



# Draft Determination

Applications for authorisation

lodged by

the Eastern Energy Buyers Group

in respect of

establishing a joint energy purchasing  
group and jointly negotiating energy  
supply agreements

Date: 13 October 2017

Authorisation numbers: A91594 & A91595

Commissioners:

Sims  
Rickard  
Schaper  
Court  
Featherston

## Summary

The ACCC proposes to grant authorisation to the Eastern Energy Buyers Group, on behalf of its current and future members, to establish a joint energy purchasing group where they will combine their gas and electricity requirements and conduct one or more joint tender processes to meet their energy demand.

The ACCC proposes to grant authorisation for 11 years.

The ACCC will seek submissions in relation to this draft determination before making its final decision.

## The applications for authorisation

1. On 4 August 2017, the Eastern Energy Buyers Group (**EEBG**), on behalf of its current and future members (the **Applicants**), lodged applications for authorisation A91594 and A91595 with the ACCC.<sup>1</sup>
2. The Applicants are seeking authorisation to pool their collective demand for electricity and gas and place one or more tenders into the market calling for proposals to meet their electricity and gas needs. The Applicants seek authorisation for 11 years.
3. The Applicants are seeking authorisation because the proposed conduct may involve an agreement amongst competing businesses about the terms and conditions on which they will acquire gas and electricity which would be at risk of breaching the *Competition and Consumer Act 2010* (Cth) (the **CCA**).
4. The Applicants also requested, and on 1 September 2017 the ACCC granted, interim authorisation to enable them to investigate potential electricity, gas and gas transport supply options, prepare tender documents, and issue one or more tenders, while the ACCC is considering the substantive applications. Interim authorisation does not extend to EEBG or its members going beyond these preparatory steps by actually entering into agreements for electricity, gas, or gas transport services.

## Background

### The Proposed Conduct

5. The Applicants are seeking to establish a joint energy purchasing group to aggregate their electricity and gas demands and conduct tender processes on the basis of those combined demands (**the proposed conduct**).

---

<sup>1</sup> Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013).

6. The Applicants seek to investigate potential options for their combined electricity and gas demand and conduct one or more joint tender processes under which proposals will be sought for:
  - An electricity supplier to enter into an electricity supply agreement with each member on the same price, and substantially the same terms, to meet the collective electricity requirements of the group.
  - A gas supplier to enter into a gas supply agreement with each member on the same price, and substantially the same terms, to meet the collective gas requirements of the group.
  - 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.<sup>2</sup>
7. Langu Resources Pty Ltd (**Langu**), an independent advisor, acts as the representative for the EEBG.

### **Joint tender process**

8. The joint tender process(es) will be managed by Langu, and will proceed as follows:
  - Tender documents will be developed, and approved by the group members, before being used. These tender documents will be used for open tender.
  - Langu will convene and chair a tender evaluation panel, comprised of representatives of each of the members. 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 group members will develop.
  - Once the evaluation panel has agreed on one or more preferred tenderers, Langu will negotiate the contractual terms with the preferred tenderer or tenderers.
  - Once negotiations are completed, the evaluation panel will make a recommendation to the group members on the preferred tenderer(s) and contract terms.
  - Each member will then undergo its own governance process to make a final decision as to whether or not to contract with the preferred tenderer. The supply start date for each individual member's agreement will depend on its existing contractual arrangements and requirements.<sup>3</sup>

### **Ongoing administration of energy supply agreements**

9. Once the electricity supply, gas supply, and gas transport arrangements have been agreed upon, each member will primarily be responsible for administering its individual arrangements without any ongoing consultation between EEBG members. However, it may be necessary for the group members to participate in ongoing joint activities and decisions about some aspects of the agreements, for example:

---

<sup>2</sup> EEBG submission, 4 August 2017, page 7.

<sup>3</sup> EEBG submission, 4 August 2017, page 7.

