

Form A

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

EXCLUSIONARY PROVISIONS AND ASSOCIATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of Applicant:**
(Refer to direction 2)

A91594

The Eastern Energy Buyers Group (the **Buyers Group**) on behalf of its current and future members (the **Applicants**).

- (b) Description of business carried on by applicant:**
(Refer to direction 3)

The current members of the Buyers Group are industrial users of energy, operating in energy intensive industries and with significant operations in Victoria who require stable, long-term energy supply and whose operations are highly sensitive to energy price increases. The members purchase electricity and natural gas for

operations primarily in Victoria, with smaller operations located in New South Wales, Queensland and South Australia. Their operations outside Victoria account for less than 10% of the combined total load.

The Buyers Group also wishes to allow additional entities to join the Buyers Group (and have the benefit of the authorisation) provided that the total gas and electricity consumption of the Buyers Group does not exceed 16 PJ (10% of Victorian gas market) and 4.5TWh (10% of the Victorian electricity market). Future members must also be industrial users of energy, who operate in energy intensive industries and have significant operations in Victoria.

(c) Address in Australia for service of documents on the applicant:

Richard Doyle, Managing Director
Langu Resources
146 Pittwater Road
Manly NSW 2095
0447 333 402

Justin Jones, Counsel
Ashurst
Level 26, 181 William Street
Melbourne VIC 3000
(03) 9679 3640

2. Contract, arrangement or understanding

**(a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)**

The Applicants propose to establish joint electricity and gas purchasing groups to implement the Buyers Group, whereby the Applicants would pool their electricity and gas demands and place a single tender into the markets calling for proposals for electricity and gas supply arrangements under which a supplier would enter into an agreement with each Applicant.

Each agreement between the Applicant and successful supplier would be on the same (or substantially similar) terms and conditions.

See section 3 of Annexure A for further details.

**(b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, exclusionary provisions and (if applicable) are, or would or might be, cartel provisions:
(Refer to direction 4)**

The proposed conduct concerns an arrangement to jointly negotiate the terms and conditions of the agreement and collectively conduct a tender process for the Buyers Group.

See section 3.1 of Annexure A for details of the arrangements between the Applicants and the proposed tender process.

- (c) **Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:**

The Applicants wish to source cost-competitive and reliable electricity and gas supplies.

- (d) **The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:**

The Applicants seek both interim and final authorisation for the Buyers Group. Final authorisation is requested for a period of 11 years. This is based on the length of time the tender process is anticipated to take, plus the term of the supply agreements.

See section 3.2 of Annexure A for further details.

3. Parties to the proposed arrangement

- (a) **Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:**

Following the completion of the tender process, the successful tenderers will be the other party to the relevant contracts with the Applicants (which includes both current and future members of the Buyers Group). This may include one supplier of electricity, gas and gas transport, or separate suppliers for each good and service. Each Applicant will enter into an agreement with the supplier.

- (b) **Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:**
(Refer to direction 5)

Details of the Applicants are set out at section 2.6 of Annexure A.

4. Public benefit claims

- (a) **Arguments in support of application for authorisation:**
(Refer to direction 6)

See section 6 of Annexure A for details.

- (b) **Facts and evidence relied upon in support of these claims:**

See section 6 of Annexure A.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods

or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 7)

The relevant markets are:

(a) a market for the generation and wholesale supply of electricity in the National Electricity Market or, in the alternative, in one or more regions of the National Electricity Market, including Victoria;

(b) a market for the retail supply of electricity to commercial and industrial customers in Victoria;

(c) the East Coast Gas Market, a market including Victoria for the retail supply of gas to commercial and industrial end customers and, to the extent that it is a separate market, the gas transport market.

See section 4 of Annexure A for further details.

6. Public detriments

- (a) **Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in particular the likely effect of the contract arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:**
(Refer to direction 8)

The Applicants do not believe there are any potential detriments to the public likely to result from the authorisation.

See section 7 of Annexure A for further details.

- (b) **Facts and evidence relevant to these detriments:**

See section 7 of Annexure A.

7. Contracts, arrangements or understandings in similar terms

- (a) **This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:**

- (b) **Is this application to be so expressed?**

No.

(c) If so, the following information is to be furnished:

**(i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:
(Refer to direction 9)**

Not applicable.

**(ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:
(Refer to direction 10)**

Not applicable.

(iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Not applicable.

8. Joint Ventures

(a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No.

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable.

(c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

9. Further information

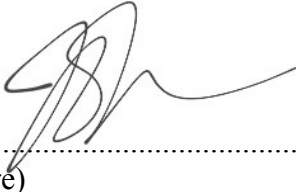
- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:**

Richard Doyle, Managing Director
Langu Resources
146 Pittwater Road
Manly NSW 2095
0447 333 402

Justin Jones, Counsel
Ashurst
Level 26, 181 William Street
Melbourne VIC 3000
(03) 9679 3640

Dated 4 August 2017

Signed ~~by~~ on behalf of the applicant



.....
(Signature)

Justin Duncan Jones
(Full Name)

Ashurst Australia
(Organisation)

Counsel
(Position in organisation)

DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for authorisation.

8. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
10. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.

Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

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- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) **Name of Applicant:**
(Refer to direction 2)

A91595

The Eastern Energy Buyers Group (the **Buyers Group**) on behalf of its current and future members (together the **Applicants**).

