



Draft Determination

Applications for authorisation
A91596 & A91597

lodged by
Loddon Mallee Waste and
Resource Recovery Group
and
eight participating
councils in Victoria

in respect of

joint procurement
of waste and
resource recovery
services

Date: 21 December 2017

Authorisation numbers:
A91596 & A91597

Commissioners:
Rickard
Schaper
Court
Featherston

Summary

The ACCC proposes to grant authorisation for 12 years for the joint procurement of certain waste and resource recovery services by Loddon Mallee Waste and Resource Recovery Group (LMWRRG) and its eight member councils in Victoria.

The eight member councils propose to issue Requests for Tender (RFTs) in two separate groups of three and five councils. RFTs will be issued for joint procurement of the main waste and resource recovery services for which authorisation is sought. The two groups will conduct these RFTs several years apart.

In relation to collection and processing of specific material waste streams (such as tyres, mattresses and e-waste), all eight councils propose to jointly issue Requests for Tender on an ad-hoc basis as required (generally at least every three years).

Next steps:

The ACCC will seek submissions in relation to this draft determination before making its final decision.

The applications for authorisation

1. On 17 August 2017, Loddon Mallee Waste and Resource Recovery Group (**LMWRRG**) lodged applications for authorisations A91596 & A91597 to make and give effect to contracts, arrangements or understandings in relation to joint procurement of certain waste and resource recovery services. LMWRRG seeks authorisation under subsections 88(1A) and (1) of the *Competition and Consumer Act 2010 (CCA)* since these arrangements may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.¹
2. The applications were lodged by LMWRRG on behalf of itself and its eight member councils (together, **the Applicants**). The eight participating councils which are members of LMWRRG are all located in Victoria. They are the City of Greater Bendigo, Rural City of Mildura, Rural City of Swan Hill, Gannawarra Shire, Loddon Shire, Buloke Shire, Mount Alexander Shire and Macedon Ranges Shire.
3. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (**the CCA**). Detailed information about the authorisation process is available on the ACCC's website in the *Guidelines for Authorisation of conduct (non-merger)*.

¹ On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 182(3), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

The Proposed Conduct

4. The Applicants seek authorisation for the following Proposed Conduct:
 - a. the joint development of requests for tenders (RFTs) by LMWRRG and each of the participating councils in respect of waste and resource recovery services;
 - b. the negotiation with selected service providers of joint arrangements between multiple participating councils for the delivery of services; and
 - c. the ongoing administration and management of contracts where joint arrangements for the acquisition of waste and resource recovery services are entered into by multiple participating councils.
5. The Applicants seek authorisation to jointly procure the following services:
 - a. domestic kerbside waste, recyclables and organic waste collection
 - b. domestic kerbside recyclables acceptance and processing
 - c. domestic organic waste acceptance and processing (including food organics and green waste)
 - d. supply and collection of bulk bins and skips; and
 - e. collection and processing of specific material waste streams, such as e-waste, mattresses, tyres and certain plastics. The Applicants propose that these services will be jointly procured on an ad-hoc basis as required (generally at least every three years).
6. The joint procurement of the main services listed above will be conducted by two separate groups of councils through Requests for Tender processes several years apart:
 - a. The first RFT involves City of Greater Bendigo, Macedon Ranges Shire, and Mount Alexander Shire whose existing contracts for waste and resource recovery services expire in 2018.
 - b. The second RFT will involve Rural City of Mildura, Rural City of Swan Hill, Gannawarra Shire, Loddon Shire and Buloke Shire and will take place in 2019 for contracts to commence in 2022.
7. Separately, the Proposed Conduct will also involve joint RFTs involving all participating councils for collection and processing of specific material waste streams, such as e-waste, mattresses, tyres and certain plastics on an ad-hoc basis as required (generally at least every three years).
8. The Applicants seek authorisation for 12 years.² They submit this would enable them to finish existing waste contracts, jointly tender for new contracts which will commence in 2022 for some of the councils, and give effect to those contracts for up to seven years (comprising an initial five year term with an option to extend for a further two years).

