



# Draft Determination and interim authorisation

Application for revocation of authorisation AA1000459 and the  
substitution of authorisation AA1000525

lodged by

the Darebin City Council & Ors

in respect of a joint renewable energy purchasing group

Authorisation number: AA1000525

26 August 2020

Commissioners:

Keogh

Rickard

Court

Ridgeway

## Summary

The ACCC proposes to grant authorisation to enable a group of 47 Victorian Councils to pool their electricity demand and collectively tender for the supply of retail electricity services and renewable energy certificates (i.e. Large Scale Generation Certificates) from an electricity retailer.

An earlier version of these arrangements was authorised by the ACCC on 31 January 2020 (AA1000459). The Participating Councils are now seeking to make changes to the authorised arrangements.

Specifically, the Participating Councils are seeking to:

- add three new councils to the group
- remove four councils and the Municipal Association of Victoria from the group, as they no longer wish to participate in the arrangements, and
- make Darebin City Council the leading procurement organisation to conduct the tender process, replacing the Municipal Association of Victoria.

The ACCC proposes to grant authorisation to the amended arrangements for 11 years.

The ACCC also grants interim authorisation to enable the group to conduct the joint tender, but not enter into contracts, while the ACCC is considering the substantive application for authorisation.

The ACCC invites submissions in relation to this draft determination by 18 September 2020 before making its final decision.

## 1. The application for revocation and substitution

- 1.1. On 29 July 2020, the Darebin City Council lodged an application on behalf of itself and a group of Victorian Councils to revoke authorisation AA1000459 and substitute authorisation AA1000525 for the one revoked with the Australian Competition and Consumer Commission (the **ACCC**). The application for revocation and substitution was made under subsection 91C(1) under the *Competition and Consumer Act 2010* (Cth) (the **Act**). The application for revocation and substitution seeks to amend the conduct authorised on 31 January 2020.
- 1.2. Authorisation AA1000459 was granted to allow 48 Victorian local councils to pool their electricity demand and place a single tender calling for proposals for the supply of retail electricity services and renewable energy certificates (i.e. Large Scale Generation Certificates) from an electricity retailer.
- 1.3. The amendments to the authorisation sought in the current application are to:
  - add three new councils (Alpine Shire Council, Borough of Queenscliffe, Cardinia Shire Council) to the group
  - remove four councils (Hume City Council, Mitchell Shire Council, City of Boroondara and Murrindindi Shire Council) and the Municipal Association of Victoria (**MAV**) from the group, as they no longer wish to participate in the arrangements, and
  - replace the MAV as the leading procurement organisation to conduct the tender process with Darebin City Council.

- 1.4. The ACCC may grant authorisation, which provides businesses with legal protection, for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

## The Participating Councils

- 1.5. The **Participating Councils** are:

- Alpine Shire Council
- Ararat Rural City Council
- Ballarat City Council
- Banyule City Council
- Bass Coast Shire Council
- Borough of Queenscliffe
- Brimbank City Council
- Buloke Shire Council
- Campaspe Shire Council
- Cardinia Shire Council
- Central Goldfields Shire Council
- City of Greater Bendigo
- City of Greater Dandenong
- City of Greater Geelong
- City of Whittlesea
- Darebin City Council
- East Gippsland Shire Council
- Glen Eira City Council
- Golden Plains Shire Council
- Greater Shepparton City Council
- Hepburn Shire Council
- Hobsons Bay City Council
- Horsham Rural City Council
- Indigo Shire Council
- Loddon Shire Council
- Macedon Ranges Shire Council
- Manningham City Council
- Maribyrnong City Council
- Maroondah City Council
- Melton City Council
- Mildura Rural City Council
- Moira Shire Council
- Monash City Council
- Moonee Valley City Council
- Mount Alexander Shire Council
- Pyrenees Shire Council
- South Gippsland Shire Council
- Stonnington City Council
- Strathbogie Shire Council
- Surf Coast Shire Council
- Swan Hill Rural City Council
- Warrnambool City Council
- Wellington Shire Council
- Whitehorse City Council
- Wodonga City Council
- Wyndham City Council
- Yarra Ranges Shire Council

## The Proposed Conduct

- 1.6. The Participating Councils are seeking authorisation to conduct a collective tender process to jointly negotiate the terms and conditions of electricity supply agreements. This involves establishing a joint electricity purchasing group, whereby the Participating Councils would pool their electricity demand and Darebin City Council will conduct a tender calling for the supply of retail electricity services and renewable

energy certificates (i.e. Large Scale Generation Certificates) (**LGCs**)<sup>1</sup> from an electricity retailer connected to the National Electricity Market (**NEM**).