- (b) **Short description of business carried on by applicant:**
(Refer to direction 3)

The current members of the Buyers Group are industrial users of energy, operating in energy intensive industries and with significant operations in Victoria who require stable, long-term energy supply and whose operations are highly sensitive to energy price increases. The members purchase electricity and natural gas for

operations primarily in Victoria, with smaller operations located in New South Wales, Queensland and South Australia. Their operations outside Victoria account for less than 10% of the combined total load.

The Buyers Group also wishes to allow additional entities to join the Buyers Group (and have the benefit of the authorisation) provided that the total gas and electricity consumption of the Buyers Group does not exceed 16 PJ (10% of Victorian gas market) and 4.5TWh (10% of the Victorian electricity market). Future members must also be industrial users of energy, who operate in energy intensive industries and have significant operations in Victoria.

(c) Address in Australia for service of documents on the applicant:

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Langu Resources
146 Pittwater Road
Manly NSW 2095
0447 333 402

Justin Jones, Counsel
Ashurst
Level 26, 181 William Street
Melbourne VIC 3000
(03) 9679 3640

2. Contract, arrangement or understanding

**(a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)**

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Each agreement between the Applicant and successful supplier would be on the same (or substantially similar) terms and conditions.

See section 3 of Annexure A for further details.

**(b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:
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The proposed conduct concerns an arrangement to jointly negotiate the terms and conditions of the agreement and collectively conduct a tender process for the Buyers Group.

See section 3.1 of Annexure A for details of the arrangements between the Applicants and the proposed tender process.

- (c) **Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:**

The Applicants wish to source cost-competitive and reliable electricity and gas supplies.

- (d) **The term for which authorisation of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:**

The Applicants seek both interim and final authorisation for the Buyers Group. Final authorisation is requested for a period of 11 years. This is based on the length of time the tender process is anticipated to take, plus the term of the supply agreements.

See section 3.2 of Annexure A for further details.

3. Parties to the proposed arrangement

- (a) **Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:**

Following the completion of the tender process, the successful tenderers will be the other party to the relevant contracts with the Applicants (which includes both current and future members of the Buyers Group). This may include one supplier of electricity, gas and gas transport, or separate suppliers for each good and service. Each Applicant will enter into an agreement with the supplier.

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(Refer to direction 5)

Details of the Applicants are set out at section 2.6 of Annexure A.

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- (a) **Arguments in support of authorisation:**
(Refer to direction 6)

See section 6 of Annexure A for details.

- (b) **Facts and evidence relied upon in support of these claims:**

See section 6 of Annexure A.

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(Refer to direction 7)

The relevant markets are:

(a) a market for the generation and wholesale supply of electricity in the National Electricity Market or, in the alternative, in one or more regions of the National Electricity Market, including Victoria;

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(Refer to direction 8)

The Applicants do not believe there are any potential detriments to the public likely to result from the authorisation.

See section 7 of Annexure A for further details.

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No.

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**(i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:
(Refer to direction 9)**

Not applicable.

(ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

Not applicable.

(iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

Not applicable.

8. Joint Ventures

(a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No.

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable.

(c) If so, by whom or on whose behalf are those other applications being made?

Not applicable.

9. Further information


(a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Richard Doyle, Managing Director
Langu Resources
146 Pittwater Road
Manly NSW 2095
0447 333 402

Justin Jones, Counsel
Ashurst
Level 26, 181 William Street
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(03) 9679 3640

Dated 4 August 2017

Signed ~~by~~ on behalf of the applicant



.....
(Signature)

Justin Duncan Jones
(Full Name)

Ashurst Australia
(Organisation)

Counsel
(Position in organisation)

DIRECTIONS

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In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.

7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

ashurst

Submission in support of an application for
interim and final authorisation

Eastern Energy Buyers Group

4 August 2017

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1. EXECUTIVE SUMMARY

This application is made by Eastern Energy Buyers Group (the **Buyers Group**) on behalf of the current energy buyers and any future members admitted to the Buyers Group as described in section 2.6 (together, the **Participating Members**).

Langu Resources Pty Ltd (**Langu**) acts as the representative for the Buyers Group.

The Participating Members seek interim and final authorisation from the Australian Competition and Consumer Commission (the **ACCC**) to establish the Buyers Group. The Participating Members wish to pool their collective demand for electricity and gas, and place one or more tenders into the market calling for proposals to meet those electricity and gas requirements.

Specifically, the Participating Members seek:

- (a) interim authorisation to jointly conduct tender processes to identify and select an electricity supplier and natural gas supplier (which may include integrated or separate gas transport arrangements) that will supply electricity and/or gas to the Participating Members;
- (b) final authorisation for each Participating Member to enter into electricity and gas supply agreements, and potentially gas transport agreements, on the same general agreed terms and conditions from the successful supplier or suppliers; and
- (c) each of the Participating Members being entitled to consult with each other and make joint decisions regarding the administration and operation of those agreements.

The Participating Members consider that establishing the Buyers Group will provide significant public benefits by enabling the Participating Members to obtain electricity and gas at cost-effective prices (and, in the case of gas, at all) resulting in:

- (a) increased efficiency and cost savings that will benefit the Participating Members' suppliers and end customers;
- (b) increased competition in the markets the Participating Members operate in because it will enable them to compete more vigorously and, in some cases, will enable them to continue to compete; and
- (c) potentially increased competition for natural gas and electricity in Victoria.

