



Determination

Application for authorisation AA1000561

lodged by

Barwon Water and Ors

in respect of establishing a joint renewable energy purchasing group
(the 'Barwon Region Renewable Energy Project')

Authorisation number: AA1000561

26 August 2021

Commissioners:

Keogh

Rickard

Brakey

Ridgeway

Summary

The ACCC has decided to grant authorisation to Barwon Region Water Corporation, Barwon Health and GeelongPort Pty Ltd to pool their demand and collectively tender for and negotiate a Power Purchase Agreement.

The ACCC has decided to grant authorisation for 12 years and 6 months, until 30 March 2034. This period reflects the proposed time to conduct the joint tender and negotiation processes, and the proposed 10 year duration of the Power Purchase Agreements.

1. The application for authorisation

- 1.1. On 21 June 2021, Barwon Region Water Corporation (**Barwon Water**) on behalf of itself, Barwon Health and GeelongPort Pty Limited lodged application for authorisation AA1000561 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants are seeking authorisation to create a joint renewable energy purchasing group (the '**Barwon Region Renewable Energy Project**') and conduct a collective tender and negotiation process to facilitate entry into a 'virtual' Power Purchase Agreement (**PPA**) with a generator of renewable energy.
- 1.3. The PPA would source green benefits, in the form of Large-scale Generation Certificates (**LGC**), and include a Contract for Difference (based on the difference between an agreed fixed price and the National Electricity Market (**NEM**) spot price) for a defined volume of electricity.
- 1.4. This application for authorisation AA1000561 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.5. Authorisation is sought for 12 years and 6 months.
- 1.6. The ACCC may grant authorisation, which provides businesses with protection from legal action in accordance with 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

- 1.7. The Applicants are:
 - Barwon Region Water Corporation (**Barwon Water**)
 - Barwon Health
 - GeelongPort Pty Ltd (**GeelongPort**)(the **Applicants**)
- 1.8. Barwon Water is a government owned statutory corporation and Barwon Health is a regional public health care provider. GeelongPort is the operator of a bulk port.

The Proposed Conduct

- 1.9. The Applicants are seeking authorisation to conduct a joint tender and collectively negotiate with renewable energy generators to procure a 'virtual' PPA. At the

conclusion of the joint tender and negotiation process, each Applicant will enter into a separate PPA with the relevant renewable energy generator on substantially the same terms, subject only to necessary variations specific to the individual applicant. The Applicants envisage that each PPA will have two components:

- the purchase of renewable energy certificates: the renewable generator will provide one LGC to each of the Applicants for each eligible MWh the subject of the Contracts for Difference.
- cash flow resulting from a Contract for Difference (**CfD**): The PPA will include a CfD based on the difference between an agreed fixed price and the NEM spot price. If the agreed fixed price is higher than the NEM spot price, the Applicants will pay the difference to the generator. If the agreed fixed price is lower than the NEM spot price, the generator will pay the difference to the Applicants. As such, the generator will receive the agreed fixed price and Applicants will have a hedge against variations in the retail price they pay. The CfD will be calculated on each Applicant's agreed volumes (likely a percentage of 'sent out' generation) of electricity in MWh.

1.10. Specifically, the Applicants seek authorisation to:

- collectively conduct a tender process to select a renewable electricity generator to enter into a PPA with each Applicant;
- collectively consider and evaluate responses to the RFP from tenderers and reach consensus on a preferred proposal;
- collectively negotiate and agree the terms of the PPA for execution by each Applicant with the preferred proponent (subject to a favourable RFP outcome and final approval to proceed with the preferred proposal);
- give effect to the terms of the PPA; and
- coordinate the ongoing management of the PPA contracts. The Applicants submit that they will be largely responsible for the management of their own PPA agreements, with limited ongoing consultation. The Applicants seek authorisation to coordinate with each other where necessary or appropriate including in relation to price reviews, breach of the PPA, exercise of termination rights, enforcement of minimum generation requirements, changes to terms and conditions and circumstances of force majeure.

(the **Proposed Conduct**).

1.11. The Applicants advise they will be seeking a PPA which includes the following elements:

- an unbundled pricing structure – with separate pricing for the LGC and CfD elements
- engagement with a wind powered renewable energy project, which is either already in existence or under construction with a target commissioning date by late 2022 and
- a 1:1 ratio between LGCs purchased and each eligible MWh the subject of the CfD mechanism.

- 1.13. The Applicants advise that the PPA contracts would be standalone contractual documents and would not affect the Applicants' retail energy agreements.
- 1.14. A copy of the application for authorisation is available on the ACCC's [Authorisations public register](#).

Interim authorisation

- 1.15. On 29 July 2021, the ACCC granted interim authorisation under subsection 91(2) of the Act to enable the Applicants to commence the tender process and negotiate the terms and conditions of the PPA, but not enter into contracts, while the ACCC considered the substantive application.¹ Interim authorisation will remain 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.

