



Australian  
Competition &  
Consumer  
Commission

# Draft Determination and interim authorisation

Applications for authorisation

lodged by

the South Australian Chamber of Mines and Energy  
Inc & Ors

in respect of

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

Date: 13 April 2017

Authorisation numbers: A91567 & A91568

Commissioners:  
Sims  
Court  
Featherston

## Summary

The ACCC proposes to grant authorisation to the South Australian Chamber of Mines and Energy Inc and 24 other parties to establish a joint electricity purchasing group, conduct a joint tender for electricity supply arrangements and jointly negotiate the terms and conditions of their electricity supply agreements.

The members of the purchasing group are businesses located in South Australia and are commercial users of electricity in their operations including mining, university, property investment, manufacturing and food sectors.

The ACCC proposes to grant authorisation for 11 years.

The ACCC grants interim authorisation for the parties to collectively investigate potential electricity supply options, conduct a tender process and negotiate an overarching electricity supply contract.

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

## The applications for authorisation

1. On 4 January 2017, the South Australian Chamber of Mines and Energy Inc (**SACOME**) on behalf of itself and 24 other parties (the **Participating Members**)<sup>1</sup> (collectively, the **Applicants**) lodged applications for authorisation (A91567 and A91568) with the ACCC.<sup>2</sup>
2. The Applicants are seeking authorisation to establish a joint electricity purchasing group to aggregate their electricity demand and place a single tender into the market. The Applicants seek authorisation for 11 years.
3. The Applicants also requested interim authorisation to enable them to engage in preparatory conduct while the ACCC is considering the substantive application. The ACCC grants interim authorisation and gives its reasons at paragraphs 96-102.

## The Proposed Conduct

4. The Participating Members are seeking to establish a joint electricity purchasing group to aggregate their electricity demand and place a single tender into the market for the supply of their combined loads with the objective of securing a cost competitive and reliable electricity supply.
5. In particular, the Participating Members, together with SACOME as an industry body, seek authorisation to:

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<sup>1</sup> Adelaide Brighton Cement Ltd, Arrium Limited, Brickworks Building Products, Central Irrigation Trust, Flinders University, Hillgrove Resources, IGA Distribution (SA) Pty Ltd, Impeach Pty Ltd, Interblast & Forge Pty Ltd, Mardina Pty Ltd, Nyrstar Port Pirie Ltd, OZ Minerals Limited, Orora Limited, Pernod Ricard Winemakers Pty Ltd, Rex Minerals (SA) Pty Ltd, SMR Automotive, Seeley International, Shahin Brothers Pty Ltd, Shahin Enterprises Pty Ltd, Shahin Holdings Pty Ltd, Shahin Properties Pty Ltd, The Bend Motorsport Park Pty Ltd, Thomas Foods International, University of South Australia.

<sup>2</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).

- collectively investigate potential electricity supply options for their combined electricity loads
- collectively conduct a tender process for the supply of their combined electricity loads that is designed to identify and select an electricity supplier(s) to supply their combined electricity loads
- jointly negotiate an overarching electricity supply contract with the successful electricity supplier(s) that enable Participating Members to gain access to the price and other terms and conditions offered by the successful electricity supplier(s)
- individually enter into an electricity supply agreement with the successful electricity supplier(s) on the same (or substantially similar) terms and conditions
- make joint decisions regarding the administration and operation of certain aspects of their electricity supply agreements (specifically, periodic and other price reviews)

**(the Proposed Conduct).**

6. The Applicants seek authorisation for a total period of 11 years, comprising:

- a 6-12 month period for the joint tender process, including investigation, market approach, negotiation, execution and mobilisation of the electricity supply agreements
- a 3-5 year period for the term of each electricity supply agreement between the successful electricity supplier(s) and each Participating Member
- a 3-5 year period to reflect the ability of each Participating Member to extend the term of an electricity supply agreement.

## **Joint tender**

7. The joint tender is intended to be conducted as follows:

- the joint tender will be developed and approved by Participating Members before being issued to the broad electricity supply market
- the process will be open to all suitably qualified suppliers of electricity (both generators with appropriate licences and retailers)
- all tender responses will be evaluated by SACOME together with a committee of nominated representatives from each Participating Member, and expert advisers as required
- the tender will be conducted on the basis that the terms of each individual electricity supply agreement will be on substantially similar terms and conditions except as required to meet the individual needs of Participating Members
- the terms of the electricity supply agreement will be negotiated with one or more preferred tenderers, as determined by the evaluation committee

- contractual negotiations will be conducted by one or more representatives of the Participating Members or by a representative of SACOME on their behalf
  - the entry of any Participating Member into an electricity supply agreement with a tenderer will be subject at all times to that Participating Member's internal governance and approval processes.
8. A broad range of potential outcomes from the tender process is possible, such as:
- a sole electricity supplier being awarded contracts to service all Participating Members for the operating term
  - a consortium of a number of parties and generation types to service all Participating Members for the operating term
  - a portion of the total requirements of the Participating Members being awarded to a combination of the above two options.
9. The commencement date for the electricity supply agreement applying to each Participating Member will depend on when their existing contractual commitments expire (or can be terminated), and so will not necessarily be the same.