- performance reviews
- periodic and other pricing reviews
- any changes to the terms and conditions, and
- any events that materially impact the performance of the agreement – for example, material changes in law or the regulatory environment, force majeure events, or material changes to market conditions.<sup>4</sup>

## Period for which the authorisation is sought

10. The Applicants seek authorisation for 11 years, comprising:

- up to 12 months for preparation of joint tenders, approach to suppliers, negotiation, and execution of individual agreements
- an initial 2-5 year term for each individual electricity supply agreement and each individual natural gas supply and gas transport agreements, and
- an additional 2-5 years to extend the initial electricity or natural gas supply agreements on the same terms.<sup>5</sup>

## The Applicants

11. The current members of the EEBG are: the Australian Lamb Company Pty Ltd; Australian Lamb (Colac) Pty Ltd; CSF Proteins Proprietary Ltd; Diamond Valley Port Pty Ltd; the Gathercole Group; HW Greenham & Sons Pty Ltd; M.C. Herd Pty Ltd; Ridley Agriproducts Pty Ltd; Rivalea (Australia) Pty Ltd; Turi Foods Pty Ltd; and Turi Foods Farming Division Pty Ltd.

12. Each of these businesses is an industrial user of energy operating in energy-intensive industries, with significant operations in Victoria. Each operates in the agri-business sector, in food production and processing of agricultural commodities.<sup>6</sup>

13. The combined electricity demand of the current members of EEBG represents approximately 0.12 Terawatt hours (0.27 per cent of Victorian electricity consumption and 0.06 per cent of consumption in the National Electricity Market (NEM)).<sup>7</sup> The combined gas demand equates to 1.2 Petajoules (0.75 per cent of Victorian gas consumption and less than 0.17 per cent of total consumption on the Australian east coast).<sup>8</sup>

14. Authorisation is sought to enable other industrial users of energy to join the group in the future, provided the combined energy consumption by the group does not exceed 16 PJ of gas (approximately 10 per cent of the Victorian gas usage,<sup>9</sup> which equates to 2.29 per cent of the east coast gas consumption) or 4.5 TWh of electricity (approximately 10 per cent of the Victorian electricity consumption,<sup>10</sup> which equates to approximately 2.29 per cent of NEM consumption). Any new

<sup>4</sup> EEBG submission, 4 August 2017, page 8.

<sup>5</sup> EEBG submission, 4 August 2017, page 8.

<sup>6</sup> EEBG to ACCC Letter, 31 August.

<sup>7</sup> EEBG submission, 4 August 2017, page 13.

<sup>8</sup> EEBG submission, 4 August 2017, page 13.

<sup>9</sup> EEBG submission, 4 August 2017, page 6.

<sup>10</sup> EEBG submission, 4 August 2017, page 6.

members will be businesses operating in any energy intensive industry and with significant operations in Victoria, but need not come from the agri-business sector.<sup>11</sup>

## Rationale

15. The Applicants submit that its members are facing rapidly increasing prices for energy and lack of available natural gas, which is seriously impeding their ability to continue to operate their businesses.<sup>12</sup>
16. The Applicants submit that Australia's east coast gas supply has undergone a significant change in recent years and has moved from an environment of ample supply and stable prices to the potential for supply shortages and volatile pricing.<sup>13</sup> In this environment, the Applicants submit that natural gas is in limited supply for small industrial users, and is increasingly expensive; and this volatility in prices has significant implications for EEBG members.<sup>14</sup>
17. The Applicants also submit that EEBG members are being significantly affected by rising electricity prices.<sup>15</sup> The Applicants contend that if they are limited to securing their supply from retailers individually, they can expect power costs to double for 2018, putting extreme financial pressure on them.<sup>16</sup>
18. The Applicants consider that, by pooling their demands for gas and electricity, they may reach a sufficient size to enable them to secure more competitive prices and commercial terms for both gas and electricity.<sup>17</sup>

## ACCC Retail Electricity Pricing Inquiry

19. On 27 March 2017, the Australian Government directed the ACCC to commence an inquiry into the supply of retail electricity and the competitiveness of retail electricity prices.<sup>18</sup>
20. The ACCC's preliminary report is due to be released by the Treasurer in October 2017.
21. The ACCC is required to provide its final report to the Treasurer by 30 June 2018.

## Gas Inquiry 2017-20

22. On 19 April 2017, the Australian Government directed the ACCC to conduct an inquiry to improve transparency and monitor gas supply in Australia.
23. On 25 September 2017, the ACCC's first interim report was released, which focused on the likely supply and demand conditions for 2018. The report projected that there would be a significant shortfall in the east coast gas market, and that this is being reflected in the prices being offered to commercial and industrial customers for 2018.<sup>19</sup>

---

<sup>11</sup> EEBG submission, 4 August 2017, page 6.

<sup>12</sup> EEBG submission, 4 August 2017, page 1.

