



Draft Determination and interim authorisation

Application for authorisation AA1000634 lodged by
1Circle Pty Ltd & the Business Renewables Buying Group members in
respect of establishing a joint renewable energy purchasing group
Authorisation number: AA1000634

1 March 2023

Commissioners: Keogh
Lowe
Brakey
Carver

Summary

The ACCC proposes to grant authorisation to enable the Business Renewables Buying Group to pool their electricity demand and conduct a joint procurement process for the supply of renewable energy.

The Group is currently comprised of 6 organisations operating in Victoria that have expressed a desire to operate their businesses with renewable electricity. Up to 5 additional organisations may join the Group in the future, provided their aggregated electricity demand does not exceed 50GWhpa. The joint procurement and contract management process will be administered by 1Circle, which is an energy consultancy.

The ACCC considers the pooling of the Group's electricity demand and the joint procurement process is likely to result in public benefits relative to if each organisation individually arranges their transition to renewable electricity, including from transaction cost savings and environmental benefits.

The ACCC considers there is likely to be little, if any, public detriment, particularly given that the joint electricity demand of the Group is relatively low.

The ACCC proposes to grant authorisation for 11 years.

The ACCC has also granted interim authorisation to enable the procurement process to commence while the ACCC is considering the substantive application.

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

The application for authorisation

- 1.1. On 31 January 2023, 1Circle Pty Ltd on behalf of the Business Renewables Buying Group (the **Group**) (together, the **Applicants**) lodged application for authorisation AA1000634 with the Australian Competition and Consumer Commission (the **ACCC**). This application for authorisation AA1000634 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The Applicants are seeking authorisation for the formation of a joint renewable energy buying group in which the Group pools their electricity demand and conducts a joint procurement and negotiation process for the supply of electricity from a renewable energy project or projects connected to the National Electricity Market (**NEM**). Authorisation is also sought to enable future members to join the Group, provided that specified limits on number and aggregate load thresholds are not exceeded.
- 1.3. Authorisation is sought for a period of 11 years.
- 1.4. The Applicants have also requested interim authorisation to enable the Group to initiate the procurement process while the ACCC is considering the substantive application. The request for interim authorisation is considered further in section 6.
- 1.5. 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.

The Applicants

- 1.6. 1Circle Pty Ltd lodged the application on behalf of and for the Group in its capacity as the facilitator of the Group.
- 1.7. The Group includes:

- DT Australiasia Pty Ltd (April Sun Farms Pty Ltd – an agricultural organisation specialising in microgreens)
- Anglicare (Victoria) – an out-of-home care provider
- Jardan Australia Pty Ltd – a furniture manufacturer and homewares retailer
- Melbourne Convention and Exhibition Trust – event and exhibition venues
- Australian Catholic University Limited – a public university
- Uniting (Victoria and Tasmania) Limited – a non-profit community services organisation of the Uniting Church.

1.8. The Group members are commercial consumers of electricity that are based in Victoria and who are active in different segments of the economy.

The Proposed Conduct

1.9. The Group is seeking authorisation to pool their electricity demand and place a single tender into the market calling for proposals for an electricity supply arrangement and an equivalent quantity of large-scale generation certificates (**LGCs**)¹ from a specific renewable energy project or projects connected to the NEM (the **Proposed Conduct**).

1.10. The Group is seeking the supply of electricity from an eligible renewable energy source within the meaning of the *Renewable Energy (Electricity) Act 2000* (Cth).²

1.11. Specifically, the Applicants propose the following:

- The Applicants will pool their electricity demand and place a single tender into the market calling for proposals for an electricity supply arrangement and an equivalent quantity of LGC's from a specific renewable energy project or projects connected to the NEM.
- The electricity supply and the LGC's may be provided by a single retailer (if the retailer is vertically integrated) or by a consortium including a retailer and a renewable power developer.
- Each Retail Service Agreement and each LGC Supply Agreement between each of the Applicants and successful tenderer would be on the same (or substantially similar) terms and conditions.
- 1Circle³ will manage the procurement process for the Group, including the contracting of energy and/or legal advisors as necessary.
- The Group members will individually enter into electricity supply agreements with the chosen retailer on the same general agreed terms and conditions.
- If necessary, the Applicants will enter into a further agreement to create a more detailed and binding legal framework for the delivery of the Group.

¹ Defined as a certificate created under Subdivision A of Division 4 of Part 2 of the *Renewable Energy (Electricity) Act 2000* (Cth). Further information on LGCs is available here: <https://www.cleanenergyregulator.gov.au/RET/Scheme-participants-and-industry/Power-stations/Large-scale-generation-certificates>.