### **Administration of contracts**

10. Once each individual electricity supply agreement is in force, it will run on its own terms and be independently administered by the relevant Participating Member, so there will be no ongoing consultation.
11. The Participating Members may also establish a contract working group, comprising representatives of each Participating Member. The contract working group will participate in joint activities and decisions which may include review of supplier performance, exercising contract options, as well as periodic and other price reviews.
12. Each Participating Member seeks authorisation to join with any or all other Participating Members to negotiate collectively with their common electricity supplier(s) in relation to significant events that will affect the group as a whole (or that will affect a subset of Participating Members with a common supplier).

## **Background**

### **The Applicants**

13. SACOME is the peak industry body representing companies with interests in the South Australian minerals, energy, extractive, and oil and gas sectors, including those who provide services to these companies.
14. The original Participating Members are companies operating in South Australia in the minerals, energy, extractive, oil and gas, manufacturing and agricultural sectors, specifically:
- **Nyrstar Port Pirie Ltd:** Global multi-metals business with major positions in zinc and lead, and growing positions in other base and precious metals

- **Arrium Limited:** International diversified mining and materials company with two key business segments – Arrium Mining and Arrium Steel
- **OZ Minerals Limited:** A copper-focused international mining company operating the Prominent Hill, and developing the Carrapateena mines
- **Adelaide Brighton Cement Ltd:** Manufacturer of clinker, cement, lime and dry blended products
- **Intercast & Forge Pty Ltd:** Delivers components primarily for the automotive, rail and general industrial markets. It supplies 40 per cent of the Australian market for high quality cast iron components
- **Hillgrove Resources:** Australian mining company (ASX: HGO) focused on developing its Indonesian and Australian base and precious metals projects
- **Seeley International:** Large Australian air conditioning manufacturer with a focus on developing energy-efficient cooling and heating products
- **Central Irrigation Trust:** Pumps water from the River Murray to 1,400 growers who irrigate 13,000 hectares of horticultural crops in the Riverland Region of South Australia. It also supplies 3,200 domestic and 17 industrial customers
- **SMR Automotive:** A global corporation with engineering capabilities, manufacturing facilities and a global customer base, specialising in R&D, innovative engineering, polymer processing, manufacturing of electronic and electromechanical systems, automated painting, and the assembly of complete systems
- **Thomas Foods International:** Large Australian family-owned meat packing company that exports to more than 80 countries. Generates revenue from livestock trading, meat processing and meat wholesaling
- **Rex Minerals:** Discovered the significant Hillside copper/gold ore deposit located near Ardrossan on Yorke Peninsula, South Australia in 2008 and completed an extended feasibility study in 2015. Rex estimates the mine could be operational from 2020 onwards. The company has an approved Mining Lease and is preparing to submit the Program for Environment Protection and Rehabilitation (PEPR) to the South Australian Department of State Development by September 2017.

15. By letter to the ACCC on 3 March 2017, and on 16 March 2017, SACOME amended the list of Participating Members to include an additional 13 companies:

- **Pernod Ricard Winemakers Pty Ltd:** A large wine, spirits, and beverage company
- **Orora Limited:** Specialises in packaging solutions, including product sourcing, manufacturing, and logistical planning for packaging
- **Impeach Pty Ltd (t/a Foodland Promotions):** A chain of supermarkets across South Australia
- **Flinders University:** A university based in South Australia
- **University of South Australia:** A university based in South Australia
- **Shahin Enterprises Pty Ltd:** Activities include operation of over 150 fuel and convenience stores across South Australia

- **The Bend Motorsport Park Pty Ltd:** Company building a motorsport facility located in Tailem Bend, South Australia, currently under construction
- **Mardina Pty Ltd:** Company involved primarily in property investment
- **Shahin Brothers Pty Ltd:** Company involved primarily in property investment
- **Shahin Holdings Pty Ltd:** Company involved primarily in property investment
- **Shahin Properties Pty Ltd:** Company involved primarily in property investment
- **Brickworks Building Products:** Producer of building materials, including bricks, precast, and roofing materials
- **IGA Distribution (SA) Pty Ltd:** Operator of a chain of supermarkets across South Australia.

16. With the addition of these thirteen companies, the combined load of the Participating Members represents approximately 15 per cent of the South Australian electricity load and less than one per cent of the load for the National Electricity Market (NEM).<sup>3</sup>

## Industry context

17. The NEM is the wholesale electricity market for Queensland, New South Wales, the Australian Capital Territory, Victoria, Tasmania and South Australia. It supplies around 80 per cent of Australia's electricity consumption.

