



# Draft Determination

Application for authorisation AA1000611 lodged by LGCS Pty Ltd as Trustee for the LGCS Trust No 1 (trading as LGA Procurement) in respect of a joint energy purchasing group comprised of 64 local government councils and 7 participating local government entities in South Australia

Authorisation number: AA1000611

9 August 2022

Commissioners: Keogh  
Rickard  
Brakey

## Summary

The ACCC proposes to grant authorisation to enable LGA Procurement (the Applicant), and a group of 64 local government councils and 7 participating local government entities in South Australia (collectively, the Participating Entities) to pool the Participating Entities' electricity demand, and jointly investigate and evaluate tenders for the supply of retail electricity services (including Accredited Renewable Electricity and Unspecified Electricity) to the Participating Entities.

The ACCC proposes to grant authorisation for 15 years. This period reflects a period of time to undertake the joint tender process, an initial 3-7 year period for the term of the electricity supply agreement/s and a 7 year period to enable extension of the term of the agreement/s.

The ACCC considers the proposed joint tender arrangement is likely to result in public benefits in the form of environmental benefits, transaction cost savings and stimulation of competition to supply electricity to the Participating Entities. The ACCC considers that the proposed arrangement is likely to result in minimal public detriment.

On 24 May 2022, the ACCC granted interim authorisation to enable the Applicant to issue the request for tender to the market and negotiate with tenderers on behalf of the Participating Entities.

The ACCC invites submissions in relation to this draft determination by 12 August 2022 before making its final decision.

### 1. The application for authorisation

- 1.1. On 26 April 2022, LGCS Pty Ltd as Trustee for the LGCS Trust No 1 (trading as LGA Procurement) (**the Applicant**) lodged an application for authorisation (AA1000611) with the ACCC on behalf of itself, 64 local government councils and 7 participating local government entities in South Australia (collectively, the **Participating Entities**). The Applicant is seeking authorisation to conduct a joint tender process, which involves pooling the individual electricity demand of the Participating Entities, placing a single tender into the market calling for proposals for the supply of retail electricity services (including Accredited Renewable Electricity and Unspecified Electricity, as mentioned in paragraph 2.3 below) from electricity retailer/s.
- 1.2. The Applicant seeks authorisation for 15 years, which comprises a period to undertake the tender process; an initial 3-7 years for the term of the electricity supply agreements; and a 7-year extension to the term of the agreements.
- 1.3. This application for authorisation AA1000611 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (**the Act**). The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. Upon the Applicant's request, on 24 May 2022, the ACCC granted interim authorisation to enable the Applicant to prepare and release a joint invitation to tender for the supply of electricity services and jointly evaluate tenders, including negotiating

with tenderers, on behalf of the Participating Entities.<sup>1</sup> Interim authorisation does not extend to the Participating Entities entering into agreements with suppliers of electricity services. Interim authorisation remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is revoked, or until it is revoked.

## The Applicant

- 1.5. The Applicant is constituted as a body corporate and a public authority pursuant to the *Local Government Act 1999* (SA), to promote and advance the interests of local governments in South Australia.
- 1.6. The Participating Entities are all either local government councils, authorities or entities associated with local government activities and operations, including entities which are regional subsidiaries of local government authorities and are formed to oversee management of a particular function, including, for example, waste management.
- 1.7. The Applicant and the Participating Entities are listed in **Annexure A**.

## The Proposed Conduct

- 1.8. The Applicant seeks authorisation to:
  - collectively investigate potential electricity supply options for the Participating Entities' combined electricity loads and determine price parameters through which the Participating Entities commit to purchasing a specified load amount of electricity from the preferred supplier/s
  - collectively conduct a tender process to select electricity supplier/s to supply the combined electricity loads
  - establish a Tender Evaluation Panel to make recommendations to the Participating Entities based on the tender evaluation criteria
  - consider tenders and negotiate an electricity supply agreement with the preferred electricity supplier/s that enables the Participating Entities to access the price and other terms and conditions offered by the successful electricity supplier/s
  - enter into a Standing Deed of Offer with the preferred electricity supplier/s to supply electricity to each of the Participating Entities, and
  - following entry into the individual supply agreements, undertake contract management services throughout the term of the Standing Deed of Offer.<sup>2</sup>

(the **Proposed Conduct**)

## Rationale

- 1.9. The Applicant submits that the Proposed Conduct is intended to enable the Participating Entities to obtain financial savings and long-term certainty with respect to

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<sup>1</sup> The decision is made in accordance with subsection 91(2) of the Act. A copy of the interim authorisation decision is available on the ACCC's [public register](#).

<sup>2</sup> The Applicant may also participate in decisions regarding the administration and operation of some aspects of the electricity supply agreements, including performance and/or pricing reviews, the exercise of contract options, or any changes to terms and conditions.

their electricity supply, and allow them to provide services to their respective local communities in a socially just and ecologically sustainable manner.

