



Draft determination and interim authorisation

Application for authorisation lodged by
Macquarie Corporate Holdings Pty Limited & Ors
in respect of
a Renewable Energy Buyers Consortium
Authorisation number: AA1000557

15 July 2021

Commissioners:

Keogh

Rickard

Brakey

Ridgeway

Summary

The ACCC proposes to grant authorisation to enable members of a Renewable Energy Buyers Consortium coordinated by Macquarie to pool their demand and collectively negotiate an electricity supply agreement.

The ACCC proposes to grant authorisation for 14 years. This period reflects the time taken to negotiate supply agreements, for a facility to reach commercial operation, and the proposed contract term.

The ACCC has also granted interim authorisation to enable the group to conduct collective discussions and negotiations, but not enter into supply contracts, while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 13 August 2021 before making its final decision.

1. The application for authorisation

- 1.1. On 11 June 2021, Macquarie Corporate Holdings Pty Limited (MCHPL) lodged application for authorisation AA1000557 with the Australian Competition and Consumer Commission (the **ACCC**). MCHPL and Macquarie Capital (Australia) Limited (**MCAL**) (together, **Macquarie**) are seeking authorisation for to identify, coordinate and secure a group of buyers to enter into Power Purchasing Agreements (**PPAs**) to support the development of a new renewable energy project (**Project**). Currently, the Project relates to the development of a wind farm facility in Victoria. Macquarie is also seeking to work with a developer to bring the Project to financial completion, anticipated to be December 2021. This application for authorisation AA1000557 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. Authorisation is sought for 14 years.
- 1.3. 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

- 1.4. The Applicants are:
 - MCHPL
 - MCAL
 - the developer of the Project, and
 - any off-taker that the developer negotiates with, and may subsequently enter into a PPA with the developer for the purchase of electricity from the Project (each, a **Buyer**, who together form a **Buyers Group**)(together, the **Applicants**).
- 1.5. It is anticipated that the Buyers Group will comprise 18-25 Buyers, who are large or medium-sized commercial and industrial customers with electricity consumption at

sites located in Victoria. The Buyers operate across a diverse range of sectors, including property, manufacturing, health, finance, telecommunications and retail. The Buyers that form the Buyers Group may change depending on the acceptability of the commercial terms agreed.

- 1.6. Under the proposed joint energy purchasing arrangements, MCAL is acting as advisor to the developer / Project and MCHPL is coordinating the Buyers Group. Macquarie advises that if it cannot reach agreement with the developer of the current Project, Macquarie will seek to identify an alternative large-scale wind farm project in Australia for the Buyer Group. In this situation, the identity of the developer and the location of the development may change; however, the alternative project is likely to be in Victoria and of a similar or lesser size.
- 1.7. The Applicants have also requested that authorisation extend to entities that may join the buying group in the future. Under the proposed joint energy purchasing arrangements, Macquarie has the exclusive rights from the developer to introduce Buyers to acquire up to 50% of the electricity generated by the Project over the duration of the PPAs.¹
- 1.8. The combined electricity generated by the current Project will account for between 0.5-3% of electricity in the National Electricity Market (**NEM**) and between 2-5% of electricity consumption in Victoria.² Macquarie expects that the developer will either contract the remainder of the electricity generated by the Project over time, or sell it into the spot market.
- 1.9. MCAL will receive a commission in respect of those Buyers it introduces and signs onto PPAs.

The Proposed Conduct

- 1.10. The Applicants are seeking authorisation to identify, coordinate and secure a group of buyers to enter into PPAs to support the development of the renewable energy Project.
- 1.11. Specifically, the Applicants seek authorisation to:
 - a. jointly negotiate, enter into and give effect to an overarching agreement (the PPA) under which:
 - i. the Buyers in the Buyers Group will pay the substantially same price for electricity and 'green products' subject to meeting agreed credit rating criteria and security requirements
 - ii. the pricing offered by the developer to the Buyers for the PPA will be in accordance with principles agreed to by the Buyers
 - iii. the Buyers in the Buyers Group will be subject to substantially same non-price terms and conditions, and
 - b. jointly discuss and exchange information (including between Buyers), that relates to:
 - i. the potential Buyers that Macquarie can approach for the purposes of becoming customers for the Project

¹ Macquarie and Ors supporting submission to the application AA1000557, 11 June 2021, p. 9.

² Macquarie and Ors application for authorisation AA1000557, 11 June 2021, p. 6.