## Synchronous versus asynchronous generation

18. Generation in the NEM can be divided into synchronous and asynchronous generation types. Synchronous generation refers to generation whose operation is tightly 'synchronised' to the operating frequency of the power system.<sup>4</sup> For example, in a power system operating at a normal frequency of exactly 50 Hertz (Hz), or 50 cycles per second, the rotating parts of most synchronous generating units (such as the turbine and rotor) connected to the power system will be spinning in step with the system frequency.

19. Traditionally, synchronous generation provided the majority of energy in Australia. Now, fossil-fuelled synchronous generation is progressively being displaced by intermittent, asynchronous generation at both the wholesale and at the residential level as consumers become more active about how their demand is met.<sup>5</sup> South Australia, as a state, has very high relative levels of asynchronous generation (via wind and photovoltaic cells).<sup>6</sup>

20. Synchronous machines have a higher level of 'inertia'. Inertia is a generator's resistance to rapid changes in frequency within the system. Asynchronous

<sup>3</sup> Prior to the amended list of Participating Members, the combined loads equated to approximately 10 per cent of the South Australian market.

<sup>4</sup> Dr Alan Finkel AO, *Independent Review into the Future Security of the National Electricity Market*, p. 7.

<sup>5</sup> AEMO, *Future Power System Security Program: Progress Report*, August 2016, p. 3.

<sup>6</sup> AER, *State of the energy market 2015*, pp. 29 & 30.

generators have less inertia and thus have less ability to contribute to system security and frequency control.<sup>7</sup>

## Challenges in the South Australian market

21. The NEM is currently facing a multitude of challenges including questions of pricing, supply and system security; arising from a variety of issues ranging from changes to the makeup of generation,<sup>8</sup> to challenges to domestic gas supply.<sup>9</sup>
22. These challenges are more acute in South Australia due to the combination of its generation mix and the risk of separation from the rest of the NEM.<sup>10</sup>
23. A number of recent energy events have occurred that affected the supply of electricity to the Participating Members. SACOME submits that these events have had significant implications for each of the Participating Members who together have a combined electricity load of 245MW and an annual demand of 1,909GWh of electricity and need a stable and reliable supply of electricity to conduct their business operations.
24. The challenges facing the South Australian electricity market have also been the subject of numerous investigations, State and Federal Government announcements, industry comments and expert commentary.<sup>11</sup> The South Australian government, on 14 March 2017, made a wide-ranging energy policy announcement, which included policy proposals which seek to address, on a broader scale, many of the same issues that the Proposed Conduct seeks to address.<sup>12</sup>

## ACCC Retail Electricity Investigation

25. On 27 March 2017, the Australian Government directed the ACCC to commence an inquiry into retail electricity pricing.<sup>13</sup>
26. The ACCC is expected to produce a preliminary report by the end of September 2017, with a final report due by 30 June 2018.

## Similar authorisations

27. The ACCC recently granted authorisation to Melbourne City Council and others for 15 years for an arrangement for joint tendering and contracting of electricity.<sup>14</sup>
28. Melbourne City Council, on behalf of itself and thirteen other parties, sought authorisation to establish a joint electricity purchasing group, involving a joint tender process.

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<sup>7</sup> AEMO, *Future power system security program: progress report*, August 2016, p. 25.

<sup>8</sup> Ibid.

<sup>9</sup> ACCC, *Inquiry into the East Coast gas market*, 13 April 2016.

<sup>10</sup> South Australia is connected to the rest of the NEM via the Heywood and Murraylink interconnectors, located in Victoria. If the Heywood interconnector fails, South Australia can be 'islanded' (with no synchronous connection to the rest of the NEM).

<sup>11</sup> For example: the COAG Energy Council market reform package; Dr Alan Finkel, *independent review into the future security of the National Electricity Market*, 14 December 2016; AEMO, *Future Power System Security Program: Progress Report*, August 2016.

<sup>12</sup> South Australian Government, *Our energy policy*, 14 March 2017.

<sup>13</sup> ACCC release, *ACCC given powers to investigate and report on retail electricity prices*, 27 March 2017.

<sup>14</sup> A91532 & A91533.

29. In the Melbourne City Council application, the proposed conduct's explicit objective was to encourage innovation and investment in renewable energy. The parties intended to use the tender to identify and select an electricity retailer who would be able to develop a renewable energy generation system that would supply energy into the NEM.
30. The ACCC found that the Conduct was likely to result in public benefits by allowing the Applicants to achieve their objectives of securing the construction of a new renewable energy generation system and promoting 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.

## Consultation

31. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
32. The ACCC invited submissions from 27 potentially interested parties including regulators, industry bodies, potential suppliers and competitors.<sup>15</sup> The ACCC also published the applications on its public register.<sup>16</sup>
33. Eleven submissions were received from interested parties. While ten submissions were supportive of the applications, Origin Energy Ltd raised some concerns about the likelihood of the proposed benefits.
34. A summary of these submissions follows.
- **Steven Griffiths MP JP** (Member for Goyder): Mr Steven Griffiths gives his full support for the applications. Mr Griffiths indicates that it is well known that South Australia has the most expensive and least reliable electricity in the nation, not only for direct commercial operations but the wider South Australian community.  
  