<sup>13</sup> EEBG submission, 4 August 2017, page 2.

<sup>14</sup> EEBG submission, 4 August 2017, page 3.

<sup>15</sup> EEBG submission, 4 August 2017, page 5.

<sup>16</sup> EEBG submission, 4 August 2017, page 5.

<sup>17</sup> EEBG submission, 4 August 2017, page 6.

<sup>18</sup> ACCC release, *ACCC given powers to investigate and report on retail electricity prices*, 27 March 2017.

<sup>19</sup> ACCC release, <https://www.accc.gov.au/media-release/interim-gas-report-finds-substantial-shortfall-for-east-coast-likely-in-2018>.

24. The ACCC is required to continue to report at least six monthly, before a final report is due by 30 April 2020.

## **Similar authorisations**

### **The A91567 & A91568 - South Australian Chamber of Mines and Energy (SACOME)**

25. On 17 May 2017, the ACCC granted authorisation to SACOME and 27 other organisations to form a joint electricity purchasing group in South Australia.<sup>20</sup> This group represents around 16 per cent of the South Australian electricity load. The authorisation was granted for 11 years.
26. The purchasers are businesses located in South Australia and are commercial users of electricity in their operations including mining, university, property investment, manufacturing and food sectors.
27. SACOME lodged this application in response to high electricity prices, and a perceived lack of competition, in South Australia. The objective of the proposed conduct was to secure reliable electricity supply arrangements for SACOME's members at competitive prices.
28. The ACCC found that the proposed conduct was likely to result in public benefits in the form of transaction cost savings and greater competition for generation and wholesale supply of electricity in South Australia.

### **A91532 & A91533 - Melbourne City Council and Others**

29. On 27 July 2016, the ACCC granted authorisation, for 15 years, to the Melbourne City Council and 13 other parties, to establish a joint electricity purchasing group, including running a joint tender.<sup>21</sup> The group's electricity demand is around 0.2 per cent of Victorian consumption.
30. The purpose of this application was to encourage innovation and investment in renewable energy. The parties intended to use the tender to identify and select an electricity retailer able to develop a renewable energy generation system that would supply electricity into the NEM.
31. The ACCC found that the proposed conduct would likely enable the Applicants to secure the construction of a new renewable energy generation system and promote investment in renewable energy more efficiently than would be the case if each member of the group sourced its supply separately. In particular, the ACCC considered that the conduct was likely to result in public benefits in the form of: transaction cost savings; economies of scale; potential for increased competition for retail supply of renewable electricity; and environmental benefits from any resulting additional reduction in greenhouse gas emissions.

---

<sup>20</sup> A91567 & A91568.

<sup>21</sup> A91532 & A91533.

## Consultation

32. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
33. The ACCC invited submissions from a range of potentially interested parties including electricity and gas suppliers, gas transporters and Australian and Victorian government energy department and regulators/agencies. No public submissions were received.
34. The ACCC received one submission that was excluded from the ACCC public register at the request of the party providing the submission. This submission raised concerns about the proposed conduct. With the consent of that party, the ACCC provided a summary of the issues raised to the Applicants.<sup>22</sup>
35. In summary, the interested party submitted that EEBG has not demonstrated that there is a failure in the energy sector that the proposed conduct is likely to address. Further, the formation of the purchasing group may have unintended consequences on competition, specifically: that EEBG's load size (if the group expanded to the maximum size permitted under the proposed authorisation) and variability will make it difficult for smaller, non-integrated energy retailers to manage demand; that EEBG's presence in multiple Australian states will advantage larger energy retailers to the detriment of smaller retailers who only operate in Victoria; and that by consolidating the position of larger energy retailers, the proposed conduct will undermine the position of smaller retailers, which will have flow-on effects in the household retail sector.
36. In response, the Applicants submit that they are willing to engage with any supplier(s) able to offer competitive terms including generators, wholesale electricity suppliers, upstream gas producers, wholesale gas suppliers and retailers, including small retailers.<sup>23</sup>
37. The Applicants submit that combining their gas and electricity loads will not place smaller energy retailers at an inherent disadvantage as these retailers necessarily deal with a variety of customers with different load profiles and potentially significant load variability. Combining the load of EEBG members, who are all industrial, energy intensive users with necessarily similar load profiles, will not increase risk for electricity and gas retailers compared to contracting with users individually.

