



Determination

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

1 December 2021

Commissioners: Keogh
Rickard
Blakey
Ridgeway

Summary

The ACCC has decided to grant authorisation, with a condition, to enable members of a Renewable Energy Buyers Consortium coordinated by Macquarie to pool their demand and collectively negotiate an electricity supply agreement with a developer of a new renewable energy project.

The ACCC considers the proposed conduct is likely to result in public benefits, including reduced transaction costs, environmental benefits and greater investment in and competition for electricity supply. This public benefit would outweigh the minimal, if any, likely detriment to the public from the proposed conduct.

At the time of this determination, Macquarie was still coordinating and finalising the members of the Renewable Energy Buyers Consortium through the negotiation of binding Term Sheets. Macquarie provided the ACCC with a list of potential members of the group on a confidential basis only. To ensure transparency of the authorisation process, the ACCC had decided to grant authorisation with a condition which imposes an obligation on Macquarie to provide a public list of the members of the group once binding Term Sheets for a minimum aggregate energy volume is reached, and to notify the ACCC when other businesses subsequently join the group in the future.

The ACCC grants authorisation for 14 years, until 31 December 2035. This period reflects the time taken to negotiate supply agreements, for a facility to reach commercial operation, and the proposed contract term.

The ACCC granted interim authorisation on 15 July 2021 to enable the group to conduct collective discussions and negotiations, but not enter into supply contracts, while the ACCC considered the substantive application. Interim authorisation remains in place until the ACCC's determination comes into effect, or it is revoked or, the application for authorisation is withdrawn.

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 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.

- 1.4. On 15 July 2021, interim authorisation was granted under subsection 91(2) of the Act.¹ Interim authorisation remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or interim authorisation is revoked.

The Applicants

- 1.5. 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**).

- 1.6. At the time of lodgement, the Buyers Group was anticipated to 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.
- 1.7. At the time of this determination, Macquarie advised that it was still coordinating and finalising the members of the Buyers Group via the negotiation of binding Term Sheets. On 25 November 2021, Macquarie provided an updated list of the potential members of the Buyers Group to the ACCC on a confidential basis.
- 1.8. 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, an alternative project is likely to be in Victoria and of a similar or lesser size.
- 1.9. The Applicants request that authorisation extend to entities that may join the Buyers 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.²
- 1.10. 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.³ 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 See ACCC Draft Determination and Interim Authorisation decision of 15 July 2021, available on the ACCC's [Authorisations Public Register](#).

² Macquarie and Ors supporting submission to the application AA1000557, 11 June 2021, p. 9.

³ Macquarie and Ors application for authorisation AA1000557, 11 June 2021, p. 6.

1.11. MCAL will receive a commission in respect of those Buyers it introduces and signs onto PPAs.

The Proposed Conduct

1.12. 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.

1.13. 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
 - 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.

1.14. 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 rights⁴, and other rights, entitlements or credits.

1.15. 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,

⁴ 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.

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).

- 1.16. 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.
- 1.17. 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.
- 1.18. The conduct, as described from paragraphs 1.13 to 1.17, is referred to in this determination as the **Proposed Conduct**.
- 1.19. A copy of the application for authorisation is available on the ACCC's [public register](#).

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 LGCs and meet their renewable energy targets
 - for the Buyers to access 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 1.14) 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:
 - [Western Australian Local Government Association](#) (2021)
 - [Barwon Region Renewable Energy Project](#) (2021)
 - [Equinix \(Australia\) Enterprises](#) (2021)
 - [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.⁵
- 3.3. The ACCC received no submissions from interested parties in relation to the application.

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

3.4. On 15 July 2021, the ACCC issued a draft determination proposing to grant authorisation for 14 years. A pre-decision conference was not requested, and no submissions were received following the draft determination.

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 that are likely to be impacted are the acquisition of renewable energy certificates and the wholesale 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.

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 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.⁶

4.5. The ACCC has considered the following public benefits:

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

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

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

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.

Environmental benefits through a reduction in greenhouse gas emissions

- 4.8. The Applicants submit that if the Project is successful, it will be a significant new wind farm facility in Australia. The Applicants submit the Project will promote environmental benefits by reducing greenhouse gas emissions by 2 million tonnes per year.
- 4.9. The ACCC accepts that any reduction in greenhouse gas emissions over and above what would be achieved in the absence of the Proposed Conduct would constitute a public benefit.

Greater investment in and competition for electricity supply

- 4.10. 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.
- 4.11. 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.

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.⁷

- 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

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

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. However, the ACCC notes that the composition of the Buyers Group is not yet finalised, or publicly known. To ensure the transparency of the authorisation process, a public list of the names of the members of the Buyers Group should be provided to the ACCC by Macquarie once binding Term Sheets are executed for the supply of a minimum aggregate volume of energy, and as parties join the group in the future.

Balance of public benefit and detriment

- 4.17. Therefore, for the reasons outlined in this 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.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.
- 4.19. 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:⁹
- 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 has decided to grant authorisation for 14 years, until 31 December 2035.

⁸ Subsection 91(1) of the Act.

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

5. 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.

The authorisation test

- 5.2. 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.
- 5.3. For the reasons outlined in this 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.
- 5.4. Accordingly, the ACCC has decided to grant authorisation.
- 5.5. Authorisation is granted with a condition that Macquarie provides the ACCC:
- Within 5 business days of Buyers signing Term Sheets which in aggregate involve the supply of the minimum aggregate threshold volume required for the PPA Buyers Group to proceed, Macquarie must provide the names of those Buyers to the ACCC to be placed on the public register.
 - After that point, Macquarie must provide to the ACCC the names of any other Buyers that subsequently sign a Term Sheet within 15 business days of them signing.

Conduct authorised

- 5.6. The ACCC has decided to grant authorisation AA1000557, with a condition, 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 1.13 to 1.17, and defined as the Proposed Conduct. The authorisation extends to future parties that may become members of the Buyers Group.¹⁰
- 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 has decided to grant authorisation AA1000557 for 14 years, until 31 December 2035.

¹⁰ Section 88(2) of the Act.

6. Date authorisation comes into effect

- 6.1. This determination is made on 1 December 2021. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 23 December 2021.