Mr Griffiths states that enabling a joint buying group to secure long-term contracts for the supply of their combined electricity loads will assist greatly in providing a more cost-competitive and secure energy supply by removing the level of volatility that these businesses currently endure, and enable them to better compete at a global level.
  - **Dan van Holst Pellekaan MP** (Member for Stuart, Shadow Minister for Energy and Mining): Mr Dan van Holst Pellekaan supports the applications. Mr van Holst Pellekaan believes that, due to the structure of the proposed conduct, it would not present a reduction in competition in the electricity market or be an abuse of market power.
  - **Tim Whetstone MP** (Member for Chaffey, Shadow Minister for Investment and Trade): Mr Tim Whetstone is in support of the applications as the

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<sup>15</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>16</sup> The Applications are available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).



formation of the joint electricity buying group has the capacity to encourage new generation and induce new entrants to electricity generation through the contracting of such a large-scale tender. He notes, however, that ‘tenders for the 10% stake of South Australian electricity use, if limited to synchronous supply, should be targeted at new generation to ensure the energy mix in other business and residential contracts does not become more [a]synchronous’.<sup>17</sup>

- **Adrian Pederick MP** (Member for Hammond): Mr Adrian Pederick also supports the applications, stating that the cost of power in South Australia deters additional and future investment. Mr Pederick claims that a specific benefit of the application is the potential to encourage new generation or underutilised generation to enter the market.
- **Whyalla City Council (Whyalla)**: Whyalla supports the applications and feels that the proposed combined load of the Participating Members, with an attractive term, will enable new or existing unutilised generation assets to be brought into the supply mix, which will increase competition amongst the electricity wholesalers in South Australia.
- **Port Pirie Regional Council (Port Pirie)**: Port Pirie states that the high price, high volatility, and unreliability of the power network are impacting on the competitiveness of South Australia. With a focus on strengthening the mining sector in South Australia, Port Pirie strongly supports the applications.
- **Chamber of Commerce and Industry South Australia (Business SA)**: Business SA strongly supports SACOME’s request for interim authorisation. Business SA believes that the Proposed Conduct will lead to positive externalities which will flow to small businesses and residential consumers in South Australia.

Business SA also states that any arrangement which can bring additional synchronous generation on line in South Australia will be critical to improving the security of the network and reducing the likelihood of future load shedding events.

- **National Irrigators’ Council (NIC)**: NIC supports the applications and believes it will provide a strong public benefit and would assist in ameliorating the impacts of lack of competition or, in NIC’s view, market failure, in the electricity sector.

With a focus on irrigated agriculture, NIC states that electricity price rises are impacting competitiveness in the international and domestic food market of Australian producers.

Using Central Irrigation Trust (**CIT**),<sup>18</sup> one of the Participating Members, as an example, NIC understands that electricity makes up about 32 per cent of the costs for CIT and that over the last seven years it has experienced increases in electricity costs of up to 107 per cent.

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<sup>17</sup> Mr Whetstone’s reference to 10% is based on the Applicant’s original submission, which was later amended on 3 March 2017.

<sup>18</sup> NIC put on the record that CIT is a member of the NIC and that CIT’s CEO, Gavin McMahon, is Chairman of the NIC. Mr McMahon declared a conflict of interest and did not participate in the preparation or consideration of NIC’s submission.

- ATCO Australia (**ATCO**): ATCO is a business that operates within the electricity sector through the ownership and operation of gas fired power stations in Karratha (wholly owned) and Adelaide (co-owned).

ATCO supports the applications and believes that the best approach to address the dynamic and challenging issues in South Australia is to promote competition through policy and infrastructure solutions that are consistent with promoting the long-term interests of customers.

ATCO considers that the combined load of the applicants is expected to create a strong investment signal to the market, and would allow a new generator to justify the investment required for entry. If the proposal were to proceed, ATCO would consider entering the market, by using its existing generation as the basis for establishing a new energy retailer.

- The Australian Industry Group (**Ai Group**): The Participating Members include both members and non-members of the Ai Group. Ai Group supports the application and believes that it offers the potential for wider benefits during a very difficult period for South Australian energy users.

Ai Group considers that the availability of a long-term contract to supply a significant quantity of electricity to industrial customers is likely to be very attractive to existing suppliers with the ability to bring more of their capacity into the market, as well as to possible new entrants.

Ai Group states the impact of the conduct on energy system security would be difficult to assess, but states that if the conduct were successful in introducing new synchronous generation into the market, it would provide valuable inertia and frequency control capabilities in South Australia.

- Origin Energy Limited (**Origin**): Origin questions the public benefits that have been claimed by the Applicants.

In particular, Origin states that the proposed length of the term is unlikely to support investment in new build generation and that collective purchasing is unlikely to have any lasting impact on competition between existing retailers in South Australia as it creates no new demand.

Origin submits that, because new entry is unlikely, the stated benefits of more competitive prices and greater system security are also unlikely to be achieved.