The Participating Members also consider that it will not lead to any public detriments (including any lessening of competition in any relevant market).

2. INTRODUCTION

2.1 Background and context

As explained in further detail in these submissions, the Participating Members are facing a situation where the rapidly increasing price of energy, and the lack of available natural gas, is seriously impeding their ability to continue to operate their businesses. Each individual Participating Member's demand for energy is not sufficient to enable it to secure cost-effective energy on reasonable commercial terms.

As a consequence, the Participating Members wish to combine their collective demand to increase their bargaining power, and make them more attractive to energy suppliers so that they can secure cost-effective energy. This will enable the Participating Members to

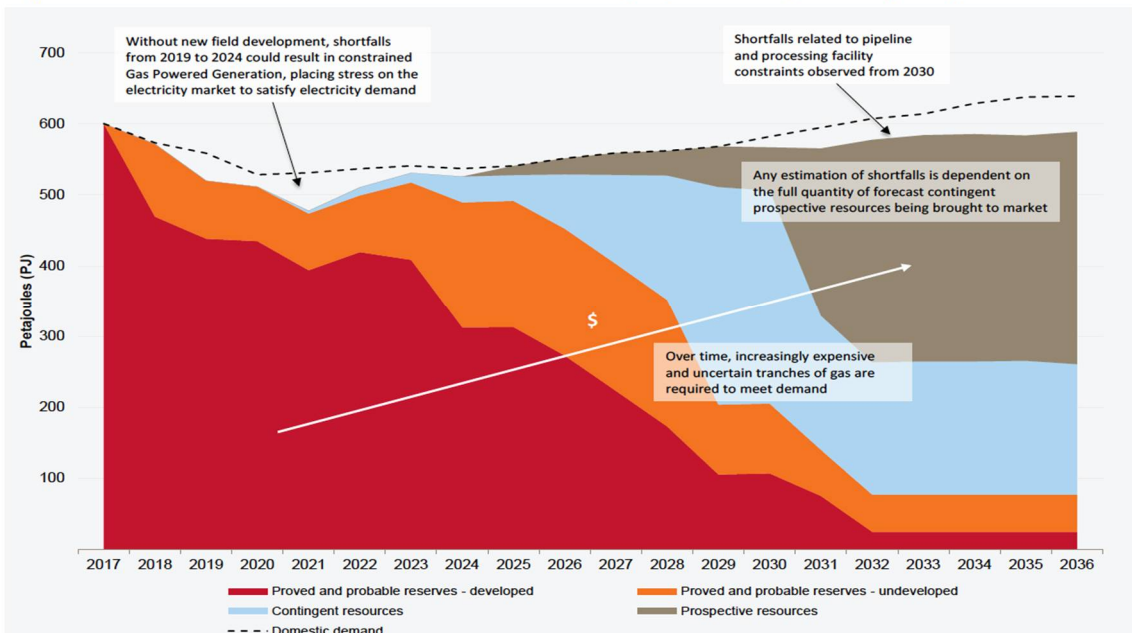
carry on their businesses more effectively, which will lead to public benefits without any public detriments.

2.2 Lack of access to natural gas

The East Coast Gas Market has undergone a significant change in the last 2-3 years, and has moved from an environment of ample supply and stable prices to the potential for supply shortages and volatile pricing. According to the 2015-16 Inquiry into the East Coast Gas Market undertaken by the ACCC, these changes in the market can be attributed to:

- the scale of gas contracted long term to the liquefied natural gas (**LNG**) export projects in Queensland;
- lower oil prices, reducing investment in exploration and lowering production forecasts for LNG projects; and
- moratoria and regulatory restrictions on onshore gas exploration and development in several states.¹

Figure 4 Eastern and south-eastern Australia domestic gas production (excluding LNG), 2017–36



Source: AEMO Statement of Gas Opportunities, March 2017

The scale of the crisis in the East Coast Gas Market is reflected by the below:

- Natural gas is in limited supply for smaller industrial customers, and is increasingly expensive.
- The establishment of the Gas Market Reform Group by the Council of Australian Governments (**COAG**) Energy Council in August 2016 to lead the design, development and implementation of wholesale gas market reforms amongst other objectives.
- The establishment of the Australian Domestic Gas Security Mechanism from 1 July 2017, which has given the Australian Government the power to impose export

¹ ACCC, *Inquiry into the east coast gas market* (April 2016).

controls on companies where there is a shortfall of gas supply in the domestic market.

- (d) The Treasurer directing the ACCC to hold a wide-ranging inquiry into the supply of, and demand for, wholesale gas in Australia under section 95H of the *Competition and Consumer Act 2010* (Cth) (**CCA**) on 19 April 2017 for three years.

This tightness in supply and volatile increasing prices have had significant implications for the Participating Members, who in aggregate purchase up to 1.2 petajoules (**PJ**) per annum.

The Participating Members recognise that there are a number of regulatory and market measures that will be implemented (some are outlined above). These measures will take some time to have a material effect on the current predicament the Participating Members face with no certainty of reliable supply at competitive prices and, in any event, the increased bargaining power from pooling gas demand would deliver significant public benefits even once those regulatory and market measures are in place, without any resulting public detriment.