- 1.7. The tender bids will be evaluated by Darebin City Council, in conjunction with the project's energy advisors and a tender evaluation panel comprised of representatives of the other Participating Councils. The successful tenderer would enter into individual agreements with each Participating Council, on substantially similar terms and conditions, for the supply of retail electricity services and renewable energy certificates (i.e. LGCs) from the electricity retailer.
- 1.8. Specifically, the Participating Councils seek authorisation to:
  - (a) collectively investigate potential electricity supply options for the combined electricity loads and determine price parameters through which Participating Councils commit to purchasing a specified load amount of electricity from the preferred supplier(s)
  - (b) collectively conduct a tender process to select an electricity supplier(s) to supply the combined electricity loads of the Participating Councils
  - (c) establish a tender evaluation panel to make recommendations to Darebin City Council and the project steering committee based on the tender evaluation criteria
  - (d) consider tenders and negotiate an electricity supply agreement with the preferred electricity supplier(s) that enables the Participating Councils to access the price and other terms and conditions offered by the successful electricity supplier(s), and
  - (e) enter into a standing deed of offer with the preferred electricity supplier(s) to supply electricity to each of the Participating Councils.

**(the Proposed Conduct)**

- 1.9. The tender will seek agreements between electricity suppliers for both power and green benefits in the form of LGCs at a minimum 1:1 basis. This equates to the supply of one LGC for every MWh electricity consumed. The LGCs must be sourced from a nominated renewable energy facility that is exporting electricity to the NEM, accredited to register LGCs under the RET scheme, and generating electricity from wind, solar or any other renewable energy source approved by the Participating Councils in writing. The Participating Councils advise that this reflects their commitment to promoting investment in renewable energy sources, and supporting the achievement of renewable energy targets that some of the Participating Councils have in place.
- 1.10. The Participating Councils seek authorisation for 11 years.
- 1.11. Other than the amendments identified at paragraph 1.3 above the Proposed Conduct is very similar to that previously authorised under authorisation AA1000459. The main difference is that under the existing authorisation the MAV proposed to enter into an umbrella contract with the successful tenderer(s) and undertake contract management services for the Participating Councils. Under the amended application Darebin City Council will not enter into an umbrella contract with the successful tenderer(s) or, at this stage, undertake contract management services for the Participating Councils.

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<sup>1</sup> LGCs are created annually based on the actual amount of electricity generated by a renewable energy generation system, registered with the Clean Energy Regulator under the Renewable energy (Electricity) Act 2000. LGCs are traded in an open market, and are generally bought and surrendered by RET-liable entities to fulfil their statutory surrender obligations.

1.12. In this respect the Participating Councils submit that in making the arrangements in respect of the previous authorisation, it was resolved that the better structure might be for Darebin City Council, rather than MAV, to take on the coordination role. If necessary, Darebin City Council, in consultation with the Participating Councils will participate in various activities and decisions regarding the operation and administration of each of the electricity agreements, including performance and/or pricing reviews, the exercise of contract options, or any changes to terms and conditions.

1.13. A copy of the application is available on the ACCC's public register for this matter.<sup>2</sup>

## Interim authorisation

1.14. The Participating Councils also requested interim authorisation to enable them to commence the tender process, but not to enter into contracts, while the ACCC is considering the substantive application. The request for interim authorisation is considered in section 6.

## 2. Background

2.1. The NEM is comprised of five interconnected regions of Queensland, New South Wales (which includes the ACT), Victoria, Tasmania and South Australia. The Participating Councils currently account for less than 0.13% of total electricity consumption in the NEM and less than 0.6% of Victorian consumption.

2.2. The ACCC has previously granted authorisation for six collective bargaining or joint purchasing arrangements for electricity:

- Melbourne City Council & Ors – Melbourne Renewable Energy Project 1 (2016)
- South Australian Chamber of Mines and Energy (SACOME) (2017)
- Eastern Energy Buyers Group (2017)
- Large Format Retail Association (2019)
- RMIT – Melbourne Renewable Energy Project 2 (2019), and
- Municipal Association of Victoria & Ors (2020).