35. On 3 March, the Applicants responded to the interested party submissions, particularly addressing the concerns raised by the submission from Origin. The relevant parts of this reply are discussed in the public benefits section.

36. The submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the applications for authorisation.

## ACCC assessment

37. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant net public benefit tests contained in the *Competition and Consumer Act*

2010 (Cth) (the **CCA**).<sup>19</sup> In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the Proposed Conduct would outweigh the likely detriment to the public, including from any lessening of competition.

38. In its assessment the ACCC has taken into account:

- the applications and submissions received from the Applicants and interested parties
- information available to the ACCC from consideration of previous matters
- the likely future with and without the Proposed Conduct for which authorisation is sought
- the relevant areas of competition likely to be affected by the Proposed Conduct
- the period for which authorisation has been sought.

## Relevant areas of competition

39. The Applicants submit that the relevant areas of competition are:

- the market for the generation and wholesale supply of electricity in the NEM or, in the alternative, in the South Australian region of the NEM, and
- the market for the retail supply of electricity to commercial and industrial customers in South Australia.

40. The ACCC received a number of responses to the question of whether or not the South Australian region was a separate market within the NEM, specifically:

- AiGroup commented that '[w]hile the NEM involves common rules and institutions for all regions, significant differences emerge in practice in the price and risk profile of supply in different regions. The South Australian region is distinguished by its relatively slim connections to the rest of the market, its greater dependency on gas and wind, and the concentration of ownership of dispatchable generation. Events in other NEM regions do impact South Australia and vice versa, and the most sensible course is to consider the South Australian segment as distinct but closely interrelated'.<sup>20</sup>
- Business SA indicated that as South Australia 'has its own price both in the spot and futures market and consumers are not able to get firm contracts across either [of the] existing interconnectors'<sup>21</sup> they do consider South Australia as a separate market.
- ATCO acknowledged that '[w]hile South Australia is technically part of the NEM, the de-rating of the Heywood Interconnector in addition to the market

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<sup>19</sup> Subsections 90(5A), 90(5B), 90(6), 90(7), 90(8).

<sup>20</sup> Ai Group Submission, 22 February 2017, p.3.

<sup>21</sup> Business SA Submission, 17 February 2017, p. 3.

failures recently experienced in South Australia effectively practically curtails customer access to a competitive NEM in the immediate and longer term'.<sup>22</sup>

- NIC considered that 'South Australia does appear to operate quite distinctly as a separate market'.<sup>23</sup> It refers to South Australia's recent inability to source electricity during peak demand due to the lack of capacity of interconnectors.
- Origin Energy was of the opinion that '[t]he South Australian region of the NEM is part of one national electricity market. It is not a separate market'.<sup>24</sup>

41. The ACCC understands that the NEM is a single, interconnected system for electricity supply. However there are times when the interconnector flow is constrained such that South Australia is effectively isolated from the rest of the NEM. When this occurs, changes to supply-demand balance can have a material effect on the South Australian wholesale electricity prices.

42. For the purpose of assessing these applications, the ACCC has considered the impacts in:

- the generation and wholesale supply of electricity in the NEM and in the South Australian region of the NEM, and
- the retail supply of electricity to commercial and industrial customers in South Australia.
- the downstream markets in which the participating members operate.

## **Future with and without**

43. To assist in its assessment of the Proposed Conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without that conduct.

44. SACOME states that without the Proposed Conduct, each Participating Member would need to purchase electricity either:

- directly through the spot market (which is currently generating prices that are very volatile and high in comparison to other States) or
- from existing electricity suppliers who are offering contracts which reflect this price volatility in futures pricing and the higher spot prices in South Australia.

45. SACOME submits that the limited generation mix and concentration of generation market power in South Australia means that if the Participating Members were to individually seek long-term electricity supply agreements, they would be unable to attain cost competitive prices.

46. The ACCC considers that the likely future without the Proposed Conduct is each Participating Member sourcing their electricity needs individually either through the spot market or contracts with existing electricity retailers. It may be that some of the

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<sup>22</sup> ATCO Submission, 20 February 2017, p. 6.

<sup>23</sup> National Irrigators' Council Submission, 21 February 2017, p. 2.

<sup>24</sup> Origin Energy Submission, 21 February 2017, p. 1.

Participating Members already use competitive tendering arrangements for the purchase of electricity and possible that some may already commit to multi-year retail contracts.

47. While recent policy proposals (including the South Australian government's recent announcement)<sup>25</sup> are designed to increase competition and improve system security,<sup>26</sup> the ACCC does not consider that these proposals, if implemented, would change our assessment of the balance of likely benefits and detriments of the Proposed Conduct.