2.3 Options for buying gas

A solution such as participating in a buyers group allows Participating Members to seek supply from upstream gas producers and other wholesale suppliers on a competitive basis, which could provide some business certainty in the intervening period.

The alternatives available to Participating Members without this solution are:

- (a) buy gas in the spot market with no guarantee of long term price or supply certainty; or
- (b) enter into a long term agreement at an uncompetitive price that could have serious consequences for their businesses and financial viability.

With a combined annual demand of up to 1.2PJ of gas, the Participating Members will be sufficiently large to either engage with upstream gas producers for direct supply or to encourage the development of new supply from offshore and onshore production. This will result in competition for the Participating Members demand and potentially in the introduction of new, much needed gas supply to the domestic market.

As energy intensive businesses operating in competitive global markets, sustained uncompetitive gas prices and risks to supply could have dire consequences for the financial future of the Participating Members and more than 4,000 direct employees in addition to their numerous suppliers, many located in regional and rural areas.

2.4 Electricity

According to the Australian Energy Market Operator (**AEMO**) in its inaugural Energy Supply Outlook (**ESO**) report published on 15 June 2017, the power system and energy markets are changing. AEMO is "collaborating closely with government and market participants to evolve capacity within the power system to meet peak demand during critical summer periods for the immediate two year horizon".²

The changing power system, rising gas prices, and reduction in wholesale electricity capacity have combined with other factors to drive up retail electricity prices. The Participating Members acknowledge that the increase retail electricity costs is a matter

² AEMO Chief Executive Officer Audrey Zibelman, Media Release 15 June 2017.

that is being investigated by the ACCC as part of its ongoing retail supply and pricing of electricity under section 95H of the CCA.

Victoria has historically been a net exporter of electricity. However, following the recent closure of Hazelwood Power Station on 31 March 2017, and the removal of its 10 terrawatt hours (**TWh**) of annual generation, it is expected that the state will become a net importer of electricity. AEMO forecasts the state will be a net importer for at least 3TWh per year for the next 2 years compared to net exporter of an average of 8TWh per year over the last 3 years.³

It could be expected that increased coal fired generation in New South Wales might meet the supply shortfall from the Hazelwood closure. However, this will require installed coal fired generation to operate at levels higher than ever before, a scenario that carries increased operational and market risk. If increased coal fired generation is unable to meet this demand, the backstop for the market will be increased gas fired generation, at a significantly higher cost given the tight supply and high pricing for natural gas.

This significant shift in supply/demand balance for the Victorian electricity market has been reflected by the below:

- (a) Increasing prices and volatility in the Victorian wholesale electricity market.
- (b) Retail offers to Participating Members for 2018 electricity supply doubling from 2017 prices.
- (c) Victorian Government Energy Storage Initiative, aiming to establish 40 megawatts (**MW**) to 100MW of energy storage by January 2018.
- (d) AEMO identifying in its inaugural Energy Supply Outlook that there is a risk of supply shortfalls in South Australia and Victoria during extreme weather conditions over the next two years.⁴
- (e) Consideration of return to service of a number of mothballed gas fired generators, including Pelican Point (South Australia), Swanbank E (Queensland) and Tamar Valley (Tasmania), the impact on electricity supply from these generators will be subject to availability and cost of gas.

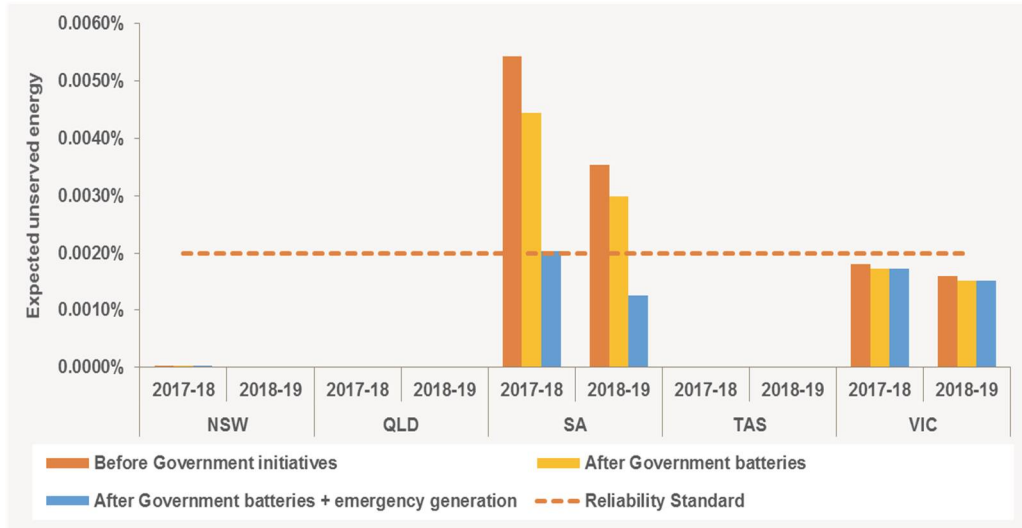
AEMO's latest Energy Adequacy Assessment Projection (**EAAP**) update published in June 2017, models the reliability on a state by state basis for electricity generation based on latest available information and forecasts the risk of unserved energy demand (**USE**).

Below is AEMO's forecast of reliability for generation assuming that 240MW of mothballed gas generation does not come back online to supply South Australia for the next 2 years. It clearly shows South Australia breaching the reliability threshold of 0.002% USE and Victoria close to the limit.

