



Draft Determination and interim authorisation

Application for authorisation AA1000562 lodged by
Western Australian Local Government Association
in respect of establishing a joint renewable energy purchasing group
Authorisation number: AA1000562

29 July 2021

Commissioners:

Keogh

Rickard

Brakey

Ridgeway

Summary

The ACCC proposes to grant authorisation to the Western Australian Local Government Association to enable local governments who are current and future members of a proposed joint renewable energy purchasing group to pool their demand and collectively tender and negotiate an electricity supply arrangement.

The ACCC proposes to grant authorisation for 15 years. This period is intended to cover an initial 3 year agreement, which will provide price transparency to the Proposed Energy Group and align Local Government contract terms for the development of a longer-term 10 year agreement when the initial 3 year agreement expires.

The ACCC has also granted interim authorisation to enable the group to engage in a joint procurement process and resulting contractual discussions, 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 12 August 2021 before making its final decision.

1. The application for authorisation

- 1.1. On 29 June 2021, the Western Australian Local Government Association (the **Applicant**) lodged application for authorisation AA1000562 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicant is seeking authorisation to create a joint energy purchasing group where members will pool their aggregate forecast demand in order to jointly acquire electricity and renewable energy certificates (the **Proposed Energy Group**). This application for authorisation AA1000562 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. Authorisation is sought for 15 years.
- 1.3. The ACCC may grant authorisation, which provides 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 Applicant

- 1.4. The Applicant is the Western Australian Local Government Association (**WALGA**). WALGA is an industry body that advocates on behalf of all 139 Western Australian Local Governments. WALGA makes the application on behalf of itself and its current and future Members and Associate Members that join the Proposed Energy Group.
- 1.5. WALGA intends to operate as a facilitator in respect of the Proposed Energy Group, through entry into a MOU with participating Members and Associate Members.
- 1.6. WALGA Members are Local Government Authorities. WALGA Associate Members are organisations associated with Local Government activity and operations, including Regional Councils which operate in specialist areas such as waste management and are formed to oversee management of a particular function.¹

¹ For a full list of WALGA Members and Associate Members please see WALGA supporting submission to the application AA1000562, 29 June 2021, Schedule 2 and 3.

1.7. At the time of lodgement, the foundation members of the Proposed Energy Group comprise 11 local governments:²

- The City of Stirling
- The City of Mandurah
- The City of Perth
- The City of Fremantle
- The City of Cockburn
- The City of Bayswater
- The City of Canning
- The City of Joondalup
- The City of Wanneroo
- The City of Gosnells
- The City of Armadale

1.8. The membership of the Proposed Energy Group will initially include WALGA and the proposed foundation members and will be joined over time by future WALGA Members and Associate Members.

The Proposed Conduct

1.9. The Applicant is seeking authorisation to allow members of the Proposed Energy Group to pool their aggregate forecast demand to jointly tender and negotiate supply contracts for:

- electricity from the South West Interconnected System (**SWIS**), whether from licensed retailers, wholesalers or by underwriting new generation plant up to a maximum of 200,000 MWh per annum; and
- Large-scale Generation Certificates (**LGCs**), Small-scale Technology Certificates (**STCs**), Australian Carbon Credit Units (**ACCUs**) and similar renewable energy certificates.

(together, the **Relevant Products**)

² WALGA supporting submission to the application AA1000562, 29 June 2021, Schedule 2.

1.10. Specifically, the Applicants seek authorisation to:

- pool the aggregated forecast demand of the Proposed Energy Group for the Relevant Products
- prepare and issue joint tenders in respect of the Relevant Products
- jointly negotiate terms for the supply of the Relevant Products
- jointly acquire the Relevant Products under contract, and
- jointly manage the contracts.

(the **Proposed Conduct**)

1.11. The Applicant is seeking authorisation for 15 years.

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

Interim authorisation

1.13. The Applicant has also requested interim authorisation to enable it to engage in a procurement process and resulting contractual discussions, but not enter into supply agreements, while the ACCC is considering the substantive application.

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

2. Background

- 2.1. The Applicant submits that the Proposed Conduct will significantly reduce administrative costs and improve the transition within the Local Government sector to renewable energy policy implementation. WALGA and its Members are interested in meeting community expectation with respect to decarbonisation of energy supply.
- 2.2. The SWIS is an interconnected electricity system located in Western Australia. The majority of the electricity network infrastructure in the SWIS is owned and operated by State government-owned Western Power.
- 2.3. Large scale generation in the SWIS is owned and operated by State government-owned Synergy and a variety of independent power producers, such as Alinta Energy, NewGen, Bluewaters, Shell Energy, Perth Energy, Collgar Wind Farm and Bright Energy.
- 2.4. There are a variety of retailers in the SWIS, including Synergy, Alinta Energy, Perth Energy, CleanTech, Kleenheat and Shell Energy. Customers that consume more than 50MWh per annum at any concession point are contestable and may purchase energy from a business other than Synergy. Customers that do not exceed this threshold must purchase electricity from Synergy.
- 2.5. The total electricity consumption of WALGA Members and Associate Members represent an estimated 140,000 MWh, which accounts for around 0.03% of electricity volume in the SWIS.³

³ WALGA supporting submission to the application AA1000562, 29 June 2021, p 12.