## 2. Background

- 2.1. The National Electricity Market (**NEM**) is comprised of five interconnected regions of Queensland, New South Wales (which includes the ACT), Victoria, Tasmania and South Australia. The Applicant submits that total consumption of electricity in the NEM in the 2020-21 financial year was 188.6 terawatt hours (**TWh**), of which South Australia consumed 11.9TWh.
- 2.2. The Applicant submits that the combined annual consumption of electricity for the Participating Entities is approximately 0.11 TWh, representing approximately 1% of the total electricity consumption in the South Australian market.
- 2.3. Under the Proposed Conduct, a number of the Participating Entities will procure 100% Accredited Renewable Electricity<sup>3</sup> in order to meet their emission reduction targets, while other Participating Entities may procure Unspecified Electricity.<sup>4</sup>
- 2.4. The breakdown of Participating Entities who have expressed interest in Renewable Electricity compared to Unspecified Electricity is as follows.<sup>5</sup>

<b>Renewable/Unspecified Survey Results</b>	<b>Number of Organisations</b>	<b>Percentage of Load</b>
Renewable Electricity	22	42%
Renewable Electricity subject to competitive pricing / price cap	9	8%
Still considering all options	17	21%
Cheapest price only	13	11%
Survey not returned	11	

## 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including electricity retailers and generators, relevant industry associations or peak bodies, state and federal government and relevant regulatory bodies.<sup>6</sup> No submissions were received.

<sup>3</sup> This is electricity generated by facilities that export electricity to the NEM and generates electricity from renewable energy sources (wind, solar or other sources approved by the Participating Entities in writing), and are accredited to register Large-Generation Certificates and may in addition be accredited as GreenPower generator/s.

<sup>4</sup> This is electricity where the generation source is unknown at the time of purchase.

<sup>5</sup> Application for authorisation, p.7.

<sup>6</sup> A list of the parties consulted is available from the ACCC's [public register](#).

## 4. ACCC assessment

- 4.1. The Applicant has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).
- 4.2. In making its assessment of the Proposed Conduct, the ACCC considers:
- the relevant areas of competition are likely to be the acquisition as well as the generation, wholesale and retail supply of electricity in South Australia including from various accredited renewable energy sources<sup>7</sup>, and
  - absent the Proposed Conduct, it is likely that each of the Participating Entities will individually tender, enter into, and administer, contracts for the supply of electricity.

### Public benefits

- 4.3. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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>8</sup>

- 4.4. The Applicant submits that the Proposed Conduct will deliver a range of public benefits including potential for increased competition for the supply of electricity to the Participating Entities, transaction cost savings, greater economies of scale and efficiency and potential increased environmental benefits.
- 4.5. The ACCC has considered the following public benefits:
- environmental benefits
  - transaction cost savings, and
  - stimulation of competition to supply electricity to the Participating Entities.

### Environmental benefits

- 4.6. The Applicant claims the Proposed Conduct will promote environmental benefits by enabling some or all Participating Entities to jointly procure Accredited Renewable Electricity. The ACCC notes that some of the Participating Entities have already committed to procuring more Accredited Renewable Electricity regardless of whether the Proposed Conduct occurs, while other Participating Entities are yet to make a decision about their electricity procurement. To the extent that the Proposed Conduct enables some Participating Entities to meet their renewable energy targets, and results

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<sup>7</sup> However, the ACCC considers it is not necessary to precisely define the relevant markets for the purpose of considering the application for authorisation.

<sup>8</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.

in lower cost of electricity supply that facilitates greater take-up of Accredited Renewable Electricity by other Participating Entities, the ACCC considers this is likely to result in a public benefit through a reduction in greenhouse gas emissions.

### **Transaction cost savings**

- 4.7. The Applicant submits that it will evaluate the tenders in conjunction with the project's energy advisors and the Tender Evaluation Panel (comprised of representatives of the Participating Entities). Once the Panel selects the preferred tenderer/s, the Applicant will negotiate an agreement with those tenderer/s in its capacity as an aggregator. Based on the negotiated contractual terms and recommendation from the Applicant, each of the Participating Entities will decide whether to enter into an individual contract with the tenderer/s for the supply of electricity.
- 4.8. The ACCC accepts that the Proposed Conduct is likely to provide transaction cost savings, including by reducing or eliminating the duplication of administrative, legal and evaluation costs associated with each of the Participating Entities conducting individual negotiations with suppliers.
- 4.9. The ACCC also considers the Proposed Conduct is likely to deliver transaction cost savings to potential suppliers, including by reducing the administrative burden of dealing with the procurement processes of multiple Participating Entities.