³ AEMO Energy Supply Outlook, published 15 June 2017.

⁴ AEMO Energy Supply Outlook, published 15 June 2017, page 12.

Figure 5 EAAP with 240MW of gas-fired generation unavailable in South Australia



Source: AEMO Energy Supply Outlook, 15 June 2017 – Page 16

The significant changes and rising prices in the south east Australian electricity markets, in particular Victoria, will have a significant impact on the Participating Members, with a combined annual demand of up to 120 million KWh (120 gigawatt hours (**GWh**)). If the Participating Members are limited to securing supply from retailers, as outlined above and below, these companies can expect power costs to double for 2018, putting extreme financial pressure on these energy intensive businesses.

It is acknowledged that a number of measures are being considered and introduced to address rising electricity costs and risks to supply by the federal government, AEMO and individual state governments and these include:

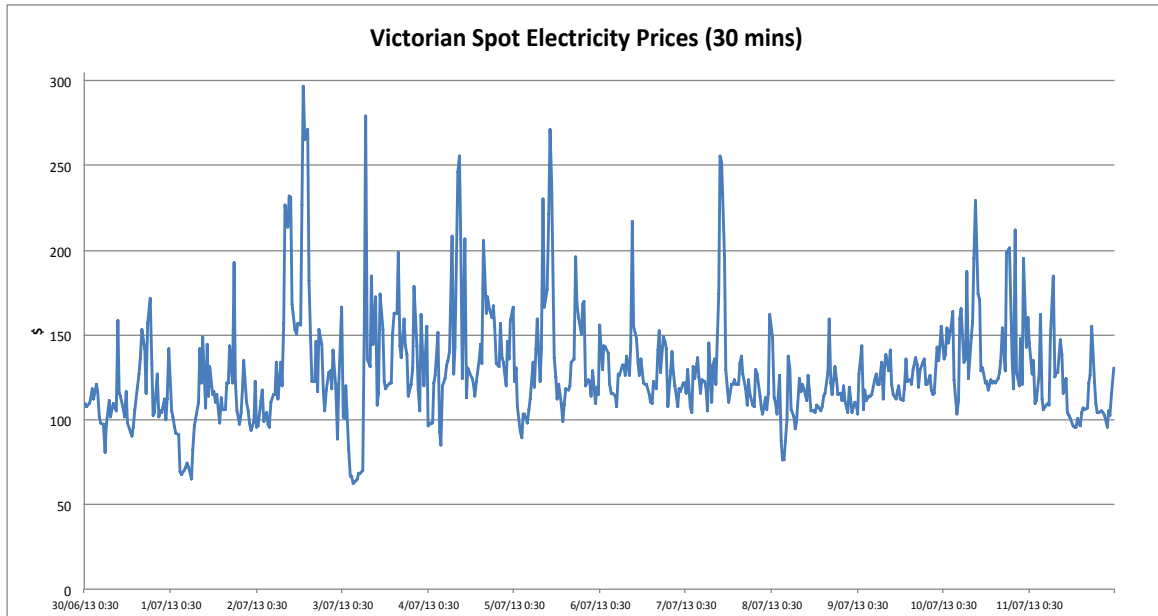
- (a) Returning mothballed gas fired generation to service—this will be subject to optimising gas supply availability—one of the key objectives of the COAG sponsored Gas Market Reform Group and introduction of the Australian Domestic Gas Security Mechanism (refer above).
- (b) Development of new renewable energy generation, with AEMO recommending this should be de-risked via storage or contracted generation.
- (c) Establishing back up electricity storage capacity—eg the Victorian Government Energy Storage Initiative and the South Australian Energy Plan.
- (d) Maximising demand side participation – pilot demand response initiative introduced for 2017-2018 summer by AEMO and Australian Renewable Energy Agency (**ARENA**).

2.5 Options for acquiring electricity

While these measures could all contribute to reducing costs and supply risk for the Participating Members, it is highly likely that positive impacts from these measures will not be realised in the short to medium term. This being the case, the Participating Members will have two alternatives:

- (a) enter into short term supply agreements with retailers, at prices higher than current costs and reflecting the market expectations of increased price and supply volatility; or
- (b) purchase electricity for the short to medium term in the spot market, fully exposed to potential further price and supply shocks (as illustrated below). The

Participating Members would not be in a position to effectively hedge against that risk using electricity derivatives or other arrangements individually, as their loads are too small to obtain cost-effective hedging instruments.



Source: AEMO Database – Victorian Spot Prices 1 July 17 to 12 July 17 (30mins)

With a combined annual demand of 120GWh of electricity, the Participating Members consider this is likely to enable them to secure better prices and commercial terms for electricity, which are essential to allowing these energy intensive, businesses to continue to operate and compete.

2.6 Participating Members

The current Participating Members are industrial users of energy operating in energy intensive industries with significant operations in Victoria, who require stable, long-term energy supply and whose operations are highly sensitive to energy prices increases. The Participating Members purchase electricity and natural gas for operations primarily in Victoria, with smaller operations located in New South Wales, Queensland and South Australia. Their operations outside Victoria account for less than 10% of the combined total load.