2. Background

- 2.1. The Applicants submit that environmental sustainability is a primary driver for participation in the Proposed Conduct. All of the Applicants have sustainability goals and wish to manage their impact on the environment, with each Applicant having a zero net emissions goal.
- 2.2. The Applicants submit that participation in the joint tender would enable the Applicants to secure better prices and terms in respect of the LGCs provided and deliver both financial savings and certainty.
- 2.3. In 2020, 33.2 million LGCs were available for surrender in Australia. The number of LGCs available for surrender in Australia is increasing every year due to increased demand for and generation of renewable energy. The Applicants' demand would have accounted for 0.2% of all LGCs available for surrender in 2020, and 0.17-0.18% in 2021.²
- 2.4. 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 0.035% of total electricity consumption in the NEM and 0.153% of consumption in the Victorian market.³

Other similar authorisations

- 2.5. The ACCC has previously granted authorisation for a number of similar collective bargaining or joint purchasing arrangements for electricity. Some more recent examples include:
 - [Equinix and others](#) (2021)
 - [Royal Melbourne Institute of Technology – Melbourne Renewable Energy Project 2](#) (2019)
 - [Municipal Association of Victoria](#) (2019)
 - [Large Format Retail Association](#) (2019)

¹ See Draft determination and interim authorisation decision of 29 July 2021 available from the ACCC's [Authorisations public register](#).

² Barwon Water and Ors application for authorisation AA1000561, 25 June 2021, p. 8.

³ Barwon Water and Ors application for authorisation AA1000561, 25 June 2021, p. 8.

- 2.6. 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.⁴
- 3.3. The ACCC received no submissions from interested parties in relation to the application.
- 3.4. On 29 July 2021 the ACCC issued a draft determination proposing to grant authorisation for 12 years and 6 months. A pre-decision conference was not requested following the draft determination and no submissions were received.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is 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 constitute a concerted practice or 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 that are likely to be impacted are the acquisition of renewable energy certificates and wholesale supply of electricity. In this case, the ACCC considers that precisely defining the geographic scope of these areas of competition (Victoria or Australia) 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, PPAs 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:

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

*...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:

- 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, PPA contracts is likely to result in public benefits from transaction cost savings compared to the situation where individual negotiation 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 Applicants claim the project will promote environmental benefits by reducing greenhouse gas emissions via the purchase of LGCs. By purchasing LGCs, the Applicants seek to promote investment in renewable energy projects. 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 Applicants submit that, at present, customers the size of Barwon Water, Barwon Health and GeelongPort do not have any meaningful bargaining power to source PPAs individually.

4.10. The ACCC considers that the combined demand of the Applicants, as well as the length of the PPAs the Applicants are seeking (approximately 10 years), are likely to encourage increased competition amongst electricity generators 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.

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.*⁶

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.

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

- 4.12. The Applicants may be considered to be competitors in the acquisition of products such as LGCs and CfDs. By conducting their procurement and conducting negotiations of a PPA jointly rather than individually, the Applicants are agreeing to no longer compete in the acquisition of these products. The Proposed Conduct may therefore lessen competition in the acquisition of LGCs and CfDs.
- 4.13. 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 LGC demand in Australia (0.2% of total LGCs available for surrender in Australia in 2020). This percentage is likely to decrease over the term of the PPA as Australian generation of renewable energy increases. Further, the ACCC notes that the Applicants currently account for 0.035% of total electricity consumption in the NEM and 0.153% of consumption in the Victorian market.
- 4.14. The ACCC considers that the aggregate demand of the Applicants 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 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.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 review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.18. In this instance, the Applicants seek authorisation for 12 years and 6 months. The Applicants submit that this provides sufficient time to account for the joint tender and negotiation process (by the end of 2022), as well as the ten-year length of the proposed PPA contracts.
- 4.19. Given the ACCC's conclusion on the balance of public benefits and detriments, the ACCC has decided to grant authorisation for 12 years and 6 months.

⁷ Subsection 91(1)

6. Determination

The application

- 6.1. On 21 June 2021, the Applicants lodged application AA1000561 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

The authorisation test

- 6.2. 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.
- 6.3. 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.
- 6.4. Accordingly, the ACCC has decided to grant authorisation.

Conduct which the ACCC has decided to authorise

- 6.5. The ACCC has decided to grant authorisation AA1000561 to enable the Applicants to pool their demand and collectively tender for and negotiate a Power Purchase Agreement as described in paragraphs 1.9 to 1.10 and defined as the Proposed Conduct.
- 6.6. 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.
- 6.7. The ACCC has decided to grant authorisation AA1000561 for 12 years and 6 months, until 30 March 2034.

7. Date authorisation comes into effect

- 7.1. This determination is made on 26 August 2021. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 17 September 2021.