- ii. the nature and operation of the Project relating to capacity, volumes, pricing and commitments, and
 - iii. the terms and conditions of becoming a Buyer, including terms and conditions that relate to pricing, volume and commitments from which a Buyer could acquire energy, and
- c. individually enter into a PPA with the developer on the same (or substantially the same) price and non-price terms and conditions, and
- d. jointly negotiate and (as relevant) enter into “sleeving arrangements” under which an intermediary retailer administers the transfer of money and energy under the PPA, in place of the Buyer. The retailer intermediary may, on request, provide firming services to each Buyer by smoothing supply from the intermittent generation of renewable projects, in return for a fee to that intermediary retailer,
- (the **Proposed Conduct**).

1.12. In relation to paragraph (a) above, ‘green products’ mean Large-scale Generation Certificates (LGCs) equivalent to 1MWh of electricity created by an accredited renewable energy generator, GreenPower rights³, and other rights, entitlements or credits.

1.13. The Applicants advise that the information referred to in paragraph (b) above relates only to information that needs to be shared between some or all of the Applicants to facilitate the acquisition of electricity from the Project. This includes, for example, information about the capacity and output of the Project, the amount and price of the electricity to be acquired and the terms on which electricity is acquired from the Project. The Applicants advise they will not share any competitively sensitive information relating to the Buyers’ separate businesses or operations (including, for example, other costs, inputs, or other suppliers and supply arrangements or prices).

1.14. In relation to paragraph (d) above, Macquarie anticipates that not all Buyers will enter into sleeving arrangements – this will be a matter for each Buyer to decide.

1.15. The Applicants advise that once the PPAs have been signed by the Buyers and energy off-take has commenced, the PPAs will operate as standalone, bilateral agreements between each Buyer and the developer. Further, any variations to the PPAs (whether in relation to price or non-price terms) will be bilaterally negotiated between the particular Buyer and the developer and there will be no need for ongoing collective negotiation. However, the Applicants note that there may be some further coordination in relation to reporting and discussions with Buyers during the construction phase.

1.16. A copy of the application for authorisation is available on the ACCC’s [public register](#).

Interim authorisation

1.17. The Applicants also requested interim authorisation to enable them to progress the negotiation process, while the ACCC is considering the substantive application.

1.18. In particular, the Applicants requested interim authorisation for the joint discussions and negotiations referred to at paragraph 1.11, up until the point that the ACCC grants

³ The GreenPower scheme is an initiative of ACT, NSW, SA and Victorian governments, which allows business customers to offset a portion of their electricity usage with renewable energy sources. When a customer selects a GreenPower contract, the participating retailers are required to purchase an equivalent amount of electricity from accredited renewable energy generators in the form of LGCs.

any final authorisation. The Applicants submit that should PPAs be signed before the ACCC has issued its final determination, those PPAs would be expressly subject to a condition that the ACCC grants final authorisation.

1.19. The request for interim authorisation is considered further in section 5.

2. Background

Rationale for the Proposed Conduct

2.1. The Applicants wish to develop an energy option that allows the Buyers to switch to renewable energy by pooling their electricity demand, so that their combined load is sufficient to underwrite an investment in new renewable energy projects. The Applicants submit that this supports their commitment to securing a reliable supply of renewable energy to reduce the impact of their operations on the environment.

2.2. Specifically, the stated rationale for the Proposed Conduct is:

- for Buyers to secure a reliable supply of renewable energy to reduce the impact of their operations on the environment
- to underwrite and support the new Project by securing foundation customers
- to increase investment in renewable energy generation assets in Australia
- for the Buyers to obtain LCGs and meet their renewable energy targets
- for the Buyers to access to the wholesale energy market and secure wholesale pricing and reasonable terms through the scale of their collective acquisition
- to develop economies of scale that enables smaller customers to contract with the Project when they would otherwise be too small or alternatively, to obtain better electricity pricing and terms than they would otherwise obtain contracting on an individual basis, and
- to continue and assist in the development of the framework and process by which groups and interested parties may acquire renewable sources of energy supply to achieve their carbon neutral business objectives.

Electricity supply and renewable energy in Australia

2.3. The NEM is comprised of five interconnected regions of Queensland, New South Wales (which includes the ACT), Victoria, Tasmania and South Australia. The Applicants advise that renewable energy providers are a growing portion of the NEM, currently providing around 21% of Australia's electricity supply.

2.4. The Applicants advise that if business customers wish to obtain electricity from renewable sources they currently have limited options, which include installing on-site renewables (for example, rooftop solar), entering into GreenPower accredited power purchasing agreements (as defined at paragraph 1.12) or directly purchasing LGCs equivalent to their own electricity usage.