The Participating Members also wish to allow additional entities to join the Buyers Group (and have the benefit of the authorisation) provided that the total gas and electricity consumption of the Buyers Group does not exceed 16PJ (10% of Victorian gas market) and 4.5TWh (10% of the Victorian electricity market). Future members must also be industrial users of energy, who operate in energy intensive industries and have significant operations in Victoria.

2.7 Buyers Group management – Langu

Langu will manage the Buyers Group. It is not itself an energy purchaser, and does not otherwise compete with any of the Participating Members.

Langu is an independent advisor to Australian companies, assisting with commodities price and supply risk management strategies. Langu as an independent third party will manage the Participating Members. Its roles and responsibilities will include:

- (a) draft Buyers Group Framework and ACCC Application;

- (b) manage ACCC consultation and approvals process;
- (c) prepare electricity, gas and gas transportation tenders (if applicable);
- (d) strategic advice regarding energy markets and supply to Participating Members;
- (e) present tenders to suppliers and commence negotiations;
- (f) assess supplier offers from tender process;
- (g) finalise negotiations with successful supplier(s);
- (h) assist individual Participating Members with conclusion of contracts with successful supplier(s); and
- (i) reporting – for the term of the agreement, Langu will provide regular reporting and progress updates to Participating Members.

3. **SCOPE OF THE AUTHORISATION**

3.1 **Proposed conduct**

Overview

The Participating Members seek to investigate potential options for their combined electricity and gas loads, and conduct one or more joint tender processes under which proposals will be sought for:

- (a) an electricity supplier to enter into an electricity supply agreement with each Applicant on the same price, and substantially the same terms, to meet their collective electricity requirements;
- (b) a gas supplier to enter into a gas supply agreement with each Applicant on the same price, and substantially the same terms, to meet their collective gas requirements; and
- (c) either as part of the gas supply agreement, or separately with another supplier (including potentially directly with a pipeline), a gas transport agreement to supply the necessary gas transportation services.

Joint tender process

Subject to obtaining interim authorisation, expression of interest are intended to be issued on 15 September 2017. Langu will manage the tender process, which will operate as follows:

- (a) The tender documents will be developed and approved by the Participating Members before being issued.
- (b) The tender will be an open tender, with an indicative deadline of 30 September 2017.
- (c) Langu will convene and chair an evaluation panel. The evaluation panel will be comprised of representatives of the Applicants. The evaluation panel may also engage non-voting advisors (including legal, financial and technical advisors). The evaluation panel will evaluate the tenders against prescribed criteria, which the Participating Members will make available to the ACCC on a confidential basis.

- (d) Once the evaluation panel has agreed on one (or more) preferred tenderers, Langu will negotiate the contractual terms (discussed further below) with the preferred tenderer or tenderers. It is anticipated these will occur during the period 15 September to 15 October 2017.
- (e) Once negotiations are completed (with a target deadline of 15 October 2017), the evaluation panel will make a recommendation to the Participating Members on the preferred tenderer and contract terms.
- (f) Each Applicant will then undergo its own governance process to make a final decision as to whether or not to award the tender to the preferred tenderer. The supply start date for each individual Applicant will depend on its existing contractual arrangements and requirements.

Ongoing administration of energy supply agreements

Once the electricity supply, gas supply, and gas transport agreements have been agreed, then each Applicant will primarily be responsible for administering it without any ongoing consultation. However, it may be necessary for the Participating Members to participate in joint activities and decisions about some aspects of the agreements, specifically:

- (a) performance reviews;
- (b) periodic and other pricing review;
- (c) 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; and
- (d) any changes to the terms and conditions.

3.2 Period for which authorisation is sought

The Participating Members seek authorisation for a period of 11 years. This is based on the length of time the tender process is anticipated to take, plus the term of the supply agreements. This is broadly comprised of the following steps:

- (a) Up to 12 months for preparation of joint tenders, approach to suppliers, negotiation, and execution of individual agreements
- (b) An initial 2-5 year term for each individual electricity supply agreement
- (c) An initial 2-5 year term for each individual natural gas supply agreement and gas transportation agreement (if applicable)
- (d) An additional 2-5 years to extend the initial electricity or natural gas supply agreements on the same terms.

3.3 Application for interim authorisation

The Participating Members seek interim authorisation in respect of this authorisation in order to enable them to conduct initial investigations in relation to potential electricity, gas and gas transport options, prepare the tender documentation, and potentially issue the tender or tenders.

The Participating Members will not enter into any electricity supply, gas supply or gas transport agreements negotiated by the Buyers Group or its representative until final authorisation is granted.

Interim authorisation is justified because:

- (a) the benefits of the conduct cannot be realised unless the Participating Members are able to move relatively quickly, so that they are in a position to complete the joint tender process and identify the successful suppliers before individual Applicant's existing supply arrangements end; and
- (b) 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 Participating Members.

3.4 **Why authorisation is being sought**

The Participating Members may be considered to be competitors in the acquisition of energy under the CCA. Accordingly, it is arguable (although the Participating Members do not concede) that making and giving effect to the arrangements underpinning the Buyers Group could be challenged on the grounds they contain provisions that may contravene the CCA, such as provisions:

- (a) having the purpose of preventing, restricting or limiting the acquisition of goods or services from particular persons or classes of persons (that is, an exclusionary provision prohibited under section 45(2)(a)(i) of the CCA);
- (b) having the purpose or effect of fixing, controlling or maintaining the price of goods or services to be acquired by the Participating Members (that is, a cartel provision prohibited under sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the CCA); or
- (c) having the purpose of allocating between the parties to the arrangement 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 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK of the CCA).