² Section 17 of the *Renewable Energy (Electricity) Act 2000* (Cth) provides a list of the eligible renewable energy sources. The MoU indicates that the Group wishes to exclude biomass projects with native timber as the energy source and any others agreed amongst them.

³ The Applicants advise that the selection of 1Circle as the facilitator of the Group was the result of a competitive procurement process to the broker and energy consultant sector.

- 1.12. The Applicants are seeking authorisation to include up to 5 additional organisations that may join the Group in the future, provided that the Group's additional aggregate consumption does not exceed 50GWhpa.
- 1.13. A copy of the application for authorisation is available on the ACCC's [Authorisation public register](#).

2. Background

- 2.1. The Group was formed as part of an initiative co-ordinated by the City of Yarra, as well as the Victorian Councils of Darebin, Melbourne, Moreland and regions covered by the Eastern Alliance for Greenhouse Action and the Northern Alliance for Greenhouse Action (the **Participating Councils**). The Applicants submit that the Participating Councils are committed to supporting Victorian businesses in their transition to 100% renewable energy supply and aim to achieve favourable cost outcomes for them through group electricity buying.
- 2.2. The Group members are organisations that have each expressed the desire to operate their business with 100% renewable electricity. The Group members each submitted an expression of interest: in response to public marketing undertaken by the Participating Councils; and/or unsolicited to gain assistance to move towards renewable energy.

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 major electricity suppliers, relevant industry associations, consumer groups and relevant regulatory bodies.
- 3.3. The ACCC received no submissions from interested parties in relation to the application or interim authorisation.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have 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 or 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**).

Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. The Applicants submit that the relevant areas of competition are:
 - the generation and wholesale supply of electricity in the NEM or, in the alternative, in one or more regions of the NEM, including Victoria

- the retail supply of electricity to commercial and industrial end consumers in Victoria.
- 4.5. In making its assessment of the Proposed Conduct, the ACCC considers that the relevant areas of competition are likely to be the acquisition, as well as the generation, wholesale and retail supply, of electricity within the NEM in Victoria including from various renewable energy sources.⁴

Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.7. The ACCC considers that absent the Proposed Conduct, it is likely that each of the Group members will individually seek to negotiate, enter into and administer individual contractual agreements for the supply of electricity with wholesale electricity retailers and that such agreements are unlikely to be on common terms. The ACCC considers that, without the Proposed Conduct, members of the Group may be unable to organise supply of electricity from renewable energy sources or may do so on less favourable terms. This is because they are unable to pool their demand and as the Applicants submit there is a lack of precedent by energy users wishing to buy renewable energy. The Group members also lack the experience in effectively buying from the market.

Public benefits

- 4.8. 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.*⁵

- 4.9. The ACCC has considered the following public benefits as submitted by the Applicants:
- transaction cost savings arising from a collective negotiation process
 - environmental benefits through a reduction in greenhouse gas emissions, an increased demand for renewable energy and an increased incentive for investment in renewable energy capacity
 - increased competition for the supply of electricity to the group members.

Transaction cost savings

- 4.10. The Applicants submit that the Proposed Conduct will lead to transaction cost savings for the Group members and potential suppliers as a result of the joint tender process. This is because the costs will be shared amongst the Group members. The Applicants note that if each Group member were to individually tender and contract their electricity

⁴ However, the ACCC considers it is not necessary to precisely define the relevant markets for the purpose of considering the application for authorisation.

⁵ 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.

supply, it would take more time to negotiate each contract and greater cost to obtain technical, legal or other advice.

- 4.11. The ACCC accepts that the Proposed Conduct is likely to provide transaction cost savings, including by reducing or eliminating the duplication of administrative, technical, legal or other costs compared to if each Group member was to undertake individual negotiations with electricity suppliers.
- 4.12. The ACCC also considers that the Proposed Conduct is likely to deliver transaction cost savings to potential electricity suppliers, including by reducing the costs of dealing with multiple Group members as part of each procurement process.