## Public benefit

48. 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>27</sup>

49. The Applicants submit that the Proposed Conduct will deliver public benefits, including:

- increasing competition in the South Australian market by encouraging new generation
- improving power system security with additional synchronous dispatchable generation able to provide Frequency Control and Ancillary Services, which reduces the risk of major unplanned supply interruptions (blackouts)
- providing all consumers with access to potential lower prices through increased competition
- increased efficiency and cost savings through the collaborative approach to tender.<sup>28</sup>

50. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

## Transaction cost savings

51. Each Participating Member individually tendering and contracting for their electricity 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 Participating Members individually. The joint tendering process to select an electricity retailer is likely to result in public benefits from transaction cost savings, including through sharing of costs between Participating Members. The ACCC recognises this as a likely public benefit from the Proposed Conduct.

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<sup>25</sup> South Australian Government, *Our energy policy*.

<sup>26</sup> See, for example: AEMO, *Future power system security program: progress report, August 2016*; Finkel, *Preliminary report of the independent review into the future security of the National Electricity Market*, 14 December 2016.

<sup>27</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, 42 677.

<sup>28</sup> SACOME, *Supporting information: SACOME electricity purchasing group*, 4 January 2017, p. 13.

## Increased competition for wholesale supply of electricity in South Australia

52. The Applicants submit that the aggregate electricity requirements of the Participating Members and the length of agreements sought is likely to incentivise competition for the supply of electricity between the existing market participants, compared to each Participating Member negotiating individually for supply of their separate volume requirements.
53. The Applicants also submit that the prospect of a joint tender will potentially provide an improved incentive for new market entrants or existing electricity suppliers to invest in new generation, as well as incentive for existing suppliers to not cease or roll back generation in South Australia. This position is supported by the majority of interested parties.
54. However, Origin disputes that the Proposed Conduct will result in either increased competition or new generation in the market. Origin submits that, because the Proposed Conduct does not actually introduce new demand into the market, the most likely outcome is that the Participating Members consolidate under an existing retailer followed by churning of the displaced load to rebalance retailers' portfolios.<sup>29</sup>
55. Origin also submits that bargaining power would not increase because, under the proposed conduct,
- the Applicants contract individually and are not bound to contract with [the] successful supplier which diminishes any benefits that may be achieved by a similar load under a single agreement.<sup>30</sup>
56. In response,<sup>31</sup> SACOME sought to emphasise that, though each of the Participating Members will ultimately enter into an individual contract with the chosen supplier(s), this will not reduce the effectiveness of the Proposed Conduct in achieving the desired benefits. The purpose of the joint purchasing group is to aggregate the electricity demand for supply of the combined loads and the Participating Members will go to market on the basis of the overarching aggregate load.
57. The ACCC notes the South Australian government's intention to build a new gas-fired generator for the State, to be powered up in emergency situations and its plan to induce new entry by offering its combined load in a single tender.<sup>32</sup> The impact of the government's plans on the prospect of new entry arising from the Proposed Conduct is unclear.
58. However, the ACCC considers that the Proposed Conduct, by offering a guaranteed reasonably sized load for up to ten years, has a real chance of changing the wholesale market dynamics, where it allows existing participants to use existing plant more efficiently, or allowing new entry. This could bring the benefits of increased competition in the wholesale market for electricity.
59. In addition, the ACCC considers that the combined demand of the Participating Members, under the aggregate load, is likely to provide a greater incentive for suppliers to compete for the tender. The ACCC considers that the Proposed Conduct is likely to allow the Participating Members to exert increased bargaining

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<sup>29</sup> Origin Energy Submission, p. 2.

<sup>30</sup> Origin Energy Submission, p. 2.

<sup>31</sup> SACOME, *Response to Submissions*, 3 March 2017.

<sup>32</sup> South Australian Government, *Our energy policy*, 14 March 2017.

power in the retail supply of energy contracts in South Australia, which is likely to be beneficial to competition in a market characterised by at times high levels of concentration on the supply side.

60. In conclusion, the ACCC considers that there is a likely public benefit arising from the Proposed Conduct of increased competition for the generation and wholesale supply of electricity in South Australia.

### **Greater economies of scale and efficiency**

61. Demand from any single member of the purchasing group is unlikely to be sufficient to attract new generation capacity or bring existing generation capacity that has been mothballed back into use. However, the Participating Members, through pooling their demand, may achieve the scale necessary for such additions to capacity.
62. The ACCC accepts that, absent the Proposed Conduct, each member of the joint purchasing group would still be able to source their electricity separately. The ACCC considers that a single supply arrangement for the Applicants has potential to realise greater economies of scale than individual supply arrangements for each Applicant. These efficiencies could be achieved if generation costs per GWh fall as volume generated increases.