The Participating Members wish to have the certainty afforded by authorisation that the arrangements do not breach these prohibitions and cannot be challenged on the ground that they have the purpose, effect or likely effect of substantially lessening competition (which is prohibited under section 45(2)(a)(ii) of the CCA).

4. **MARKET DEFINITION**

4.1 **Gas market**

As the ACCC is aware, natural gas is traded in a distinct market covering the east coast of Australia, including the Australian Capital Territory, New South Wales, South Australia, Queensland, Victoria and Tasmania.⁵ Energy retailers act as market intermediaries by buying gas from producers and selling it with transmission pipeline services to residential, commercial and small industrial customers. In addition, gas producers are willing to sell directly to larger wholesale gas customers from time to time.

Consequently, the Participating Members consider that the East Coast Gas Market, which is a market including Victoria, for the retail supply of gas to commercial and industrial end customers, is relevant to the assessment of the Buyers Group's effect on competition.

The total consumption of gas across the East Coast Gas Market in 2016 was approximately 700PJ.⁶ The Participating Members' combined load committed to the Project represents less than 0.17% of the total consumption in the gas market. However,

⁵ Australian Energy Regulator, *State of the Energy Market 2017*, 64.

⁶ Australian Energy Regulator, *State of the Energy Market 2017*, 66.

by combining their demand, they may be able to buy directly from gas producers and other large wholesale suppliers, rather than continuing to rely on a single gas retailer.

4.2 **Gas transportation**

Gas transport is an intrinsic part of gas supply. The Applicants anticipate that their gas supplier will be in a position to provide gas transport, but it is possible that the combined demand of the Participating Members will enable them to negotiate directly with gas suppliers "at the source". The Participating Members may therefore need to acquire their own gas transportation services to deliver gas to their sites.

Consequently, in considering the gas supply market, it is also relevant to consider the gas transport market (to the extent that it is a separate market).

4.3 **Electricity market**

The Participating Members consider that both of the following markets are relevant to the assessment of the Buyers Group's effect on competition:

- (a) a market for the generation and wholesale supply of electricity in the National Electricity Market (**NEM**) or, in the alternative, in one or more regions of the NEM, including Victoria; and
- (b) a market for the retail supply of electricity to commercial and industrial end customers in Victoria.

As the ACCC is aware, wholesale electricity in eastern and southern Australia is traded through the NEM, covering the Australian Capital Territory, New South Wales, South Australia, Queensland, Victoria and Tasmania. Generators in the NEM sell electricity through a pooled wholesale spot market in which changes in the supply–demand balance determine prices. Larger customers (particularly retailers) also "hedge" their electricity positions through electricity derivative contracts.

The main customers are energy retailers who buy electricity from the wholesale market, package it with transmission and distribution network services, and sell it to energy customers.⁷ The total consumption of electricity in the NEM in 2016-17 was 196.5TWh, of which Victoria consumed 45.3.⁸ Victoria is a net exporter of electricity, but exports are partially offset by hydro generation imports from Tasmania through the Bass-link interconnector.

The Participating Members' combined load committed to the Project represents less than 0.06% of the total consumption in the NEM, and 0.27% of the total consumption in the Victorian market. The Participating Members may also acquire electricity outside Victoria, but the quantities are too low the Applicants submit that they are not material.

5. **COUNTERFACTUAL**

If the ACCC does not grant the authorisation, then each Applicant will need to independently obtain electricity and gas.

This is likely to have a very significant impact on the Participating Members and, in some cases, will mean that their ability to continue to operate will be jeopardised. This is because not only will the Participating Members be unable to achieve cost savings and efficiencies sought by the proposed conduct, some Participating Members will not be able to afford energy at all.

⁷ Australian Energy Regulator, *State of the Energy Market 2017*, 22, 25.

⁸ Australian Energy Regulator, *Electricity supply to regions of the National Electricity Market*, <https://www.aer.gov.au/wholesale-markets/wholesale-statistics/electricity-supply-to-regions-of-the-national-electricity-market> as at 12 July 2017.

The following outcomes will be likely if the Participating Members do not carry out the proposed conduct:

- (a) higher transaction costs and higher energy input costs, which will adversely impact customers and suppliers for goods and services provided by the Participating Members;
- (b) the Participating Members will be forced to accept "take it or leave it" commercial terms, which are likely to include terms that impose additional costs on them, including take or pay provisions combined with restrictions on on-supply, which mean that customers must bear the full risk of not meeting the take or pay level without any ability to mitigate that risk by on-supplying energy they are required to buy but do not need; and
- (c) periods where Participating Members do not have access to cost effective electricity or gas.

6. PUBLIC BENEFITS

6.1 Overview

The term "public benefit" is not defined in the CCA. It has however been interpreted broadly and includes:

*"...anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency."*⁹

The Buyers Group will provide a wide range of public benefits, which include:

- (a) increased efficiency and cost savings that will benefit the Participating Members' end customers;
- (b) increased competition in the markets the Participating Members operate in because it will enable them to compete more vigorously and, in some cases, will enable them to continue to compete; and
- (c) potentially increased competition for natural gas and electricity in Victoria.

