



# Draft Determination and interim authorisation

Application for authorisation AA1000558 lodged by  
Equinix (Australia) Enterprises Pty Ltd & Ors  
in respect of establishing a joint renewable energy purchasing group  
Authorisation number: AA1000558

15 July 2021

Commissioners:

Keogh

Rickard

Brakey

Ridgeway

## Summary

The ACCC proposes to grant authorisation to Equinix (Australia) Enterprises Pty Ltd and others to form a proposed joint renewable energy purchasing group to pool their demand and collectively tender and negotiate a Power Purchasing Agreement.

The ACCC proposes to grant authorisation for 24 years. This period reflects the time taken to undertake the tender process, and the proposed length of agreements including possible extension options.

The ACCC has also granted interim authorisation to enable the group to conduct the joint tender process and commence 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 29 July 2021 before making its final decision.

### 1. The application for authorisation

- 1.1. On 15 June 2021, Equinix (Australia) Enterprises Pty Ltd (**Equinix**) on behalf of itself and the other businesses listed at paragraph 1.4 below (the **Applicants**) lodged application for authorisation AA1000558 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation to undertake a joint procurement process for an aggregated hedged volume of electricity and equivalent volume of Green Products<sup>1</sup> from a solar or wind electricity generation facility, likely to be New South Wales. The proposed tender process will call for proposals to construct new facility that will generate sufficient electricity to meet the Applicants aggregate demand.<sup>2</sup>
- 1.2. Authorisation is sought for future parties that join the group, provided that certain volume thresholds are not exceeded. The Applicants seek authorisation for 24 years. This application for authorisation AA1000558 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 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:

- Equinix (Australia) Enterprises Pty Ltd (**Equinix**)
- HSBC Bank Australia Limited (**HSBC**)
- Nike Australia Pty Ltd (**Nike**)

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<sup>1</sup> Green Products means Large Scale Generation Certificates (**LGCs**) and any other rights, entitlements, credits, offsets, allowances, compensation, benefits or certificates of any kind, recognised or arising under any scheme, law, policy or arrangement established or regulated by or on behalf of a government authority which are or which become available to the owner or operator of any facility for the generation of electricity from a renewable source in connection with its existence or operations as a generator of electricity from a renewable source.

<sup>2</sup> Equinix and Ors supporting submission to the application for authorisation AA1000558, 15 June 2021, p. 4.

- J.Aron & Company LLC (**Goldman Sachs**)
- H&M Hennes & Mauritz Finance AB (**H&M**)

(the **Applicants**)

- 1.5. The Applicants are commercial consumers of electricity who are active in different segments of the economy.
- 1.6. The Applicants have also requested that authorisation extend to entities that may join the group in the future, provided that the total electricity consumption of the group does not exceed 5% of electricity consumption in the NEM or any individual state within the NEM.

## The Proposed Conduct

- 1.7. The Applicants are seeking authorisation to pool their electricity demand and place a single tender into the market calling for proposals for the terms on which a supplier (**Seller**) will enter into a Power Purchasing Agreement (**PPA**) with the Applicants in the form of a contract for differences (also known as a hedge) for electricity and for the physical delivery of Green Products (including Large-scale Generation Certificates) from a renewable energy generation facility (**Facility**) connected or to be connected to the National Electricity Market (**NEM**), likely in New South Wales.
- 1.8. The Applicants expect that the Seller will enter into a PPA with each Applicant on substantially similar terms and conditions, except as required to meet individual Applicant's needs.
- 1.9. Specifically, the Applicants seek authorisation to:
  - jointly conduct a tender process to identify and select a Seller, including joint evaluation of tender responses and the joint negotiation of PPA terms
  - individually enter into PPAs with the Seller on the same general agreed terms and conditions and
  - consult with each other and make joint decisions regarding the ongoing administration and operation of certain aspects of the PPA during the term of the contract. The Applicants submit that the matters which may be discussed include performance reviews, periodic and other price reviews, the exercise of contract options, any potential expansion of the Facility, events that materially impact the performance of the PPA, changes to the terms and conditions of the PPA, and breach of the PPA.

(the **Proposed Conduct**)

- 1.10. The Applicants advise that the primary purpose of the PPA is to:
  - hedge the Applicants' exposure to the wholesale (spot) price of electricity in the NEM and
  - to obtain Green Products for a variety of purposes, including to potentially offset any green charges payable to their retailer.
- 1.11. The scope of the authorisation sought does not extend to the Applicants pooling their electricity demand for the purpose of negotiating an electricity retail contract with an authorised/licenced electricity retailer in the NEM, and they will manage this

individually.

- 1.12. A copy of the application for authorisation is available on the ACCC's [Authorisations public register](#).

## Interim authorisation

- 1.13. The Applicants also requested interim authorisation to enable them to commence the joint tender process, including the joint evaluation of tender responses and the negotiation of PPA terms, while the ACCC is considering the substantive application. The Applicants advise that they will not award the tender until final authorisation is granted.
- 1.14. The request for interim authorisation is considered further in section 5.