Environmental benefits

- 4.13. The Applicants submit that through fulfilment of goals and objectives relating to the transition to renewable energy by the Group members, the Proposed Conduct will in-turn reduce environmental emissions.⁶ The Applicants further submit that the move towards net-zero emissions will provide benefit to the public as well as the individual Group members in achieving public expectations.
- 4.14. To the extent that the Proposed Conduct enables or assists the Group members in meeting their renewable energy targets and results in lower cost of electricity supply to Group members, thereby facilitating greater take-up of renewable energy by the Group members in place of fossil-fuel-generated electricity, the ACCC accepts that it is likely to result in a public benefit through a reduction in greenhouse gas emissions of the Group members.
- 4.15. The Applicants submit that the Proposed Conduct will increase the demand for renewable energy generation, which will promote economic, environmental and social benefits. The Applicants further submit that the combined electricity load of the Group may incentivise new generation of renewable energy capacity. The Applicants note that, if the combined electricity demand of the Group increases, the likelihood of reaching a scale sufficient to incentivise new investment increases.
- 4.16. The ACCC acknowledges that an increase in the demand for renewable energy, particularly in light of Australia's long-term plan to reduce emissions, could have the result of incentivising the generation of new renewable energy capacity by electricity generators. The ACCC also acknowledges that the greater demand for renewable electricity arising from the emergence of buying groups such as this one may result in an increased willingness and appetite of retailers to participate in these kinds of arrangements. However, the ACCC considers that the benefit from the Proposed Conduct itself will be small given the Group's electricity consumption, even at its highest, represents only a small portion of electricity demand in both the NEM and Victoria.

Increased competition for the supply of electricity to Group members

- 4.17. The Applicants submit that the Proposed Conduct will increase competition for the retail supply of electricity to the Group members; specifically, the Applicants consider that the combined electricity demand of the Group and the length of electricity supply

⁶ The Applicants submit that the reduction of environmental emissions is classified as Scope 2 – indirect emissions. Scope 2 greenhouse gas emissions are emissions released to the atmosphere from the indirect consumption of an energy commodity; an example is the 'indirect emissions' that come from the use of electricity produced by the burning of coal in another facility: <https://www.cleanenergyregulator.gov.au/NGER/About-the-National-Greenhouse-and-Energy-Reporting-scheme/Greenhouse-gases-and-energy#:~:text=must%20be%20reported,-Scope%20%20emissions,of%20coal%20in%20another%20facility>.

contracts⁷ being sought are likely to encourage more competitive pricing and terms than without the Proposed Conduct. The Applicants submit that this increase in competition may also assist in ensuring reliability of supply and greater price certainty for the Group members.

- 4.18. The ACCC considers that the Group may be able to attract greater interest from potential electricity suppliers by pooling their electricity demand as part of the collective tender process, compared to a scenario where each of the Group members individually negotiates with suppliers.
- 4.19. If the Proposed Conduct stimulates more competition between suppliers to supply to the Group members, the ACCC considers that this is likely to result in better terms and conditions (including lower prices) for the Group members.

ACCC conclusion on public benefit

4.20. The ACCC considers that the Proposed Conduct is likely to result in public benefits from:

- transaction cost savings for both the Group members and potential retail electricity suppliers as a result of the joint tender process and
- environmental benefits through a reduction in greenhouse gas emissions as a result of the Group members being able to transition to renewable energy at lower cost and with less risk than if they each sourced renewable electricity individually.

4.21. If the Proposed Conduct stimulates more competition between suppliers to supply to the Group members, the ACCC considers that this is likely to result in better terms and conditions (including lower prices) for the Group members.

Public detriments

4.22. 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.*⁸

4.23. The Applicants submit that they do not believe there is a net public detriment that is likely to result from the Proposed Conduct, noting that:

- The tender process will be open and transparent and will ensure there will be competition between electricity suppliers to secure the contracts.
- The Proposed Conduct involves a relatively small proportion of electricity demand for the NEM and Victoria and accordingly would not have a material impact on competition.⁹

⁷ While the length of these agreements will be determined as part of the procurement process, the Applicants submit that the Group are proposing a term of 7 years.

⁸ Re 7-Eleven Stores (1994) ATPR 41-357 at 42, 683.

⁹ The Applicants submits that the Group's combined electricity demand in the financial year 2022 amounts to less than 0.007% of total electricity consumption in the NEM and 0.032% of total consumption in Victoria.

- Any information shared between the Group members will be limited to the acquisition of electricity and the implementation of the Proposed Conduct. The Applicants submit that, given the Group members are not competitors (in the services they provide) and their alignment is centred on the purchase of renewable energy, the likelihood of public detriment from an increased risk of coordination between the Group members is considered negligible.
- They propose a cap on the additional electricity load and participant numbers (as outlined in paragraph 1.12 above) thereby limiting the potential impact of the Group’s buying activity regardless of any future member joining the Group.

4.24. The ACCC considers that:

- The aggregate electricity demand of the Group,¹⁰ inclusive of any future members that will not exceed 50GWhpa, will not achieve a large enough proportion of electricity consumption in either the NEM or Victoria to create competition concerns.
- While some of the current and future members of the Group may compete downstream, the ACCC considers there is a low risk that coordination as part of the Proposed Conduct could lead to broader coordination between the Group members. Any information-sharing authorised as part of the Proposed Conduct is confined to discussions regarding the joint electricity tender process and any consultation that may arise after the tender will be limited to aspects of the ongoing management of the contracts.
- 1Circle¹¹ (in its role as the facilitator of the Group and with responsibility for managing legal issues) will have oversight of the Group and act as an intermediary between Group members, which will further mitigate any risk of unauthorised coordination between the Group members.

