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30 November 2016

General Manager – Retail Markets
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

Attention: Susan Faulbaum

By email: AERAuthorisations@aer.gov.au

Dear Ms Faulbaum

**Ultium Energy Pty Ltd Application for Electricity Authorisation AER Reference AC 102/16
Submission under section 91 of the National Energy Retail Law**

We act for Locality Planning Energy Pty Ltd (**LPE**).

On behalf of LPE, we make the following submission under section 91 of the National Energy Retail Law (**Retail Law**) in respect of the application made by Ultium Energy Pty Ltd (**Ultium**) for an Electricity Authorisation under Part 5, Division 2 of the Retail Law dated 8 November 2016 (**Application**).

It is the view of LPE that the Application should be refused by the AER on the following grounds:

1. the Application contains false or misleading information;
2. Ultium fails to meet the entry criteria under section 90(1) of the Retail Law; and
3. Ultium has failed to provide required information.

False or misleading information

A significant amount of the contents of the Application comprises the intellectual property of LPE which has been reproduced verbatim without permission or attribution, in breach of the *Copyright Act 1968* (Cth). The intellectual property so infringed comprises an application to the AER for a retailer authorisation (**LPE Application**), which was granted on 13 November 2014.

The material in the Application which has been reproduced without permission or attribution from the LPE Application includes material taken from parts of the LPE Application that are not public, in particular material redacted from the public version of the LPE Application and from Attachment D – Business Plan to the LPE Application.

The false or misleading statements made in the Application include statements purporting to demonstrate compliance with the Entry Criteria prescribed by section 90(1) of the Retail Law, such as having the necessary organisational and technical capacity to meet the obligations of a retailer.

For example, in paragraph 2.1.3, the Application states that Mr Jason Hague, who the Application states is a nominated contact person for Ultium and the only officer of Ultium having retail or energy experience, “was responsible for delivering the business case for the Sunshine Coast Council demonstrating the financial viability and the principal architect in the unique energy retailing model using renewable energy as the generation source”. However, this statement is false, as is demonstrated by LPE Application, which at paragraph 1.3 states the correct position, which is that Damien Glanville, the Chief Executive

Officer of LPE, “was largely responsible for delivering the business case for the Sunshine Coast Council demonstrating the financial viability and the principal architect in the unique energy retailing model using renewable energy as the generation source.”

A further example of the authorised reproduction of material contained in the LPE Application can be observed in paragraph 1.6.5, which states in part: “*Ultium Energy fielded the peak strata community lobby group 'Strata Community Australia' (SCA) who have over 300 management companies as full members and a further 200+ associated services as members.*” However, this statement is also false, as is demonstrated in page 3 of Attachment D – Business Plan of the LPE Application (a confidential non-public section of that application), which states “*LPE fielded the peak strata community lobby group 'Strata Community Australia' (SCA) who have over 300 management companies as full members and a further 200+ associated services as members.*” LPE is an industry partner of Strata Community Australia; LPE is of the belief that Ultium is not.

To demonstrate the extent of the unauthorised verbatim reproduction of material taken from the LPE Application in the Application, Annexure A to this submission contains a copy of the Application marked up to show the following:

- (a) material reproduced verbatim from the public version of the LPE Application – marked in yellow;
- (b) material reproduced verbatim from material redacted from the public version of the LPE Application – marked in pink;
- (c) material reproduced verbatim from Attachment D – Business Plan – marked in blue.

The fact of Ultium improperly reproducing the LPE Application without authorisation is further demonstrated by the fact that the metadata of the version of the Application which is available on the AER website as at 25 November 2016 includes the following particular: “Author: Chester”. This refers to Ben Chester, Chief Operating Officer of LPE, who was the designated author of the LPE Application.

Entry criteria

The Application fails to meet the entry criteria under section 90(1) of the Retail Law because:

- (a) Ultium does not have the necessary organisational and technical capacity to meet the obligations of a retailer; and
- (b) the persons submitting the Application are not suitable persons to hold a retailer authorisation.