2.5. Macquarie estimates that the combined electricity that will be generated by the Project will account for between 0.5–3% of electricity in the NEM and between 2–5% of electricity in Victoria. As previously mentioned, the Applicants will acquire a smaller proportion of the electricity generated by the Project, that is, up to 50%.

Other similar authorisations

- 2.6. The ACCC has previously granted authorisation for a number of similar collective bargaining or joint purchasing arrangements for electricity. Some more recent examples include:
- [Royal Melbourne Institute of Technology – Melbourne Renewable Energy Project 2](#) (2019)
 - [Municipal Association of Victoria](#) (2019)
 - [Large Format Retail Association](#) (2019)
- 2.7. In each of these cases, the ACCC found that the joint buying of electricity would be likely to result in public benefits, including transaction cost savings, promoting increased competition for the supply of energy and environmental benefits. Little or no public detriment was considered likely to result.

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, state and federal government and relevant regulatory bodies.⁴
- 3.3. The ACCC received no submissions from interested parties in relation to the application.

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, may substantially lessen competition within the meaning of section 45 of the Act, and may be a concerted practice within the meaning of section 45 of the Act. Consistent with subsection 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).
- 4.3. In making its assessment of the Proposed Conduct, the ACCC considers that:
- The relevant areas of competition are likely to be the wholesale and retail supply of electricity. The ACCC considers the precise identification of the geographic scope of these areas of competition (that is, Victoria, or the broader NEM) is not required for the purpose of assessing this application.
 - Absent the Proposed Conduct, it is likely that the participating members of the group will need to individually negotiate electricity supply contracts.

⁴ A list of the parties consulted and the public submissions received is available from the ACCC's [public register](#).

Public benefits

- 4.4. 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 the term should be given its widest possible meaning, and 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.*⁵

- 4.5. The ACCC has considered the following public benefits:

- reduced transaction costs
- greater investment in and competition for the supply of electricity, and
- environmental benefits through a reduction in greenhouse gas emissions.

Reduced transaction costs

- 4.6. The Applicants submit that if the Buyers are required to source PPAs individually, each Buyer would need to engage legal and technical advisors to negotiate each agreement and prepare the documentation. The Proposed Conduct allows these parties to collectively negotiate and eliminate replication of work, saving time and money, which will ultimately benefit the buyers and their customers.
- 4.7. The ACCC accepts that collective tendering for, negotiation of and administration of contracts regarding the supply of electricity is likely to result in public benefits from transaction cost savings compared to the situation where individual negotiations and contract administration is conducted by participating members of the group. These savings can arise from reducing the total time of negotiation and creating the ability to share costs in obtaining legal and technical advice to inform the negotiation.

Greater investment in and competition for electricity supply

- 4.8. The Applicants submit that by aggregating demand for renewable energy, the scale of the Buyers' demand facilitates a significant new renewable energy project in Victoria. In addition, the Applicants submit that encouraging new electricity generation will increase competition for the generation and wholesale supply of electricity in the NEM.
- 4.9. The ACCC considers the aggregated electricity requirements of the Buyers (and term of the proposed PPA) are likely to incentivise competition for the supply of electricity, by providing greater certainty to support the construction of a new renewable energy facility. This is likely to result in more competitive pricing and contract terms, which is a public benefit. The ACCC acknowledges the initial construction of a new energy facility in Victoria is likely to have flow-on economic benefits in this region.

Environmental benefits through a reduction in greenhouse gas emissions

- 4.10. The Applicants submit that if the Project is successful, it will be a significant new wind farm facility on Australia. The Applicants submit the Project will promote environmental benefits by reducing greenhouse gas emissions by 2 million tonnes per year.

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.

4.11. The ACCC accepts that any reduction in greenhouse gas emissions over and above what would be achieved in the absence of the Proposed Conduct, or the same reduction in emissions but at a lower cost, would constitute be a public benefit.

Public detriments

4.12. 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.⁶

4.13. The Applicants submit that there are no, or minimal, public detriments arising from the Proposed Conduct. Macquarie estimates that the electricity generated from the Project will account for between 0.5-3% of electricity in the NEM, and between 2-5% of electricity in Victoria, with the Applicants seeking to collectively acquire only up to 50% of that production.

4.14. The ACCC notes that the Applicants have applied for authorisation for future participating members, and that the addition of new participants in the joint buying group may increase the aggregate demand. However, the ACCC notes that new members can only join the buying group if the aggregate demand of the joint buying group would remain below 50% of electricity generated by the Project. The ACCC considers that this means it is unlikely that the aggregate demand will achieve a large enough proportion to create competition concerns.