### **Improved system security in South Australia**

63. System security in South Australia is recognised as an important emerging issue within the NEM, with a number of government bodies currently examining ways to address the issue, including the building of new interconnectors, or purchasing mothballed generation.<sup>33</sup> Historically, system security had relied on inertia provided by large, synchronous, generators.<sup>34</sup> The increased proportion of asynchronous generation in the South Australian region can mean the subsystem is more susceptible to higher rates of change of frequency.
64. The Applicants submit that the Proposed Conduct encourages new, synchronous generation to enter the market. New synchronous generation would provide additional inertia to the South Australian system, which helps guard against rapid changes in frequency.<sup>35</sup>
65. Origin disputes that the proposed conduct will result in new generation in the market. Origin states that there could be potential system security improvements if a new, synchronous, generator were to enter the market, but that it considers it unlikely that the Proposed Conduct would incentivise new generation. Further, Origin considers that any new generation, without corresponding new demand, will ultimately displace an older generator rather than leading to more generation overall.<sup>36</sup>
66. The Applicants replied to this in their response to submissions and argue that the proposed conduct could encourage new generation or enhance the viability of mothballed or underutilised plant. The Applicants refer to advice they have received

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<sup>33</sup> ABC News, *SA power: Taxpayers should buy gas-fired electricity generator, top economic advisor says*, 8 March 2017, [www.abc.net.au/news/2017-03-07/taxpayers-should-buy-gas-fired-power-station/8331228](http://www.abc.net.au/news/2017-03-07/taxpayers-should-buy-gas-fired-power-station/8331228); Electranet, *South Australian energy transformation: RIT-T Project specification consultation report*, 7 November 2016.

<sup>34</sup> AEMO, *Future power system security program: progress report*, August 2016, p. 20.

<sup>35</sup> *Ibid.*, p. 4.

<sup>36</sup> Origin Energy Submission, p. 2.

which suggests that a firm load of 150MW or more could incentivise proposed new generation that has stalled due to a lack of firm capacity to contract.<sup>37</sup>

67. The ACCC considers that, to the extent that the Proposed Conduct increases synchronous generation in South Australia, it may provide some public benefit of enhanced system security through increasing inertia in the system.

### **ACCC conclusion on public benefits**

68. The ACCC considers that relative to a situation where each Participating Member individually negotiated a supply agreement, the collective negotiations and joint tendering is likely to result in public benefits arising from transaction costs savings and increased competition for generation and wholesale supply of electricity in South Australia.
69. While some of the other claimed public benefits have potential to arise from the Proposed Conduct, the ACCC is not convinced at this time that they are likely benefits, given that they depend on a number of factors, such as government policy, market movement and the outcome of the tender process. In any case, it is not necessary to form a concluded view about these other claimed benefits given that the ACCC is satisfied, in its preliminary view, that the likely benefits from the Proposed Conduct outweigh the likely detriments, as set out below.

### **Public detriment**

70. 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>38</sup>

71. The Applicants submit that the Proposed Conduct would not result in any significant public detriment and any public detriment would be outweighed by the substantial public benefits outlined, and that any public detriment will be mitigated by the following factors:

- the tender process will be open and transparent and will ensure that there is competition between electricity suppliers to be awarded the tender
- the successful electricity supplier(s) will be free to contract with any other parties for the supply of electricity if it wishes to do so
- the process will be technology neutral with all retailers and producers with differing asset portfolios able to apply
- applying as a group entity, it enables retailers and generators to source a firm load that is of significant size enabling easier contractual arrangements for fuel sources.<sup>39</sup>

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<sup>37</sup> SACOME, *Response to Submissions*, 3 March 2017, p. 2.

<sup>38</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357, 42 683.

<sup>39</sup> SACOME, *Supporting information: SACOME electricity purchasing group*, 4 January 2017, p. 16-17.



72. The ACCC's preliminary assessment is that there will be minimal public detriment from the Proposed Conduct.
73. In theory it may be that conduct in this form could result in some public detriment, if the Participating Members were able to exercise market power to artificially depress prices for electricity. However, the size of the Participating Members' combined load is relatively small (15 per cent of South Australian aggregate load and less than 1 per cent of the NEM) such that this is unlikely.
74. As with any application for authorisation to engage in coordinated conduct, the ACCC has considered the potential for coordination beyond the scope of the Applications. Some Participating Members operate in overlapping areas of competition (for example in the mining or grocery retail industries), and there is a potential risk that allowing coordination for the proposed conduct could lead to additional coordination between these Participating Members. In this case, however, any information-sharing required by the proposed conduct is confined to electricity discussions with all members; and, in their submission, the Applicants stressed that the only ongoing consultation that would arise after the tender would be restricted to the electricity purchasing working group.<sup>40</sup> Given these restrictions, the ACCC considers that the likelihood of public detriment from an increased risk of coordination between Participating Members is minimal.
75. The ACCC accepts that the Proposed Conduct is likely to result in the Participating Members' electricity load requirements not being contestable for the duration of the contract period. However, any detriment is limited because:
- the successful electricity supplier will be selected as a result of a tender process which is open and transparent and will ensure that there will be competition between retail electricity suppliers to win the contract; and
  - the Proposed Conduct involves a relatively small proportion of the electricity load of South Australia (15 per cent) and an even smaller proportion of the NEM (less than 1 per cent). As such, the significant volume of the electricity required by other users of electricity is not subject to the Proposed Conduct and may remain available to alternative suppliers who are not successful tenderers for the Participating Members' contract.

