

13 September 2008

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Trade Practices Act 1974* by

State of Tasmania

and

Aurora Energy Pty Ltd (ABN 85 082 464 622)

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1 Persons giving Undertaking

- 1.1 This Undertaking is given to the ACCC under section 87B of the Act by:
- (a) the State of Tasmania; and
 - (b) Aurora Energy Pty Ltd, ABN 85 082 464 622, of 21 Kirksway Place, GPO Box 191, Hobart, Tasmania 7001.

2 Background

- 2.1 Aurora Energy Pty Ltd is a Tasmanian Government owned electricity distribution and retail business. Aurora Energy has two shareholders – the Tasmanian Minister for Energy and the Tasmanian Treasurer. Aurora Energy is one of only two companies licensed to retail gas in Tasmania and supplies almost all the retail electricity in the State.
- 2.2 Babcock and Brown Power is the current owner of the Tamar Valley Power Station Project. Babcock and Brown Power is Australia's largest ASX-listed electricity generation business. Its portfolio is diversified by geographic location, fuel, source, customers, contract type and operating mode. Babcock and Brown Power's portfolio consists of base load, intermediate and peak power stations.
- 2.3 The Tasmanian Government has publicly stated that it proposes to acquire the Tamar Valley Power Station Project to ensure that it will be built to secure electricity supply, to the benefit of Tasmanian consumers. In particular, the introduction of further gas generation into Tasmania was seen as critical to ensure the reliability of future electricity supply.
- 2.4 On 15 August 2008, the Tasmanian Government signed a Heads of Agreement with Babcock and Brown Power to purchase the shares in Alinta Energy (Tamar Valley) Pty Ltd (the entity that owns the Tamar Valley Power Station Project) and all other assets that are owned or used in relation to that project. The Tasmanian Government's purchase was effected by directing Aurora Energy to enter into a Purchase Agreement, under which Aurora Energy will acquire all the shares in Alinta Energy (Tamar Valley) Pty Ltd (ABN 29 123 391 613). Aurora Energy will also acquire two thermal units that are currently part of the Bell Bay Power Station as well as some related rights from Hydro Tasmania, the Tasmanian Government owned electricity generation business. The purchase was conditional upon approval by the Tasmanian Parliament. To that end, the *Tamar Valley Power Station Act (2008)* was passed. The Act empowers the Tasmanian Government to, inter alia, direct Aurora Energy to purchase the Tamar Valley Power Station Project.
- 2.5 On 18 August 2008, the ACCC was approached by the Tasmanian Government regarding informal clearance of the Proposed Acquisition. On 19 August 2008, the ACCC commenced its public review of the Proposed Acquisition.
- 2.6 The ACCC conducted a truncated review of the Proposed Acquisition in an attempt to provide The Parties with a view in a timeframe which would meet the Proposed Acquisition's commercial timeframe.
- 2.7 During this period, the ACCC conducted market inquiries and considered the information provided by The Parties, industry participants and others. The ACCC's inquiries were aimed at assessing whether or not the Proposed Acquisition was likely to substantially lessen competition in any substantial Australian market in contravention of section 50 of the *Trade Practices Act 1974 (Cth)* (the Act).
- 2.8 On 10 September 2008, the ACCC informed The Parties that, on the basis of the information available to the ACCC at that time, the ACCC was of the view that the Proposed Acquisition would remove the potential for the Tamar Valley Power Station Project to play a critical role in competition in the

generation of electricity in Tasmania. The ACCC also noted that the Proposed Acquisition would in its view reduce the potential for competition in electricity retailing, as private sector ownership of the Tamar Valley Power Station Project may facilitate new retail entry into Tasmania through the provision of further hedging opportunities and because the private owner may have the incentive to commence retailing itself.

