PPAs for that facility. The execution of a bankable PPA is a key step in obtaining project financing for a new renewables facility. Once project financing has been obtained and the

¹ Green Products means Large Scale Generation Certificates (**LGCS**) and any other rights, entitlements, credits, offsets, allowances, compensation, benefits or certificates of any kind, recognised or arising under any scheme, law, policy or arrangement established or regulated by or on behalf of a government authority which are or which become available to the owner or operator of any facility for the generation of electricity from a renewable source in connection with its existence or operations as a generator of electricity from a renewable source.

facility has been constructed and commissioned, the facility will compete with other generators in the NEM to dispatch electricity in accordance with NEM processes;

- (b) enabling the Applicants to obtain electricity at cost-effective prices resulting in increased efficiency and cost savings (including transaction costs);
- (c) increased environmental benefits by supporting the development and operation of renewable energy generation in the NEM;
- (d) promoting new investment in renewable energy; and
- (e) job creation.

The Applicants also consider that the Project will not lead to any public detriments, including that there will be no substantial lessening of competition in any relevant market in Australia.

2. INTRODUCTION

2.1 Background and context

Each of the Applicants has sustainability goals, and wishes to manage its impact on the environment. Each of the Applicants is an RE100 Member,² and they have the following commitments to minimise the impact on the environment:

- (a) **Equinix** has a long-term goal to use 100% clean and renewable energy usage across its global portfolio.³
- (b) **Goldman Sachs** is progressing towards a goal of 100% renewable power for its global electricity needs by year-end 2020.⁴
- (c) **HSBC** is targeting 100% renewable energy by 2030.⁵
- (d) **Nike, Inc.** is committed to reaching 100% renewable electricity by 2025.⁶
- (e) **H&M** is targeting 100% renewable power by 2030.⁷

Participation in the Project enables the Applicants to combine their individual demand for a hedged volume of electricity and equivalent volume of Green Products in order to collectively negotiate with a potential Seller or Sellers as a group. This will enable the Applicants to create scale, thereby improving their prospects of securing cost-efficient bundled arrangements for electricity and Green Products.

Australia has a commitment to increasing the use of renewable energy sources, which generate electricity with little or no carbon emissions. This is reflected in:

- (a) **Australia's international commitment to reduce greenhouse gas emissions.** Australia is a party to the Paris Agreement, an international treaty on climate change. It was adopted by 196 Parties on 12 December 2015 and entered into force on 4 December 2016.

² <https://www.there100.org/re100-members>.

³ <https://sustainability.equinix.com/environment/>.

⁴ <https://www.goldmansachs.com/our-commitments/sustainability/sustainable-finance/our-operational-impact/index.html>.

⁵ <https://www.there100.org/re100-members>.

⁶ <https://www.there100.org/re100-members>.

⁷ <https://www.there100.org/re100-members>.

- (b) **The Renewable Energy Target scheme (RET).** The RET encourages generation of electricity from renewable sources to reduce greenhouse gas emissions in the electricity sector.
- (c) **State and territory renewable energy targets.** Every state and territory in Australia has committed to zero net emissions by 2050 and almost all have their own renewable energy targets.⁸ The New South Wales (**NSW**) Renewable Energy Action Plan lists the following goals:
 - (i) attract renewable energy investment and projects;
 - (ii) build community support for renewable energy; and
 - (iii) attract and grow expertise in renewable energy technology.

Sufficient offtake volumes are a critical component in supporting the financing and investment in renewable energy projects. As a result, the Project will help to contribute to the increased use of renewable energy sources, in particular in NSW.

The ACCC is familiar with these types of arrangements and has authorised similar joint purchasing arrangements for electricity in the past.⁹

2.2 Renewable energy investment

The Applicants will seek proposals in respect of the Project that involve a renewable energy generation system (solar or wind) that is connected or is to be connected to the NEM. The evaluation criteria will favour a Facility in NSW.

In 2019, 24% of Australia's total electricity was generated from renewable energy.¹⁰ Of the renewable energy volumes, the vast majority is generated by wind (8.5%), hydro (6.2%) and small-scale solar (5.3%).

Renewable energy investment in NSW is significantly lower than other states with only 17.1% of energy generated from renewable energy sources. By comparison, Tasmania generates 95.6% of its energy from renewable energy sources, and South Australia generates 52.1% from renewable energy sources.¹¹ As the Facility will likely be located in NSW, this will contribute to renewable energy investment in the region and increase the volumes of energy generated from renewable energy sources.