6.2 Potential for increased competition for natural gas supply in eastern Australia

With a combined annual demand of more than 1.2PJ and the ability to enter into long term supply agreements, the Participating Members will incentivise other suppliers including gas producers to compete for the supply opportunity. The lower gas costs that result will flow through in the prices for food and other goods and services supplied by the Participating Members, for whom the production process is highly energy intensive.

6.3 Potential for increased competition for electricity supply in eastern Australia

The combined load offered by the Participating Members, and length, is likely to be attractive to a range of electricity retailers, and more attractive than the prospect of supplying electricity to any individual Applicant. It may also encourage electricity

⁹ *Re 7-Eleven* (1994), ATPR 41-357 at [42,777]. See also *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,242 and *VFF Chicken Meat Growers' Boycott Authorisation* (2006) AcomPT 9 at [75].

suppliers who would otherwise not supply the Participating Members to compete for the tender.

None of the Participating Members have meaningful bargaining power in the Victorian market. The combined load would allow the Participating Members to negotiate lower electricity prices, and superior commercial terms. This will enable them to pass on those benefits to downstream customers, so any reduced electricity price will ultimately benefit end customers.

6.4 Greater economies of scale and efficiency

While each Applicant is in a position to source electricity separately, not all of the Participating Members are able to source gas separately, and the Participating Members that can source gas separately have difficulty obtaining it at cost-effective prices. By aggregating their gas requirements, the Participating Members will be able to create economies of scale for gas suppliers, and enable them to participate in wholesale gas markets.

In addition, the strengthened bargaining power will also enable the Participating Members to negotiate better commercial terms (in addition to price), which will deliver further cost savings that will benefit Participating Members' suppliers and customers.

6.5 Reliable and competitively priced natural gas for eastern Australia

As energy intensive businesses in globally competitive markets, the Participating Members place a premium on long-term certainty of supply and price for gas. This appetite to manage risk is complementary to the risk considerations for gas producers investing in new production in Australia, who are seeking long-term certainty for off-take and price to manage the financial risk. By pooling the collective demand, the Buyers Group has the potential to deliver increased certainty for off-take and price for new gas production of at least 1.2PJ per annum, promoting more investment and strengthening supply.

6.6 Reliable and competitively priced electricity for eastern Australia

Each of the Participating Members have energy intensive operations, and therefore need long term, reliable and cost effective energy to secure their future. By securing their future, they will contribute to maintaining a strong base of energy users, promoting continued investment in energy in eastern Australia. This may promote efficient investment in new energy generation, like gas generation in Victoria, strengthening supply, placing downward pressure on prices and increasing reliability.

6.7 Investment in regional Australia

The Participating Members have significant operations located in regional areas, and so continued and expanded operations will encourage regional investment and employment in those areas, strengthening the local communities. It will also deliver benefits to the broader economy, including the upstream suppliers, and downstream customers, of the Participating Members.

6.8 Transaction cost savings

Conducting a tender of this complexity is a detailed and rigorous process which requires significant time and resources. The process requires the preparation of tender documents and the advertising, receipt and evaluation of tenders. Once a successful tender is selected, the process of contract preparation, negotiation and administration must follow.

Conducting a joint tender and contract administration process will be more efficient as it will eliminate the replication of work by each Applicant, and the need for specialist energy and legal advisors would make the costs prohibitive for any individual Applicant. This will

save the time and expenditure that would be incurred by each Applicant if required to conduct separate tender processes. These savings will ultimately benefit the customers and suppliers of each Applicant.

7. PUBLIC DETRIMENT

7.1 Natural gas (including gas transport)

The Participating Members submit that the authorised conduct will not have any material public detriment, and, in particular, is likely to be pro-competitive rather than anti-competitive.

The Participating Members' combined natural gas demands equate to less than 0.17% of the total consumption in the east coast market, and 0.75% of the total consumption in the Victorian market.

	Participating Members	East coast
Annual gas consumption	1.2PJ	700PJ

The amount the Participating Members wish to purchase is so comparatively small that it cannot have any material impact on competition in any wholesale or retail market. It also follows that there would not be any material impact on competition in any gas transportation market.

7.2 Electricity

The Participating Members submit that the authorised conduct will not have any material public detriment, and, in particular, is likely to be pro-competitive rather than anti-competitive.

The Participating Members' combined electricity demands equate to less than 0.06% of the total consumption in the NEM, and 0.27% of the total consumption in the Victorian market.

	Participating Members	Victoria	NEM
Annual electricity consumption	0.12TWh	45.3TWh	196.5TWh

Whether the relevant market is the National or the Victorian electricity market (or any other region of the NEM), the amount of energy the Participating Members wish to purchase is so comparatively small that it cannot have any material impact on competition in any wholesale or retail market.

7.3 Mitigating factors

While the Participating Members submit no material public detriments will arise, it is also relevant that, by conducting an open and transparent tender process, potential suppliers will have an opportunity to compete to supply the Participating Members (and, in all likelihood, more suppliers will compete than would otherwise be the case).

8. **CONCLUSION**

The Participating Members are at risk of no longer being able to effectively compete in their respective markets due to rising energy prices, and the lack of gas availability. The establishment of the Buyers Group is essential to enable those businesses to secure cost effective energy, mitigate the effects of rising electricity prices and handle the effects of the gas supply crisis.