4.25. Taking these factors into account, the ACCC considers that any likely public detriment arising from the Proposed Conduct will be minimal.

Balance of public benefit and detriment

4.26. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh the minimal, if any, likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.27. The Act allows the ACCC to grant authorisation for a limited period of time.¹² This enables the ACCC to be in a position to be satisfied that the likely public benefits will

¹⁰ The Applicants provided the following figures of their total electricity consumption (during the financial year 2021-22) relative to the NEM and Victoria total consumption:

	Applicants	Victoria	NEM
Annual electricity consumption (TWh)	0.014	43.7	189.1

¹¹ 1Circle submits that it is a specialist energy manager that offers its clients services to assist them in procuring renewable energy, including: strategy and planning; procurement and implementation; and performance management.

¹² Subsection 91(1) of the Act.

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.

- 4.28. In this instance, the Applicants seek authorisation for 11 years.
- 4.29. The Applicants submit that this period would cover the expected term of the tender process and the maximum term of each electricity supply agreement.¹³ The Applicants note that the anticipated agreement term with the successful energy retailer is between 5 to 7 years, but acknowledge that the agreement may not commence for up to 2 years. The Applicants submit that agreements of 5 to 10 years have historically provided significantly lower tariffs than shorter agreements.
- 4.30. Taking into account a 7-year agreement period and the up to 2-year lag before the agreements commence, the Applicants are seeking authorisation for 11 years to allow for procurement flexibility in the event that the term of the agreement were to be longer and/or if the procurement process were to extend longer than anticipated due to market conditions.
- 4.31. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC proposes to grant authorisation for 11 years.

5. Draft determination

The application

- 5.1. On 31 January 2023, 1Circle on behalf of the Business Renewables Buying Group lodged application AA1000634 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicants seek authorisation for the Proposed Conduct (as defined in paragraph 1.9). 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 is satisfied, in all the circumstances, 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.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000634 to enable the Applicants to engage in the Proposed Conduct described in paragraphs 1.9 to 1.12 and defined as the Proposed Conduct.

¹³ The Applicant notes that this represents their best estimate as to the minimum period of purchasing commitment by each Group Member that would be required to secure pricing.

- 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 AA1000634 for 11 years.
- 5.9. This draft determination is made on 1 March 2023.

6. Interim authorisation

- 6.1. At the time of lodging the application, the Applicants also requested interim authorisation to enable the Group to initiate the electricity procurement process while the ACCC is considering the substantive application. The Applicants have advised the ACCC that they will not enter into electricity supply agreements unless or until final authorisation is granted.
- 6.2. The Applicants seek interim authorisation on the basis that some of the Group members have existing contracts that are approaching expiry and are therefore at risk of having to turn to the electricity spot market if a new agreement is not promptly signed.
- 6.3. The Applicants submit that they were not able to lodge their application sooner as some of the Group members were waiting on additional third-party legal advice and review prior to the application being lodged.
- 6.4. The ACCC has decided to grant interim authorisation to enable the Applicants to initiate the joint electricity procurement process (for example, to prepare and release a joint invitation to tender for the supply of electricity services and jointly evaluate tenders, including negotiating with potential suppliers, on behalf of the Group members). Interim authorisation does not extend to the Group members entering into agreements with suppliers of electricity services.
- 6.5. In granting interim authorisation, the ACCC considers that:
 - Granting interim authorisation would not permanently alter the competitive dynamics of any markets or inhibit the markets from returning to their current state if the ACCC later denies final authorisation. The Group members would not have entered into any supply agreements and could return to individual bargaining if necessary.
 - Interim authorisation would facilitate commencement of the joint tender process and negotiation of the terms and conditions of the electricity supply agreements and, if the ACCC grants final authorisation, would allow the arrangements to be established earlier than would otherwise be the case.
 - As outlined in paragraphs 4.8 to 4.26, the ACCC has formed the preliminary view that the Proposed Conduct is likely to result in public benefits, with little to no public detriments and that it is not likely to materially impact competition nor confer any significant market power to the Group members.
 - Potential electricity suppliers, and competitors to the individual businesses in the Group, are unlikely to be harmed if the ACCC grants interim authorisation.
- 6.6. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for authorisation is withdrawn.
- 6.7. The ACCC may review interim authorisation at any time, including in response to feedback received after the granting of this interim authorisation.

6.8. The ACCC's decision in relation to this interim authorisation should not be taken to be indicative of whether or not final authorisation will ultimately be granted.

7. Next steps

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