2.3 The Applicants

The Applicants are commercial consumers of electricity who are active in different segments of the economy, but are united by their commitment to supporting a renewable energy facility by participating in the Project. Details of the businesses carried on by each Applicant in Australia are set out in Schedule 1.

⁸ Clean Energy Council, Clean Energy Australia Report 2020, p 16.

⁹ Melbourne City Council & Others – Authorisation numbers A91532 and A91533 granted on 21 July 2016; The South Australian Chamber of Mines and Energy Inc and Others – Authorisation numbers A91567 and A91568 granted on 17 May 2017 (minor variation granted on 16 August 2017); The Eastern Energy Buyers Group – Authorisation numbers A91594 and A91595 granted on 22 November 2017; Large Format Retail Association Limited and Others – Authorisation number AA1000450-1 granted on 23 October 2019; Royal Melbourne Institute of Technology and Others – Authorisation number AA1000455-1 granted on 18 December 2019; Municipal Association of Victoria and 48 Victorian Councils – Authorisation number AA1000459-1 granted on 31 January 2020; and Darebin City Council and Others – Authorisation number AA1000525-1 granted on 9 October 2020.

¹⁰ Clean Energy Council, Clean Energy Australia Report 2020, p 9.

¹¹ Clean Energy Council, Clean Energy Australia Report 2020, p 10.

It is estimated that the Applicants will hedge combined total of around [REDACTED] per annum of electricity load through the Project, and it is envisioned that the Applicants will have an option to increase their volumes by 10% during the term of the PPA. At the date of this application, the Applicants' expected individual loads that will be hedged under the PPA are as follows:

APPLICANT	LOAD TO BE HEDGED (GWH)	% OF TOTAL LOAD TO BE HEDGED
J. Aron (Goldman Sachs)	[REDACTED]	[REDACTED]
HSBC	[REDACTED]	[REDACTED]
Nike	[REDACTED]	[REDACTED]
Equinix	[REDACTED]	[REDACTED]
H&M	[REDACTED]	[REDACTED]
Total	[REDACTED]	100%

The current participants wish to allow additional entities to participate in the Project. Authorisation is sought to enable any future participants in the Project to have the benefit of Authorisation, provided that the total energy consumption of the group does not exceed 5% of electricity consumption in the NEM, or in any individual state within the NEM.

3. **SCOPE OF THE AUTHORISATION**

3.1 **Proposed conduct**

The Applicants propose to undertake a joint tender process to select a Seller to enter into a PPA with each Applicant to provide a contract for differences for the electricity generated from a renewable energy Facility, together with the physical delivery of Green Products created by reference to such electricity.

The LGCs purchased under the PPA must be sourced from a Facility that:

- (a) will export electricity to the NEM;
- (b) will be an accredited power station under the *Renewable Energy (Electricity) Act 2000* (Cth); and
- (c) will generate electricity from wind or solar power.

The tender process will call for proposals to construct a Facility that will generate sufficient electricity to meet the Applicants' aggregate demand.

A request for proposal (**RFP**) is intended to be issued promptly following receipt of interim authorisation from the ACCC. Ernst & Young (**EY**) will manage the tender process for the Applicants, which is expected to operate as follows:

- (a) The tender documents will be developed and approved by the Applicants before they are issued.
- (b) The tender will be a closed tender, but will involve a material number of bidders being invited to respond (likely between six to ten bidders). No late tenders will be accepted.

- (c) An evaluation panel will be established which will comprise representatives of the Applicants. The evaluation panel will evaluate the tenders and may engage non-voting advisors (including legal, financial and technical advisors). The evaluation panel will evaluate the tenders against the prescribed criteria, which can be made available to the ACCC on a confidential basis on request.
- (d) Once the evaluation panel has agreed on one (or more) preferred tenderers, one or more representatives from each of the Applicants will negotiate the contractual terms with the preferred tenderer(s), with support from their external advisers.
- (e) Once negotiations are completed, the evaluation panel will make a recommendation to the Applicants on the preferred tenderer, and contract terms.
- (f) Each Applicant will then undergo its own internal governance process to make a final decision as to whether or not to enter into the PPA on the proposed terms. The supply start date for each Applicant is dependent on the Applicant's requirements.

The Applicants anticipate that the terms of the PPA will be on substantially similar terms and conditions except as required to meet individual Applicant's needs.