- 2.9 On 11 September 2008, the Tasmanian Government informed the ACCC that it did not agree with the ACCC's assessment of the effect of the Proposed Acquisition on competition and that it intended for the Proposed Acquisition to be completed on 15 September 2008 due to commercial pressures which in the Tasmanian Government's view might otherwise result in the Tamar Valley Power Station Project not proceeding. However, The Parties acknowledge that the ACCC is not satisfied that the Proposed Acquisition will not result in a contravention of section 50 of the Act.
- 2.10 This Undertaking is intended to ensure that:
- (a) the ACCC is given a reasonable opportunity to conduct a full market inquiries process with respect to the Proposed Acquisition, without having to seek an interlocutory injunction;
 - (b) Aurora Energy and any other body corporate generating or retailing electricity, or providing network services, in Tasmania which the Tasmanian Government has the ability to control, including by reason of the Tasmanian Government holding a legal or beneficial interest in such a body corporate, are held separate from the Relevant Business, in whole or in part, until the ACCC has considered the competition ramifications of the Proposed Acquisition; and
 - (c) consistent with (b) above the Relevant Business is maintained by The Parties as an ongoing concern in good condition while held separate so as to ensure that the ACCC has a reasonable opportunity to conduct a full market inquiry process with respect to the Proposed Acquisition.
- 2.11 The ACCC has agreed to accept this Undertaking to assist The Parties in their commercial objectives while at the same time making it clear to The Parties that, following a comprehensive review of the Proposed Acquisition as provided for in these undertakings, the ACCC may conclude that the Proposed Acquisition is likely to result in a substantial lessening of competition, in which case the ACCC will take such action as it considers necessary whether during or after the period terminating on the Hold Separate Termination Date.
- 2.12 The ACCC has agreed to accept this Undertaking in these circumstances because, on the basis of the information currently available to the ACCC, the ACCC is of the view that significant parts of the Relevant Business are not yet operational, which makes competition concerns within the immediate future unlikely if there is a hold separate in place, and the transfer of other parts of the Relevant Business currently controlled by Tasmanian Hydro is unlikely to raise competition issues in the immediate future. The ACCC considers that, in light of these factors, no competitive harm is likely in the immediate future if this Undertaking is accepted.
- 2.13 The Parties acknowledge that:
- (a) following acceptance of this Undertaking, the ACCC will conduct a public review of the Proposed Acquisition in a timeframe determined by the ACCC;
 - (b) the result of such a review may be that the ACCC concludes that the Proposed Acquisition is likely to result in a substantial lessening of competition in breach of section 50 of the Act; and
 - (c) the ACCC will take such action as it considers necessary to remedy any such breach.
- 2.14 Notwithstanding the above, The Parties maintain that the Proposed Acquisition is not likely to result in a substantial lessening of competition in breach of section 50 of the Act.
- 2.15 Aurora Energy has given this Undertaking with the consent of the Tasmanian Government through Aurora Energy's member shareholders.

- 2.16 The ACCC is satisfied that this Undertaking will provide it with the opportunity to comprehensively review the Proposed Acquisition, form a view and take any necessary action to remedy any breach of the Act.

3 Definitions and interpretation

- 3.1 The meanings of the key terms used in this document are set out below.

ACCC	the Australian Competition and Consumer Commission, and where relevant any advisors or agents engaged by the ACCC to assess compliance with this Undertaking.
Act	the <i>Trade Practices Act 1974</i> (Cth).
Aurora Energy	Aurora Energy Pty Ltd, ABN 85 082 464 622, 21 Kirksway Place, GPO Box 191, Hobart, Tasmania 7001.
Bell Bay Power Station	The Bell Bay Power Station currently comprises two 120MW gas-fired thermal units.
Business Day	a day other than a Saturday or Sunday on which banks are open for business generally in Hobart, Tasmania.
Commencement Date	the date on which this Undertaking comes into effect as set out in clause 4.1
Control Date	the date on which the Purchase Agreement is completed, which is anticipated to be 15 September 2008..
Hold Separate Termination Date	6 months from the Control Date
Proposed Acquisition	the proposed acquisition by Aurora Energy of the Tamar Valley Power Station Project and three FT8 open cycle gas turbines from Babcock and Brown Power pursuant to the Purchase Agreement.
Purchase Agreement	the Purchase Agreement described in clause 2 of this Undertaking to which Aurora Energy is a party.
Related Body Corporate	has the meaning given to that phrase by section 4A of the Act.
Relevant Business	are all of the interests described in Schedule 1 of this Undertaking
Tamar Valley Power Station Project	The Tamar Valley Power Station Project is not yet completed but will at least include: - a new 210MW Mitsubishi combined cycle gas turbine;

	<ul style="list-style-type: none"> - a new 60MW Rolls Royce open cycle gas turbine; - three 40MW FT8 gas turbines. <p>It may also include the two 120MW thermal units that are currently part of Bell Bay Power Station.</p>
Tasmanian Government	The Crown in right of the State of Tasmania
Hydro Tasmania	Hydro-Electric Corporation, ABN 48 072 377 158
The Parties	The Tasmanian Government and Aurora Energy Pty Ltd, ABN 85 082 464 622
Undertaking	is a reference to all the provisions of this document, including its Schedules.