2.6. The Applicant is also seeking to acquire various renewable energy certificates, including ACCUs, LGCs and STCs. WALGA estimates that the Local Government sector will account for less than 5% of demand for renewable energy certificates in Western Australia.⁴

Other similar authorisations

2.7. 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)

2.8. 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 to the applicants 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.⁵

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 Applicant has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with 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 WALGA supporting submission to the application AA1000562, 29 June 2021, pp 15, 18.

⁵ A list of the parties consulted and the public submissions received is available from the ACCC's [public register](#).

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 the SWIS as well as the acquisition of various renewable energy certificates.
- absent the Proposed Conduct, it is likely that the participating members of the group will individually tender, enter into, and administer, 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.*⁶

4.5. The ACCC has considered the following public benefits:

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

Transaction cost savings

4.6. 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 and contract administration is conducted by participating members of the group.

4.7. 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.

Environmental benefits

4.8. The ACCC notes that the Applicant claims the project will promote environmental benefits by reducing greenhouse gas emissions via the purchase of renewable energy certificates. The ACCC agrees 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.

Greater investment in and competition for the supply of electricity

4.9. The ACCC considers that the combined electricity demand of the Proposed Energy Group, as well as the length of the supply agreements the Applicant is seeking (an initial 3 year term and then longer term 10 year agreements), 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 an innovative electricity supply project.

⁶ 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.

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.⁷

4.11. The members of the Proposed Energy Group 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.

4.12. The size of any likely public detriment arising from the Proposed Conduct is minimal since the Proposed Conduct involves a relatively small proportion of electricity demand, with all WALGA Members and Associate Members accounting for 0.03% of electricity demand in the SWIS. WALGA Members and Associate Members also represent a small proportion of demand for renewable energy certificates (less than 5%).

4.13. The ACCC notes that the Applicants have applied for authorisation for future WALGA Members and Associate Members to join the group, and that the addition of new participants in the joint buying group may increase the aggregate demand.

4.14. The ACCC considers that the aggregate demand of the Proposed Energy Group, and future participating members, is unlikely to be large enough to create competition concerns.

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

Balance of public benefit and detriment

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

Length of authorisation

4.17. The Act allows the ACCC to grant authorisation for a limited period of time.⁸ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.18. In this instance, the Applicant seeks authorisation for 15 years. This period is intended to cover:

- An initial agreement of three years in order to aggregate spend and align Local Government contract terms for the future development of a long-term Power Purchase Agreement (**PPA**). The three-year initial arrangement will provide price transparency to the Proposed Energy Group and Local Government

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

⁸ Subsection 91(1).

sector. The Applicant submits that renewable energy is an emerging market in Western Australia and consequently, the adoption of LGC procurement alongside conventional energy contracts is not common for the sector. The Applicant proposes to engage the market through its initial tender, which will incorporate within its scope an initial contract alongside the ability to then negotiate a longer term PPA. The Applicant advises that many of the planned renewable energy infrastructure projects within Western Australia are either under development or yet to commence, however as this capacity is streamed into the grid, the supply options and competitiveness of the market will be greatly enhanced.

- WALGA then intends to run a secondary open market process for a longer-term agreement, of 5-10 years.

4.19. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC proposes to grant authorisation for 15 years, which is proposed to cover the possible long term agreement of 10 years.

5. Draft determination

The application

- 5.1. On 29 June 2021, the Applicant lodged application AA1000562 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicant seeks authorisation for Proposed Conduct. 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 AA1000562 to enable the Applicant to form a proposed joint renewable energy purchasing group to pool their demand and collectively tender and negotiate an electricity supply arrangements as described in paragraphs 1.9 to 1.10 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 or constitute a concerted practice within the meaning of section 45 of the Act.

5.8. The ACCC proposes to grant authorisation AA1000562 for 15 years.

5.9. This draft determination is made on 29 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 Applicant requested interim authorisation to enable it to commence a procurement process and resulting contractual discussions, but not enter into supply agreements.

6.3. The Applicant submits that interim authorisation is justified because some of the Members' current contracts are reaching term, and in the absence of interim authorisation, they would need to individually recontract for a two or three year period which would negate the ability of the Proposed Energy Group to optimise its aggregate spend. The Applicant submits that any delay in the procurement timetable will not allow sufficient time for industry responses, evaluation of bids, and respective consideration prior to the proposed commencement date for the initial contract of 1 April 2022.

6.4. The ACCC has decided to grant interim authorisation to enable the Applicant to engage in a procurement process and resulting contractual discussions. 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 when the application for re-authorisation is withdrawn.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 12 August 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.