3.2 **Ongoing administration of the PPA**

Once each Applicant has entered into a PPA with the chosen Seller, each Applicant will primarily be responsible for administering its own contract without consultation with the other Applicants. However, it may be necessary for the Applicants to participate in joint activities and decisions about some aspects of the PPAs during the term that the agreements remain in foot. Some examples of areas where the Applicants anticipate they may need to coordinate with each other include:

- (a) performance reviews;
- (b) periodic and other pricing reviews;
- (c) the exercise of contract options;
- (d) any potential expansion of the Facility;
- (e) any events that materially impact the performance of the agreement – for example, material changes in law or regulatory environment, force majeure events, or material changes in market conditions;
- (f) any changes to the terms and conditions; and
- (g) allegations of a breach of the terms and conditions.

3.3 **Period for which authorisation is sought**

The Authorisation is requested for 24 years which is the length of time the tender process is expected to take, plus the anticipated period for the Facility to begin lawfully generating and exporting electricity to the NEM, and the term of the PPA (including any extensions). This is comprised of:

- (a) up to 12 months for the preparation of joint tenders, approach to suppliers, negotiation, and execution of the individual PPA's;
- (b) up to 3 years for the Facility to reach commercial operations;
- (c) 15 years, being the anticipated period of the first term of the PPA from the commencement of commercial operations of the Facility; and

- (d) 5 years, being the anticipated period of any extension of the initial term.

It is possible that the term of each PPA ultimately agreed between each Applicant and the chosen Seller may vary slightly, depending on each Applicant's internal requirements. The Applicants are requesting authorisation for the maximum period of time over which they may ultimately seek to coordinate with each other in respect of the PPAs.

3.4 **Application for interim authorisation**

The Applicants request that the ACCC grant interim authorisation in relation to this application to enable the Applicants to conduct the joint tender process for the Project while the ACCC is determining the application. The Applicants expect to issue the RFP promptly on receipt of interim authorisation, but will not award the tender until final authorisation is granted.

The Applicants submit that interim authorisation is justified because:

- (a) carrying out the joint tender process is unlikely to have any impact on any relevant market as it will not result in a change in purchasing behaviour of, or entry into any contracts by, the Applicants; and
- (b) the Project is ready to move to the joint tender phase, and any delay in progressing the Project will have consequences for the timing of the commencement of the Project, which in turn will impact the Applicants' ability to achieve their renewable energy targets.

In light of the above, the Applicants respectfully request that the ACCC determine the application for interim authorisation as quickly as possible, and in any event within 28 days. The Applicants note that the ACCC has previously granted interim authorisation for similar arrangements for the joint purchasing of electricity.

3.5 **Application for expedited draft determination**

If the ACCC is minded to do so, having regard to its deep familiarity with authorisation applications of this nature, and the very low risk of the Project giving rise to competition law concerns, the Applicants also respectfully request that the ACCC expedite its draft determination to coincide with the interim authorisation. The ACCC having previously approved a number of authorisations of the same nature, the Applicants submit that consultation is not necessary in advance of a draft determination.

3.6 **Why authorisation is being sought**

The Applicants may be considered to be competitors for the acquisition of a contract for differences for electricity and/or the acquisition of Green Products for the purposes of Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The Applicants do not consider that any of the proposed conduct in respect of the Project is likely to substantially lessen competition in any market, and do not concede that the conduct would otherwise contravene any provision of the CCA, having regard to the availability of the "collective acquisition" exception in section 45AU of the CCA and other potential exceptions. Nonetheless, the Applicants wish to have the certainty afforded by the requested Authorisation that making and giving effect to the arrangements underpinning the Project could not be challenged on the grounds that they contain provisions that may contravene the CCA. In this regard, the Applicants have considered those provisions of the CCA that prohibit contracts, arrangements or understandings:

- (a) having the purpose or likely effect of fixing, controlling or maintaining the price of goods or services to be acquired by the Applicants (that is, a cartel provision prohibited under sections 45AF, 45AG, 45AJ and 45AK of the CCA);

- (b) having the purpose of allocating between the Applicants the persons or classes of persons who are likely to supply goods or services to any of the parties to the arrangement (that is, a cartel provision prohibited under sections 45AF, 45AG, 45AJ and 45AK of the CCA); or
- (c) having the purpose or likely effect of substantially lessening competition (that is, an anti-competitive contract, arrangement, understanding or concerted practice prohibited under section 45(1) of the CCA);

The Applicants are therefore seeking authorisation out of an abundance of caution.