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

76. 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.
77. 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 wholesale supply of electricity in South Australia.
78. The ACCC considers the public detriment likely to result from the Proposed Conduct is minimal.
79. 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

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<sup>40</sup> SACOME, *Supporting information: SACOME electricity purchasing group*, 4 January 2017, p. 11.

the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.

80. Accordingly, the ACCC proposes to grant authorisation.

## **Length of authorisation**

81. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>41</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.

82. In this instance, the Applicants seek authorisation for 11 years.

83. Origin states that the proposed length of the term is unlikely to support investment in new build generation. The NEM is currently subject to considerable policy uncertainty which makes investing in new generation capacity unattractive.

84. However, ATCO – who identified itself as a potential new retail entrant if the Proposed Conduct was authorised – considered that the length of time was warranted, and did not raise any concerns regarding the possibility that the length of authorisation was too short.

85. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC grants authorisation for 11 years.

## **Draft determination**

### **The applications**

86. On 4 January 2017, the Applicants lodged applications for authorisations A91567 and A91568. Application A91567 was made using a Form A and application A91568 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 options for the Participating Members' combined electricity loads
- collectively conduct a tender process for the supply of the Participating Members' combined electricity loads that is designed to identify and select an electricity supplier(s) to supply their combined electricity loads
- jointly negotiate an overarching electricity supply contract with the successful electricity supplier(s) that enables Participating Members to gain access to the price and other terms and conditions offered by the successful electricity supplier(s)
- individually enter into an electricity supply agreement with the successful electricity supplier(s) on the same (or substantially similar) terms and conditions

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<sup>41</sup> Subsection 91(1).

- make joint decisions regarding the administration and operation of certain aspects of the Participating Members' electricity supply agreements (specifically, periodic and other price reviews).

87. Authorisation is sought as the proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of the CCA.

88. 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**

89. 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.

90. The ACCC is satisfied, pursuant to section 90(8), that 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 to take place.

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

91. The ACCC proposes to grant authorisations A91567 and A91568 to enable the Applicants to make and give effect to the Proposed Conduct as outlined in paragraph 86.

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

93. This draft determination is made on 13 April 2017.

## **Next steps**

94. 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.

## Interim authorisation

95. Section 91 of the CCA allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in conduct while the ACCC is considering the substantive applications for authorisation.

96. At the time of lodging the applications, the Applicants requested interim authorisation so they are able to commence the following preparatory steps:

- investigating potential electricity supply options for the Participating Members' combined electricity loads
- conducting a request for proposal/tender process for the supply of the Participating Members' combined electricity loads that is designed to identify and select a preferred electricity supplier or group of electricity suppliers able to supply the Participating Members' combined electricity loads
- negotiating an overarching electricity supply contract with the successful electricity supplier(s) that enables Participating Members to gain access to the price and other terms and conditions offered by the successful electricity supplier(s) **if and when** the ACCC grants the final authorisation.

97. The Applicants submit that interim authorisation is critical, so that the implementation of the joint tender process can be achieved as soon as possible in 2017. The Applicants submit that, due to the volatility of the current market, any delay in developing and publishing the tender document would impact negatively on project timelines and decrease the ability of the Participating Members to effectively address the issues raised in the application.

98. The Applicants submit that no electricity supply agreement would be entered into unless the final authorisation was granted.

99. The ACCC considers requests for interim authorisation on a case by case basis. Broadly, the ACCC will consider:

- whether the proposed conduct has the potential to be significantly anti-competitive
- whether granting interim authorisation will permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied
- the urgency of the need for interim authorisation
- any possible harm to the Applicants from having their request for interim denied
- any possible harm to interested parties from granting or denying interim authorisation
- any public benefits or detriments the ACCC is able to assess.

100. The ACCC has decided to grant interim authorisation to enable the Applicants to commence the preparatory steps as outlined in paragraph 96. Relevant to its decision the ACCC considers that:

- Interim authorisation is unlikely to alter competition, as it is limited to conducting the tender process and negotiating the terms of supply agreements. Participating Members will not enter into electricity supply contracts pursuant to the joint tender process unless the ACCC issues a final determination granting authorisation to enable contracts to be made.
- Interim authorisation is unlikely to permanently change the competitive dynamics of the market such that the market would not return to its pre-interim state if final authorisation is denied, as no contracts will be entered into without final authorisation.
- The Proposed Conduct is likely to result in public benefits, as outlined in the draft determination.
- Any public detriment resulting from the Proposed Conduct appears to be limited.
- There is public benefit in granting interim authorisation, insofar as it will allow the joint purchasing group to engage in negotiations with the successful tenderer and, if the ACCC grants final authorisation, allow the benefits from the collective supply agreement to be established earlier than otherwise would be the case.

101. Accordingly, and in line with the ACCC's draft determination, interim authorisation is granted to the conduct outlined in paragraph 96.

102. Interim authorisation will remain in place until the date of the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.