4.15. The ACCC also notes that some members of the joint buying group may be competitors, not just for the acquisition of electricity, but also in other areas. This means there is a potential risk that coordination in respect of the Proposed Conduct could lead to additional coordination between the members. However, any information-sharing authorised as part of the Proposed Conduct will be confined to information required to facilitate the acquisition of electricity from the Project. The Applicants state there will be no sharing of competitively sensitive information relating to the Buyers' separate businesses or operations (including, for example, other costs, inputs, or other suppliers and supply arrangements or prices).

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

Balance of public benefit and detriment

4.17. Therefore, 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

4.18. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ 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

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁷ Subsection 91(1) of the Act.

review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.19. In this instance, the Applicants seek authorisation for 14 years. The Applicants submit this is intended to cover the length of time that collective negotiations is expected to take, and the term of the PPA (around 10 years). In particular, the Applicants advise that the Project will take the following steps to enable the development of the project over the next 3-4 years:⁸

- initial negotiations with potential Buyers and signing of binding term sheets
- collective negotiations and signing full form PPAs
- financial close for the Project (December 2021) and
- construction of the Project, with commercial operation targeted to start in 2025.

4.20. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC proposes to grant authorisation for 14 years

5. Draft determination

The application

- 5.1. On 11 June 2021, the Applicants lodged application AA1000557 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicants seek authorisation for the Proposed Conduct (as defined at paragraph 1.11 to 1.13). 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 AA1000557 to enable the Applicants to identify, coordinate and secure a group of buyers to collectively negotiate PPAs to support the development of a new renewable energy project, as described in paragraph 1.11 to 1.13 and defined as the Proposed Conduct. The proposed

⁸ Macquarie and Ors application for authorisation AA1000557, 11 June 2021, pp 5, 9.

authorisation extends to future parties that may become members of the buying group.⁹

- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act, or may constitute a concerted practice within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000557 for 14 years.
- 5.9. This draft determination is made on 15 July 2021.

6. Interim authorisation

- 6.1. The ACCC has decided to grant interim authorisation.
- 6.2. At the time of lodging the application, the Applicants requested interim authorisation for the Proposed Conduct to enable the Applicants to commence the collective negotiations and discussions regarding the PPA while the ACCC considers the merits of the authorisation application.
- 6.3. The Applicants consider that the request for interim authorisation is reasonable and justified given the compressed timeline for the Project, and that there are clear public benefits to the Proposed Conduct, and no discernible public detriments. In particular:
 - the Term Sheet and full form PPA will be conditional on ACCC authorisation – the Buyers will not enter into any binding Term Sheet until interim authorisation is granted and any PPA collectively negotiated by the Buyers Group will be subject to final authorisation
 - the benefits of the conduct cannot be realised unless the parties are able to move relatively quickly (expedited by collective negotiation), so that they are in a position to complete negotiations, and sign PPAs which enable the Project to secure finance
 - the Proposed Conduct is reversible – carrying out collective negotiations and sharing information – only to the extent necessary to enter into the PPAs – is unlikely to have any impact on any relevant market, as it will not result in any change in any change to market structure or the buying behaviour of, or the entry into any final contracts by, the Buyers, and
 - any further delay to progressing the Project through securing Buyers via collective negotiation of the PPAs will have significant flow-on delay to the development of the Project and commencement of supply (which will take 2-4 years to build), and the achievement of each Applicant's renewable energy policies and targets.
- 6.4. The Applicants submit that if interim authorisation is not granted, and the Applicants need to wait until the ACCC issues a final determination, then the Applicants' ability to engage jointly on key issues will be limited, which may have an impact on the timing of the Project.
- 6.5. The ACCC has decided to grant interim authorisation to enable the Applicants to commence collective negotiations and discussions in relation to the PPA, but not enter into full-form PPAs.

⁹ Section 88(2) of the Act.

- 6.6. The ACCC has decided to grant interim authorisation for the following reasons:
- For the reasons outlined in this draft determination, the Proposed Conduct, including the conduct the subject of the request for interim authorisation, is likely to result in public benefits that would outweigh the minimal, if any, likely detriment to the public.
 - There is public benefit in granting interim authorisation insofar as it will allow the Applicants to commence negotiating PPAs and, if the ACCC grants final authorisation, allow the benefits from the joint purchasing to be realised earlier than would otherwise be the case.
- 6.7. 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.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by 13 August 2021. 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.