3.7 **Rationale**

The Applicants wish to combine their individual demand for renewable electricity in order to collectively negotiate with a potential Seller or Sellers as a group. This will enable the Applicants to create scale, thereby improving their prospects of securing cost-efficient bundled arrangements for electricity and Green Products.

As outlined further below, jointly procuring electricity and Green Products in this way will enable the Applicants to save on transaction costs, and will also improve the prospects of the Applicants obtaining attractive pricing offers from Sellers given the larger scale combined load.

4. **MARKET DEFINITION**

The Applicants consider that, consistent with previous determinations made by the ACCC in respect of similar conduct, the following markets are relevant for the ACCC's assessment of the proposed conduct and its effect on competition:

- (a) a market for the generation of electricity in the NEM, or in the alternative, in any individual state within the NEM; and
- (b) a market for the retail sale of electricity to commercial and industrial customers in the NEM, or in the alternative, in any individual state within the NEM.

The NEM operates across the Australian Capital Territory, NSW, Queensland, South Australia, Tasmania and Victoria as a market for the trading of wholesale electricity. Electricity is sold by generators in the NEM through a wholesale spot market whereby prices fluctuate depending on the supply and demand of power.

The main customers are energy retailers who buy electricity from the wholesale market, package it with transmission and distribution network services and sell the electricity to residential and business customers. During the 2019-2020 financial year, the total consumption of electricity in the NEM was 192.4TWh,¹² and of this figure, users based in NSW consumed 69.8TWh.

The Applicants' combined electricity demand amounts to approximately [0% - 5%] of the total consumption in the NEM, and approximately [0% - 5%] of the total consumption in NSW (the state where the highest proportion of the total combined load is located).

5. **COUNTERFACTUAL**

In the absence of the collective procurement of a contract for differences for electricity and the physical delivery of "Green Products by means of the Project, the Applicants are likely to consider other initiatives in order to progress their respective sustainability initiatives.

¹² Australian Energy Regulator, National Electricity Market electricity consumption, <https://www.aer.gov.au/wholesale-markets/wholesale-statistics/annual-electricity-consumption-nem> as at 15 February 2021.

This may involve the Applicants entering into individual arrangements to:

- (a) separately negotiate and enter into a PPA (see below);
- (b) invest in small scale renewable energy systems, which are unlikely to meet the Applicants' energy demands and will likely be significantly more costly than the Project;
- (c) commit to GreenPower purchasing arrangements, which are unlikely to result in new renewable energy investment; and/or
- (d) purchase LGCs, which are subject to price uncertainty.

If the Project does not proceed and each Applicant is required to separately pursue a PPA, the length of time it will take for each Applicant to do so is likely to be extended, and the cost efficiencies associated with the Project will not be realised. Furthermore, it may lead to some or all of the Applicants being unable to achieve their renewable energy targets and instead lead to them purchasing traditional forms of electricity:

- (a) directly through the spot market; or
- (b) from existing electricity suppliers who are offering contracts which reflect price volatility.

6. **PUBLIC BENEFITS**

6.1 **Overview**

The Project will provide a range of public benefits which include:

- (a) increased competition for electricity generation;
- (b) transaction cost savings;
- (c) increased environmental benefits; and
- (d) job creation.

6.2 **Potential for increased competition for electricity supply**

Although each Applicant is part of a large and sophisticated organisation, none of the Applicants or their respective corporate groups individually has a sufficiently large demand for electricity in Australia to have meaningful bargaining power with potential PPA counterparties. The combined load of all the Applicants will result in:

- an attractive opportunity that will encourage a greater number of potential generators to compete for the tender; and
- the Applicants having an increased ability to negotiate better commercial terms, which will in turn deliver cost savings that the Applicants can use in other aspects of their businesses.

6.3 **Transaction cost savings**

The authorisation will enable the Applicants to jointly tender, and subsequently negotiate the terms of a PPA with the Seller. This process of collective tendering and negotiation will allow the Applicants to save on transaction costs as they will not be required to independently conduct a tender process. As the ACCC will be aware, such processes are often time-consuming and resource intensive, requiring the party to respond to queries,

evaluate multiple tender submissions and then negotiate the terms of the contract with the successful bidder.

The Applicants are also likely to save on other costs, including those incurred to obtain technical or legal advice.

The successful Seller will also save costs in preparing one tender instead of many small tenders in the market (and this also applies to other parties who participate in the tender response).