## 2. Background

- 2.1. The Applicants advise that they each have sustainability goals and wish to manage their impact on the environment, all having long term goals of using 100% renewable power for electricity needs.
- 2.2. The Applicants submit that participation in the project enables the Applicants to create scale, thereby improving their prospects of securing cost-efficient bundled arrangements for electricity and Green Products, as well as promoting investment in renewable energy generation.
- 2.3. 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 Applicants currently account for less than 5% of total electricity consumption in the NEM and less than 5% of NSW consumption.

## Other similar authorisations

- 2.4. 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)
- 2.5. 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.<sup>3</sup>
- 3.3. The ACCC received one submission from Snowy Hydro Limited in support of the application. Public submissions by the Applicants and interested parties are on the [Authorisations public register](#) for this matter.

## 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 and may substantially lessen competition 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 that precise identification of the geographic scope of these areas of competition (NSW 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 individually tender, enter into, and administer PPA's.

## 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.*<sup>4</sup>

- 4.5. The ACCC has considered the following public benefits:
  - transaction cost savings
  - greater investment in and competition for the supply of electricity
  - environmental benefits through a reduction in greenhouse gas emissions

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<sup>3</sup> A list of the parties consulted and the public submissions received is available from the ACCC's [public register](#).

<sup>4</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.

## Transaction cost savings

- 4.6. 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 and competition for electricity supply

- 4.7. Snowy Hydro Limited, an electricity supplier and retailer in the NEM and an active buyer of PPAs, submits that PPA's offer a viable, low cost means of procuring medium to large-scale supplies of electricity. It considers the development of this market has promoted competition in the supply of electricity, and is ultimately reducing the costs of electricity.<sup>5</sup>
- 4.8. The ACCC considers that the combined electricity demand of the Applicants, as well as the length of the supply agreements the Applicants are seeking (approximately 15 years), are likely to encourage increased competition amongst electricity suppliers in responding to the tender requests, and may encourage a new supplier to enter or underwrite investment in a new renewable energy facility. This is likely to result in more competitive pricing and contract terms, which is a public benefit.

## Environmental benefits

- 4.9. The ACCC notes that the Applicants claim the project will promote environmental benefits by reducing greenhouse gas emissions via the purchase of Green Products, including Large-Scale Generation Certificates. 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 will be a public benefit.

## Public detriments

- 4.10. 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>6</sup>*

- 4.11. The Applicants submit that the risk of any public detriment arising from the Proposed Conduct is minimal since the Proposed Conduct involves a relatively small proportion of electricity in NSW or the NEM as a whole (less than 5% in both).
- 4.12. 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 5% of electricity consumption in the NEM, or in any individual state within the NEM. The ACCC considers that this means it is unlikely that

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<sup>5</sup> Submission from Snowy Hydro, 2 July 2021, p. 1.

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

the aggregate demand will achieve a large enough proportion to create competition concerns.

- 4.13. The ACCC also notes that some current and future members of the joint buying group may be competitors, not just for the acquisition of electricity, but in downstream retail supply. 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 discussions regarding the electricity joint tender process, and any ongoing consultation that would arise after the tender is limited to aspects of the management of PPAs such as performance reviews, periodic and other price reviews, changes to terms and conditions and breach of the PPA.
- 4.14. 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

- 4.15. 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

- 4.16. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>7</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.
- 4.17. In this instance, the Applicants seek authorisation for 24 years, which proposes to cover the length of time for the tender process to be completed, the anticipated period for the facility to begin lawfully generating and exporting electricity to the NEM, and the term of the PPA (including any extensions). More specifically, the Applicants advise that this is comprised of:<sup>8</sup>
- up to 12 months for the preparation of joint tenders, approach to suppliers, negotiation, and execution of the individual PPA's;
  - up to 3 years for the Facility to reach commercial operations;
  - 15 years, being the anticipated period of the first term of the PPA from the commencement of commercial operations of the Facility; and
  - 5 years, being the anticipated period of any extension of the initial term.
- 4.18. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC proposes to grant authorisation for 24 years.

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<sup>7</sup> Subsection 91(1)

<sup>8</sup> Equinix and Ors supporting submission to the application for authorisation AA1000558, 15 June 2021, pp 5 -6.

## 5. Draft determination

### The application

- 5.1. On 15 June 2021, the Applicants lodged application AA1000558 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicants seek authorisation for Proposed Conduct (as defined at paragraph 1.7 to 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 AA1000558 to enable current and future members of the proposed joint renewable energy purchasing group to pool their demand and jointly tender for PPA as described in paragraphs 1.7 to 1.9, 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 AA1000558 for 24 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 to enable them to commence the joint tender process, including the joint evaluation of tender responses, and the negotiation of PPA terms.
- 6.3. The Applicants submit that interim authorisation is justified because carrying out the joint tender process will not result in a change of purchasing behaviours, or entry into any contracts by the Applicants. The Applicants also submit that any delay in progressing the project will have consequences for the timing of the commencement of the project which will affect the ability of the Applicants to achieve their renewable energy targets.

- 6.4. The ACCC has decided to grant interim authorisation to enable the Applicants to conduct the tender process, including the joint evaluation of responses, and commence negotiations. Interim authorisation does not extend to entering into any supply agreements.
- 6.5. 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 joint purchasing group to commence the tender process and negotiate with the successful tenderer(s) and, if the ACCC grants final authorisation, allow the benefits from the joint purchasing to be realised earlier than would otherwise be the case.
- 6.6. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation 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 29 July 2021. 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.