3.2 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to 'this Undertaking' includes all of the provisions of this document.
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking.
- (c) a reference in this Undertaking to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Hobart, Tasmania.
- (d) if the day on which any act, matter or thing is to be done under this Undertaking is not a business day, the act, matter or thing must be done on the next business day.
- (e) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) a reference in this Undertaking to any company includes its Related Bodies Corporate.
- (g) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced.
- (h) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking.
- (i) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (j) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (k) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders.
- (l) a reference to the word 'include' or 'including' is to be construed without limitation.
- (m) a reference to the word 'control' when used in the sense of one entity controlling another, shall have the meaning given by section 50AA of the Corporations Act 2001 (Cth).
- (n) a construction that would promote the purpose or object underlying the Undertaking (whether expressly stated or not) shall be preferred to a construction that would not promote that purpose or object.
- (o) material not forming part of this Undertaking may be considered to:

- (1) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
 - (2) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking.
- (p) in determining whether consideration should be given to any material in accordance with clause 3.2(o), or in considering any weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to the:
- (1) effect that reliance on the ordinary meaning conveyed by the text of the clause would have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
 - (2) the need to ensure that the result of the Undertaking is to address the ACCC's competition concerns.
- (q) the ACCC may authorise the Mergers Review Committee, a member of the ACCC or a member of ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose.
- (r) in performing its obligations under this Undertaking, The Parties will ensure that their performance of those obligations is done in a manner which is consistent with promoting the purpose and object of the Undertaking.

4 Commencement and termination of Undertaking

- 4.1 This Undertaking comes into effect when:
- (a) the Undertaking is executed by The Parties; and
 - (b) the Undertaking so executed is accepted by the ACCC.
- 4.2 This Undertaking terminates on the Hold Separate Termination Date or on the date the ACCC communicates in writing to The Parties:
- (a) that it will not oppose the Proposed Acquisition; or
 - (b) its consent to the withdrawal of this Undertaking in accordance with section 87B of the Act.
- 4.3 This Undertaking will also terminate if The Parties notify the ACCC in writing that they will not be acquiring the Relevant Business and the ACCC confirms receipt of such notice in writing to The Parties.

5 Preservation of Relevant Business

- 5.1 From the Control Date to the Hold Separate Termination Date, The Parties must not, having paramount regard to the successful operation of the Relevant Business, sell or transfer any of their interest in, or assets of, the Relevant Business or remove or add or make any other adverse material change to the structure, attributes, extent or operations of the Relevant Business.
- 5.2 Unless the ACCC agrees in writing to specific exceptions to this clause, The Parties will from the Commencement Date until the termination of this Undertaking, take all steps to ensure that:

- (a) management, financial and operational decisions continue to be made in the best interests of the Relevant Business and these decisions are conducted separately from the management, financial and operational decisions of Aurora Energy and any other body corporate generating or retailing electricity, or providing network services, in Tasmania which the Tasmanian Government has the ability to control, including by reason of the Tasmanian Government holding any legal or beneficial interest in such a body corporate;
- (b) the Relevant Business are able to meet all legal, corporate, financial, accounting, taxation, audit and regulatory requirements and these requirements are conducted separately from the requirements of Aurora Energy and any other body corporate generating or retailing electricity, or providing network services, in Tasmania which the Tasmanian Government has the ability to control, including by reason of the Tasmanian Government holding any legal or beneficial interest in such a body corporate
- (c) the books and records of the Relevant Business are kept separate from those of Aurora Energy and any other body corporate generating or retailing electricity, or providing network services, in Tasmania which the Tasmanian Government has the ability to control, including by reason of the Tasmanian Government holding any legal or beneficial interest in such a body corporate
- (d) any agreements entered into between the Relevant Business and Aurora Energy (or any other body corporate generating or retailing electricity, or providing network services, in Tasmania which the Tasmanian Government has the ability to control, including by reason of the Tasmanian Government holding any legal or beneficial interest in such a body corporate) are at arms length and on commercial terms;
- (e) key personnel are not redeployed between the Relevant Business and either Aurora Energy or any other body corporate generating or retailing electricity, or providing network services, in Tasmania which the Tasmanian Government has the ability to control, including by reason of the Tasmanian Government holding any legal or beneficial interest in such a body corporate;
- (f) the Relevant Business is operated as a separate and independently viable going concern to Aurora Energy and any other body corporate generating or retailing electricity, or providing network services, in Tasmania which the Tasmanian Government has the ability to control, including by reason of the Tasmanian Government holding any legal or beneficial interest in such a body corporate

6 Compliance and information

- 6.1 The Parties will provide the ACCC with any executed Purchase Agreement within three (3) Business Days of the Commencement Date.
- 6.2 The Parties will respond in a timely manner to any queries or requests for information or documents made by the ACCC (including a person authorised by the ACCC under paragraph 3.2(q)) about this Undertaking.
- 6.3 The ACCC may direct The Parties in respect of their compliance with this Undertaking to, and The Parties will:
 - (a) furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce information, documents and materials to the ACCC within The Parties' custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (including its staff or its agents) may have.