6.4 **Increased environmental benefits**

As mentioned above, the Applicants are committed to investment in a renewable energy generation facility to meet their individual sustainability targets.

The Project delivers numerous environmental benefits, is aligned with Australia's commitment to reduce greenhouse gas emissions (noted in the Paris Agreement), and will contribute to the attainment of relevant targets including the RET and the NSW Renewable Energy Action Plan.

By participating in the Project, the Applicants will effectively invest in renewable energy through the acquisition of Green Products to reduce the impact of greenhouse gas emissions on the environment.

6.5 **Job creation**

If authorisation is granted and the successful tenderer proposes to develop a new Facility, the Applicants estimate that the Project will generate a number of additional social benefits including, without limitation, the creation of jobs in the construction and subsequent operation of the Facility.

7. **PUBLIC DETRIMENT**

The Applicants submit that the proposed conduct will not have any material public detriment, and is likely to be pro-competitive rather than anti-competitive.

The Applicants' combined electricity demand amounts to approximately [0% - 5%] of the total consumption in the NEM, and approximately [0% - 5%] of the total consumption in NSW.¹³

Annual consumption of electricity

APPLICANTS	NEW SOUTH WALES (FY2019 – FY2020)	NEM (FY2019 – FY2020)
[REDACTED]	69.8TWh	192.4TWh

In other words, even on a combined basis the Applicants' electricity requirements are so limited as a proportion of the total demand in the NEM (or any part of the NEM) that the collective procurement process cannot conceivably have any material effect on competition in any relevant market. This is the case even if additional buyers join the collective procurement arrangement given that, as explained above, the intention is that the total

¹³ The Applicants' electricity demand is not limited to NSW, but this is the state where the highest proportion of the total combined load is located. The Applicants' demand will therefore be less than [0% - 5%] of the total consumption in NSW, but the shares have been calculated as a proportion of total load to be hedged to present a conservative approach.

energy consumption of the Applicants will not exceed 5% of electricity consumption in the NEM (or any part of the NEM).

The tender process is closed, but will be available to a material number of suppliers (between six and ten prospective bidders) which will ensure that there is adequate competition between electricity suppliers to win the tender.

8. **CONCLUSION**

For the reasons set out above, the Applicants submit that the proposed conduct will not have any material public detriment, and is likely to be pro-competitive rather than anti-competitive.

Accordingly, the Applicants seek interim and final authorisation from the ACCC to participate in the Project.

SCHEDULE 1

The Applicants

1. **HSBC Bank Australia Limited ABN 48 006 434 162**

Address: 100 Barangaroo Avenue, Sydney NSW 2000

Description of business: HSBC is a banking and financial services organisation. Its services include retail, wholesale and private banking, trade finance, treasury and financial markets, global liquidity and cash management, assets management and securities custody.

2. **Nike Australia Pty. Limited ACN 055 141 743**

Address: Level 3, 161 Collins Street, Melbourne VIC 3000, Australia

Description of business: Nike's principal activities are as a wholesaler and retailer of sports and fitness footwear, apparel, accessories and equipment.

3. **Equinix (Australia) Enterprises Pty Ltd ABN 26 605 084 473**

Address: 639 Gardeners Road, Mascot, Sydney NSW 2000

Description of business: Equinix is a digital infrastructure company. Digital leaders harness Equinix's trusted platform to bring together and interconnect the foundational infrastructure that powers their success. In Australia, Equinix's IBX data centres are present in the top 6 markets across the country, including Sydney, Melbourne, Perth, Canberra, Adelaide and Brisbane.

4. **J. Aron & Company LLC (J. Aron)**

Address: 200 West Street, New York, NY 10282 (Ph: +1 212 902 1000)

Description of business: J. Aron, a participant in the commodities business for over 100 years, was acquired in 1981 by Goldman Sachs, and is the entity through which Goldman Sachs executes its commodities business. J. Aron is a registered swap dealer and market-maker for a wide array of commodities and commodity derivative contracts relating to diesel, oil, natural gas, gasoline, jet fuel, other petroleum products, power, metals, and soft commodities, among others. J. Aron is a New York limited liability company.

5. **H&M Hennes & Mauritz Finance AB (H&M) Registration number 559159-7090**

Address: Mäster Samuelsgatan 46A, 106 38 Stockholm

Description of business: H&M is a wholly owned subsidiary of H&M Hennes & Mauritz AB. The H&M group is one of the world's leading fashion and design companies and has eight independent fashion brands. The H&M Group seeks to make fashion and design sustainable.