## ACCC assessment

38. The ACCC's assessment of the proposed conduct is conducted in accordance with the relevant net public benefits tests contained within the CCA.<sup>24</sup> The ACCC has taken into account:
  - the applications and submissions received from the Applicants and interested parties and other relevant information available to the ACCC
  - the likely future without the proposed conduct for which authorisation is sought. In particular, this would involve each EEBG member sourcing their

---

<sup>22</sup> ACCC to Applicant re interested party submission excluded from the Public Register, 18 September 2017.

<sup>23</sup> <http://transition.intranet.accc.gov.au/content/index.phtml/itemId/1971265/display/submission>.

<sup>24</sup> Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8).

energy needs individually either through the spot market or contracts with electricity and gas suppliers

- the relevant areas of competition likely to be impacted by the proposed conduct, in particular the retail supply of electricity and gas. The ACCC considers that that precise identification of the product and geographic dimensions of this area of competition (for example, residential and small business versus industrial and commercial) is not required for the purposes of assessing these applications. The ACCC can consider the areas of competition in a broad sense when assessing any public benefits or public detriments that would likely result from the proposed arrangements. The ACCC has also considered whether the conduct would affect competition in the downstream markets in which group members compete (e.g. for the supply of the products that they sell), and
- that the Applicants have requested authorisation for 11 years.

## **Public benefit**

39. Public benefit is not defined in the CCA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>25</sup>

40. The ACCC considers that the proposed conduct is likely to result in public benefits by enabling the Applicants to seek more competitive pricing and terms through combining their gas and electricity demands. In particular, the ACCC has considered the following potential public benefits.

## **Transaction cost savings**

41. Each member of EEBG individually tendering and contracting for their electricity and gas supply will incur transaction costs, such as the time taken to negotiate and other costs such as obtaining legal and technical advice. Potential suppliers will also incur transaction costs in negotiating with the members individually. The joint tendering process to select a gas and electricity supplier is likely to result in public benefits from transaction cost savings, including through sharing of costs between members.

## **Potential for increased competition for the supply of electricity and gas**

42. The combined electricity and gas demands of the joint purchasing group and the length of the supply agreements the Applicants are seeking to negotiate are likely to encourage increased competition amongst energy suppliers to respond to the tenders. This increase in competition may also assist in ensuring reliability of supply and greater price certainty for the Applicants.

## **Incentives for investment in generating capacity**

43. The ACCC has previously accepted that a single supply arrangement has the potential to realise greater economies of scale than multiple individual supply

---

<sup>25</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.



arrangements. These efficiencies could be achieved if production costs per unit of production fall as volume generated increases.

44. For example, the ACCC concluded that the volume of electricity sought to be collectively acquired (around 16 per cent of the South Australian electricity load in the case of the SACOME joint electricity purchasing group) or the specific requirements of the group (a new renewable energy generation system in the case of the Melbourne City Council group) may achieve the scale necessary for investment in new generation.
45. The EEBG's current members' combined demand is around 0.27 per cent of Victorian electricity consumption and 0.75 per cent of Victorian gas consumption and the group does not have an explicit objective of incentivising new supply options. Rather, the aim of the proposed conduct is to source reliable, competitively priced energy from any supplier (existing or new).
46. Notwithstanding this, the volume of demand the EEBG is seeking to aggregate, and the longer term supply agreements they propose to negotiate (two to five years with two to five year extensions) may incentivise investment in new generation, for example a small-scale power purchase agreement, where EEBG would commit to acquire the generator's capacity up front.
47. Further, authorisation is sought to enable other industrial users of energy to join the group, provided the combined energy consumption by the group does not exceed 10 per cent of Victorian gas or electricity consumption. The ACCC considers that if the combined energy demand of the group does increase, this increases the likelihood that the group will achieve a scale necessary to incentivise new investment.

## Public detriment

48. Public detriment is also not defined in the CCA but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>26</sup>

49. The ACCC accepts that joint conduct of this form could result in some public detriment, if the Applicants were able to exercise market power to artificially depress prices for electricity and gas. Further, the proposed conduct is likely to result in the members' gas and electricity demands being not contestable for the duration of the contract periods.
50. However, the ACCC considers that any detriment is limited because:
  - the tender process is open and transparent and will ensure that there will be competition between retail electricity suppliers, and gas suppliers/transporters, to win the contracts, and
  - the proposed conduct involves relatively small proportions of the gas and electricity demands for Victoria and in the NEM. The maximum combined demand for EEBG members, of 16 PJs of gas and 4.5 TWh of electricity, represents approximately 10 per cent of Victoria's gas demand and 10 per cent of electricity demand.