2.3. 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 and promoting increased competition for the supply of energy to the applicants. 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> No submissions were received.

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<sup>2</sup> [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>3</sup> A list of the parties consulted is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

## 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 Participating Councils 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. In this respect, the ACCC considers that precise identification of the geographic scope of these areas of competition (Victoria or the broader NEM) is not required for the purpose of assessing this application.
  - Absent the Proposed Conduct, it is likely that Participating Councils will individually tender and enter into contracts for the supply of electricity on a stand-alone basis.

### 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 competition and investment in the supply of electricity
  - environmental benefits through a reduction in greenhouse gas emissions.
- 4.6. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

### Transaction cost savings

- 4.7. The ACCC accepts that collective tendering for, 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 or tenders are conducted by each Participating Council.

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<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.

- 4.8. 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 competition and investment in the supply of electricity**

- 4.9. The ACCC considers that the combined electricity demand of the Participating Councils, as well as the length of the supply agreements they are seeking (approximately 11 years), are likely to facilitate increased competition amongst electricity suppliers in responding to the tender requests and may encourage a new supplier to enter or underwrite investment in an innovative electricity supply project.

### **Environmental benefits**

- 4.10. The ACCC notes that the Participating Councils claim the project will promote environmental benefits by reducing greenhouse gas emissions via the purchase of LGCs. The ACCC accepts that any reduction in greenhouse gas emissions over and above what would be achieved in the absence of the Proposed Conduct and or the same reduction in emissions but at a lower cost is likely to be a public benefit.

### **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>5</sup>*

- 4.12. The Participating Councils may be considered to be each other's competitors for the acquisition of electricity. By conducting their procurement jointly rather than individually, the Participating Councils 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 councils is likely very limited.
- 4.13. The Participating Councils 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 demand compared to that of Victoria (0.6%) or the NEM as a whole (0.13%).
- 4.14. The ACCC considers that the total demand of the Participating Councils 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. The ACCC is satisfied that the Proposed Conduct is likely to result in public benefits from transaction cost savings, increased competition for the supply of electricity and environmental benefits; and that these likely public benefits would outweigh the minimal, if any, likely detriment to the public from the Proposed Conduct.

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

## 5. Draft determination

### The application

- 5.1. On 29 July 2020 Darebin City Council lodged an application to revoke authorisation AA1000459 and substitute authorisation AA1000525 for the one revoked. This application for revocation and substitution was made under subsection 91C(1) of the Act.
- 5.2. 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 revoke authorisation AA1000459 and grant authorisation AA1000525 in substitution. Authorisation AA1000525 enables Participating Councils to pool their demand and collectively tender for an electricity supply arrangement 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 AA1000525 for 11 years.
- 5.9. This draft determination is made on 26 August 2020.

## 6. Interim authorisation

- 6.1. At the time of lodging the application, the Participating Councils requested interim authorisation to issue the request for tender by late August/early September 2020 and negotiate the terms and conditions of electricity supply agreements. The Participating Councils would not award the tender unless and until final authorisation is granted.
- 6.2. In support of their request for interim authorisation the Participating Councils submit that:
  - (a) Carrying out the joint tender process is unlikely to have any impact on any relevant market, as it will not result in any change in the purchasing behaviour of, or the entry into any final contracts by, the Participating Councils.



- (b) Due to the Victorian local government elections on 24 October 2020, there will be a caretaker period from 22 September to 24 October 2020, in which the Participating Councils will not be able to announce or commence significant activities like the tender process that may be seen to affect the election period.
  - (c) Any further delay to commencing the tender process will affect the ongoing electricity supply of some of the Participating Councils whose contracts are due to expire in the near future. Further, any delays may also impact on the ability of individual councils to achieve any renewable energy policies and targets they may be required to achieve.
- 6.3. The ACCC has decided to grant interim authorisation to enable the Participating Councils to conduct the tender process (the conduct outlined at paragraph 1.8(a)-(d) of this Draft Determination). Interim authorisation does not extend to entering into any supply agreements with the successful tenderer(s).
- 6.4. 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 Participating Councils 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. Being able to commence the tender process as soon as possible may also assist to minimise any delays as a result of the proposed upcoming local government elections.
- 6.5. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

## 7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by 18 September 2020. In addition, consistent with section 90A of the Act, the Participating Councils or an interested party may request that the ACCC hold a conference to discuss the draft determination.