Organisational and technical capacity

The Application states that Ultium’s key personnel are Scott Juniper and Jason Hague. Neither person has or expertise in the energy or related industries. Mr Juniper is a property developer and Mr Hague is a town planner. Accordingly, the key staff of Ultium do not have experience in the energy market and the Application fails to detail how Ultium intends to bring such experience into its business. The plagiarism of the LPE Application clearly demonstrates this fact.

Suitable person

As indicated, a large proportion of the content of the Application comprises the intellectual property of LPE which has been reproduced without the permission of LPE. This includes material which is not part of the public version of the LPE Application.

LPE is of the view that Ultium obtained this information from Mr Hague, who was a director of LPE from 24 January 2011 until 9 September 2014, during which period of time LPE developed and made the LPE Application. Mr Hague’s company JCAL (QLD) Pty Ltd is a significant shareholder in Ultium.

It is LPE’s suspicion that Mr Hague made copy of the LPE Application during his tenure as a director of LPE. LPE was unaware of this fact and did not provide permission for Mr Hague to use the LPE

Application in any capacity apart from his capacity as director of LPE or for any person's benefit apart from that of LPE.

Mr Hague has accordingly made making improper and unauthorised use of the intellectual property of LPE, to which he had access only because of his position as a director of LPE. In doing so, Mr Hague was in breach of his fiduciary duties to LPE as a former director of LPE. He has demonstrated lack of good faith and a lack of transparency in his dealings with LPE. Accordingly, LPE submits that Mr Hague is not a suitable person to hold a retail authorisation.

It is the suspicion of LPE that Ultium failed to disclose to the AER that the Application contains material reproduced without permission from the LPE Application breach of copyright. Assuming this is correct such lack of honesty further taints Ultium and the officers involved in the Application.

Further, LPE is aware that Ultium's sole director Mr Juniper has recently been subject to a Personal Insolvency Agreement (**PIA**) under Part X of the *Bankruptcy Act 1966* (Cth) (**Act**). The judgment of Judge Burnett in the Federal Circuit Court of Australia in the proceeding *Roberts v Juniper & Anor* [2013] FCCA 130 (26 April 2013), which is Annexure B to this submission, shows (at paragraphs 9 and 12) that as at 23 September 2012, debts admitted by Mr Juniper's controlling trustee under Part X of the Act amounted to \$48,665,160.00, while claimed debts (including a debt claimed by Bankwest which had not been admitted) were in the amount of \$70,000,913.00.

In *Roberts v Juniper*, creditors of Mr Juniper challenged the validity of the PIA, in part on the basis that Mr Juniper had made false statements in his statement of affairs which matters arguably induced a majority of creditors to consent to the PIA (see paragraph 33). In regard to that allegation, Judge Burnett held (at paragraph 42) that "*it would be open to a properly directed jury to make the necessary factual findings that misleading statements were made by the debtor [ie Mr Juniper] to his creditors which arguably in turn induced them to agree to the proposed PIA.*"

Ultium's use of LPE's copyrighted material, Ultium's failure to disclose its unauthorised reproduction of LPE's intellectual property and Mr Juniper's previous insolvency together with the observations of Judge Burnett in regard to Mr Juniper's transparency or lack thereof further demonstrate that neither Ultium, nor Mr Hague nor Mr Juniper are suitable persons to hold a retail authorisation.

Failure to Provide Required Information

Given the fact that the material reproduced verbatim from the LPE Application applies to LPE and not to Ultium, it is the view of LPE that all such material should be rejected by the AER, and, as a result, that Ultium has failed to provide all the information purported to be provided through that unauthorised reproduction. This includes material related to the experience and skills of the officers of Ultium or lack thereof and the organisational and technical capacity of Ultium or lack thereof.

Conclusion

The Application should be rejected because:

1. the Application contains false or misleading information;
2. Ultium fails to meet the entry criteria under section 90(1) of the Retail Law; and
3. Ultium has failed to provide required information.

Please contact Craig Melrose on 3231 1659 or the writer on 3223 4738 if you would like further information in respect of this submission.

Yours faithfully


Guy Edgecombe
Partner

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