- 6.4 Information furnished, documents and material produced or information given in response to the ACCC's direction under clause 6.3 may be used by the ACCC for any purpose consistent with the exercise of its statutory functions and powers.
- 6.5 Any direction made by the ACCC under clause 6.3 will be notified to The Parties in accordance with paragraph 11.
- 6.6 Nothing in paragraph 6 requires the provision of information or documents in respect of which The Parties have a claim of legal professional privilege.

7 Obligation to procure

- 7.1 Where the performance of an obligation under this Undertaking requires a Related Body Corporate of one of The Parties, to take or refrain from taking some action, The Party will use its best endeavours to procure that Related Body Corporate to take or refrain from taking that action, as the case may be.

8 Confidentiality and disclosure

- 8.1 The Parties acknowledge that the ACCC may:
- (a) make this Undertaking publicly available; and
 - (b) publish this Undertaking on its Public Section 87B Undertakings Register; and
 - (c) from time to time publicly refer to this Undertaking.

9 No derogation

- 9.1 The Undertaking does not prevent the ACCC from taking enforcement action at any time, whether during or after the period of this Undertaking, in respect of any breach by The Parties of any term of the Undertaking.
- 9.2 Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that the ACCC decides that the Proposed Acquisition may contravene section 50 of the Act.

10 Costs

- 10.1 The Parties must pay all of their own costs incurred in relation to this Undertaking.

11 Notices

- 11.1 Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Name: Australian Competition & Consumer Commission
Address: 23 Marcus Clarke Street, Canberra, ACT, 2601
Fax Number: (02) 6243 1212
Attention: General Manager, Mergers and Asset Sales Branch

11.2 Any notice or communication to The Parties pursuant to this Undertaking must be sent to:

Name: Aurora Energy Pty Ltd
Address: 21 Kirksway Place, Hobart
Fax Number: (03) 6237 3444
Attention: Mr Robert Kimber

and

Name: Department of Treasury and Finance
Address: 21 Murray Street, Hobart,
Fax Number: (03) 6233 5690
Attention: Mr Rob Nicholl

11.3 If The Parties or the ACCC gives the other three (3) Business Days notice of a change to its address or fax number, any notice or communication is only given to the relevant entity if it is delivered, posted or faxed to the most recently advised address or fax number.

Executed by Aurora Energy Pty Ltd, ABN 85 082 464 622
in accordance with s87B of the Trade Practices Act
by or in the presence of:



Signature of Director



Signature of ~~Director~~/Secretary

GEORGEY LIVINGSTONE WILLIS

Name of Director (please print)

R. A. Kimber
Company Secretary

Name of ~~Director~~/Secretary (please print)

Date: 13 September 2008

Executed by The Honourable Michael Aird MLC, Treasurer, for and on behalf of the The
Crown in the right of the State of Tasmania
in accordance with s87B of the Trade Practices Act
by or in the presence of:



Signature of Authorised Person



Signature of Authorised Person
WITNESS

Michael Aird

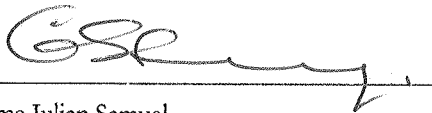
Name of Authorised Person (please print)

ANTON BERNARD VOSS

Name of ~~Authorised Person~~ (please print)
WITNESS

Date: 13 SEPTEMBER 2008

Accepted by the Australian Competition & Consumer Commission pursuant to section 87B of the
Trade Practices Act 1974



Graeme Julian Samuel

Chairman

Date: 15 September 2008

Schedule 1

The Relevant Business includes:

1 Tamar Valley Power Station Project

The Tamar Valley Power Station Project is expected to comprise:

- a new 210MW Mitsubishi combined cycle gas turbine;
- a new 60MW Rolls Royce open cycle gas turbine; and
- three 40 MW FT8 gas turbines.

2 Other

- all ancillary plant, equipment and facilities;
- all associated operations necessary for the functioning of the assets described above in the supply of electricity;
- all contracts, agreements and regulatory approvals required for the completion, commissioning and/or operation of the Relevant Business, including those necessary for connection to the gas and electricity transmission systems;
- any employees that are required to operate the assets; and
- associated freehold and leasehold land related to the operation of the assets.

For the avoidance of doubt, the Relevant Business includes all of the assets acquired by Aurora Energy as part of the Proposed Acquisition.