---

<sup>26</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357, 42 683.

51. As with any application for authorisation to engage in coordinated conduct, the ACCC has considered the potential for coordination beyond the scope of the proposed conduct. EEBG's current members operate in similar industries and there is a potential risk that coordination in respect of the proposed conduct could lead to additional coordination between the members. In this case, however, any information-sharing required by the proposed conduct is confined to discussions regarding the electricity and gas joint tender process. Any ongoing consultation that would arise after the tender(s) is limited to aspects of the agreements such as performance and pricing reviews. Given this restriction, as well as the discipline that group members face from competition in the downstream markets in which they participate, the ACCC considers that the likelihood of public detriment from an increased risk of coordination between the members of the EEBG is minimal.
52. The ACCC notes the concern raised by one interested party that the size and scope of the proposed bargaining group may make it difficult for smaller retailers to compete to supply the group with services and that this, in turn, may undermine the position of smaller energy retailers more generally.
53. The ACCC notes that it would not be in the interest of EEBG to structure the tender process, or the scope of the services sought, in a manner that significantly limited the potential energy suppliers able to compete to supply the group, particularly as one of the main reasons EEBG is seeking to collectively tender for electricity and gas supply is a concern about lack of competition to supply them individually. In this respect, the Applicants state that they are willing to engage with any supplier(s) able to offer competitive terms, including small retailers.
54. Further, as noted, the proposed tender involves a relatively small proportion of the gas and electricity demands in Victoria and in the NEM.
55. Accordingly, the ACCC does not share this concern.

## **Balance of public benefit and detriment**

56. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
57. The ACCC considers that the proposed conduct is likely to result in public benefits in the form of transaction costs savings and increased competition for the retail supply of electricity and gas to members of the EEBG.
58. The ACCC considers the public detriment likely to result from the proposed conduct is minimal.
59. Therefore, for the reasons outlined in this draft determination, the ACCC considers that the proposed conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
60. Accordingly, the ACCC proposes to grant authorisation.

## Length of authorisation

61. The CCA allows the ACCC to grant authorisation for a limited period.<sup>27</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
62. In this instance, the Applicants seek authorisation for 11 years. This period is intended to cover the length of conducting and finalising the tender process, an initial term of the supply agreements, and an additional term to cover a possible extension of the agreements.
63. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC proposes to grant authorisation for 11 years.

## Draft determination

### The applications

64. On 4 August 2017, the Applicants lodged applications for authorisation A91594 and A91595. Application A91594 was made using a Form A and application A91595 was made using a Form B, under subsections 88(1) and 88(1A) of the CCA. Authorisation is sought to:

- collectively investigate potential electricity supply, gas supply, and gas transportation options
- collectively conduct one or more tender processes under which proposals will be sought for suppliers of electricity, gas and gas transport to enter into agreements with each Applicant on the same price and substantially the same terms to meet their collective requirements
- individually enter into electricity supply, gas supply and/or gas transport agreements with the successful electricity and gas supplier(s) at the same price and on the substantially the same terms, and
- make joint decisions regarding the administration and operation of certain aspects of the members' electricity and gas supply agreements (including performance and price reviews, and any events that materially impact the performance of the arrangements).

65. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

66. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7), that in all the circumstances the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition that is likely to result.

---

<sup>27</sup> Subsection 91(1).

67. The ACCC is satisfied that, pursuant to section 90(8), the conduct for which authorisation is sought is likely to result in such a benefit to the public that the proposed conduct should be allowed.

## **Conduct which the ACCC proposes to authorise**

68. The ACCC proposes to grant authorisations A91594 and A91595 to enable the Applicants to make and give effect to the Proposed Conduct, as outlined in paragraph 63.

69. The ACCC proposes to grant authorisation for 11 years.

70. Under section 88(10) of the CCA, the ACCC proposes to extend the authorisation to future parties to the proposed conduct provided the combined annual energy consumption by the group does not exceed 16 Petajoules of gas or 4.5 Terawatt hours of electricity.

71. This draft determination is made on 13 October 2017.

## **Next steps**

72. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.