### **Stimulation of competition to supply electricity to the Participating Entities**

- 4.10. The ACCC considers that the combined electricity demand of the Participating Entities, as well as the length of supply agreements they are seeking (up to 14 years), are likely to attract greater interest from potential suppliers to respond to the joint tender request, compared to a scenario where each of the Participating Entities individually negotiates with suppliers. To the extent that the proposed joint tender stimulates more competition between suppliers to supply the Participating Entities, the ACCC considers this is likely to result in better terms and conditions (including lower prices) and higher quality of services to the Participating Entities.

### **Public detriments**

- 4.11. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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>9</sup>*

- 4.12. The Participating Entities may be considered to be each other's competitors for the acquisition of retail electricity supply. By conducting their procurement jointly rather than individually, the Participating Entities are agreeing to no longer compete. The Proposed Conduct therefore will lessen competition in the acquisition of electricity, although in practice any such competition between these entities is very limited.
- 4.13. The Applicant submits that the risk of any public detriment arising from the Proposed Conduct is minimal since the Proposed Conduct involves a relatively small proportion of the current electricity demand compared to that of South Australia ( $\leq 1\%$ ) or the NEM as a whole (approximately 0.058%).

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<sup>9</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.14. The ACCC considers that the total demand of the Participating Entities is unlikely to be large enough to mean that combining that demand would create competition concerns.
- 4.15. Taking this into account, the ACCC considers that any likely detriment arising from the Proposed Conduct will be minimal.

## Balance of public benefit and detriment

- 4.16. Therefore, for the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

- 4.17. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>10</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.
- 4.18. In this instance, the Applicant seeks authorisation for 15 years. This period is intended to cover a period of time to undertake the joint tender process, and initial 3-7 year period for the term of the electricity agreement/s and a 7 year period to enable extension of the term of the electricity supply agreement/s.
- 4.19. Given the ACCC's conclusion of the balance of public benefits and detriments, the ACCC proposes to grant authorisation for 15 years.

## 5. Draft determination

### The application

- 5.1. On 26 April 2022, the Applicant lodged application AA1000611 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicant seeks authorisation for the Proposed Conduct defined in paragraph 1.8 above. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

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<sup>10</sup> Subsection 91(1) of the Act.

## Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000611 to enable the Applicant and the Participating Entities to conduct a joint tender process for the pooled electricity demand of the Participating Entities, and to enter into and give effect to electricity supply contracts as described in paragraph 1.8 and defined as the Proposed Conduct.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000611 for 15 years. This encompasses a period of time to undertake the joint tender process, an initial 3-7 year period for the term of the electricity supply agreement/s, and a 7 year extension to the agreement/s.
- 5.9. This draft determination is made on 9 August 2022.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.



## 7. Annexure

### Annexure 1 – Applicant and a list of Participating Entities

#### **Applicant**

- LGA Procurement

#### **Participating councils**

- Adelaide Hills Council
- Adelaide Plains Council
- Alexandrina Council
- Barunga West Council
- Berri Barmera Council
- Campbelltown City Council
- City of Burnside
- City of Charles Sturt
- City of Holdfast Bay
- City of Marion
- City of Mitcham
- City of Mount Gambier
- City of Norwood Payneham & St Peters
- City of Onkaparinga
- City of Playford
- City of Port Adelaide Enfield
- City of Port Lincoln
- City of Prospect
- City of Tea Tree Gully
- City of Unley
- City of Victor Harbor
- City of West Torrens
- City of Whyalla
- Clare & Gilbert Valleys Council
- Coorong District Council
- Copper Coast Council
- Corporation of the Town of Walkerville
- District Council of Ceduna
- District Council of Cleve
- District Council of Elliston
- District Council of Franklin Harbour
- District Council of Grant
- District Council of Karoonda East Murray
- District Council of Kimba
- District Council of Lower Eyre Peninsula
- District Council of Loxton Waikerie
- District Council of Mount Remarkable
- District Council of Orroroo Carrieton
- District Council of Peterborough
- District Council of Robe
- District Council of Streaky Bay
- District Council of Tumby Bay
- District Council of Yankalilla
- Kangaroo Island Council
- Kingston District Council
- Light Regional Council
- Mid Murray Council
- Mount Barker District Council

- Naracoorte Lucindale Council
- Northern Areas Council
- Port Augusta City Council
- Port Pirie Regional Council
- Regional Council of Goyder
- Renmark Paringa Council
- Southern Mallee District Council
- Tatiara District Council
- The Barossa Council
- The Flinders Ranges Council
- The Rural City of Murray Bridge
- Town of Gawler
- Wakefield Regional Council

- Wattle Range Council
- Wudinna District Council
- Yorke Peninsula Council

### **Participating local government entities**

- Local Government Association of South Australia
- Eastern Region Alliance Water
- Eastern Waste Management Authority
- Fleurieu Regional Aquatic Centre
- Northern Adelaide Waste Management Authority
- Centennial Park Cemetery Authority
- Southern Region Waste Resource Authority