Interim authorisation

9. LMWRRG, the City of Greater Bendigo, Macedon Ranges Shire, and Mount Alexander Shire sought, and on 14 September 2017 the ACCC granted, interim

² The Applicants initially sought authorisation for 16 years, but later revised this period of authorisation sought to 12 years in their submission of 23 October 2017.

authorisation to immediately commence their joint procurement (but not to enter into or give effect to any contracts) while the ACCC assesses the substantive application.³ The ACCC's interim authorisation decision is on the Public Register.⁴

Background

The Applicants and the Loddon Mallee Region

10. LMWRRG was formed on 1 August 2014. It is one of seven waste and resource recovery groups in Victoria established under *the Environmental Protection Act 1970* (Vic) (**Vic EPA**). Among other things, LMWRRG is empowered to perform the following functions in the Loddon Mallee resource recovery region:⁵
 - a. planning for the future needs of waste and resource recovery infrastructure
 - b. facilitating the provision of waste and resource recovery infrastructure and services by councils
 - c. facilitating the development of contracts for the joint procurement of waste management facilities and waste resource recovery services
 - d. managing contracts in the performance of its objectives and functions
11. The eight Victorian councils are all local governments under the provisions of the Local Government Act 1989 (Vic) (LGA) and provide services outlined in the LGA. The eight Victorian council areas constitute the Loddon Mallee Waste and Resource Recovery Region.⁶
12. The Loddon Mallee Waste and Resource Recovery Region covers the area shown in Figure 1 which makes up approximately a quarter of the total area of Victoria. It includes two major population hubs (Bendigo and Mildura); areas classified as part of Melbourne's urban fringe (Macedon Ranges); a number of rural councils; and remote areas of the state. The estimated population of the participating councils is around 274,000 which is approximately 5 per cent of the total population of Victoria.

³ Section 91 of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.

⁴ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/loddon-mallee-waste-and-resource-recovery-group-ors-authorisations-a91596-a91597>

⁵ LMWRRG is established under section 49C of the *Vic EPA*. Its powers and functions are set out in sections 49H(a)-(d) and 49I(1) of the *Vic EPA*.

⁶ *Vic EPA*, section 4(1).



Figure 1: Location of the participating councils in Victoria

13. Regional Development Victoria, the Victorian Government's lead agency in developing rural and regional Victoria, considers that the Loddon Mallee region is often considered as two sub-regions, the north and the south, which reflects the different challenges and opportunities they each face.⁷ The Applicants have structured the proposed conduct accordingly by proposing that joint procurement of the main waste services will occur in two separate groups of three and five participating councils.

Victorian Waste and Resource Recovery Policy

14. In 2014, the Victorian Government developed the Victorian Waste and Resource Recovery Planning Framework (including Division 2AB of the Vic EPA) (the Framework). The Framework provides the structure for strategic planning for waste and resource recovery that integrates state, regional and local planning. The key objectives of the framework include:
- a. ensuring long-term strategic planning for waste and resource recovery infrastructure at state and regional level
 - b. facilitating the integration of state-wide directions for the management of waste and resource recovery infrastructure and regional infrastructure needs

⁷ As noted on the Regional Development Victoria website: Loddon Mallee Regional Development Area – Regional Snapshot <http://www.rdv.vic.gov.au/regional-development-australia/loddon-mallee/regional-snapshot>.

- c. enabling waste and resource recovery planning to be effectively integrated with land use and development planning and policy, and transport planning and policy
- d. enabling waste and resource recovery infrastructure planning decisions at the appropriate level of the Framework.⁸

Waste and Resource Recovery in the Region

15. LMWRRG estimates that nearly 540,000 tonnes of materials and waste were generated in the Region in 2014-15. Of this, 357,000 tonnes (66%) was recovered and 184,000 tonnes (34%) went to landfill.⁹ Across Victoria, local governments collected approximately 2.14 million tonnes of waste, recyclables and garden organics in the 2015-16 financial year.¹⁰ Proportionate to their share of Victoria's total population, the participating councils collect approximately 5 per cent or 100,000 tonnes of waste, recyclables and garden organics each year.¹¹
16. The LMWRRG 2016-26 Implementation Plan provides further details of the waste and resource recovery facilities in the Region, including how the participating councils will manage facilities and plan for new facilities over the next decade. It outlines the current waste and resource infrastructure in the Loddon Mallee Region, and LMWRRG's analysis of future needs in the region.
17. The councils provided the ACCC with confidential estimates of the volumes of domestic waste, recyclables and organic waste collected by each of them. They also provided confidential details of the current status of existing contracts between each council and service providers for the collection of those materials.

Service streams

18. The Applicants intend to undertake a number of competitive tender processes for the services within the following service streams:
- a. domestic kerbside waste, recyclables and organic waste collection
 - b. domestic kerbside recyclables acceptance and processing
 - c. domestic organic waste acceptance and processing (including food organics and green waste)
 - d. supply and collection of bulk bins and skips; and
 - e. collection and processing of specific material waste streams (such as e-waste, mattresses, tyres and certain plastics)
19. Each of these service streams is described briefly below. More detail about them is set out in the Applicants' submission and in the LMWRRG Implementation Plan 2016-26.

⁸ LMWRRG, Implementation Plan 2016-26, p2, <https://lmwrrg.vic.gov.au/publications/implementation-plan/>

⁹ LMWRRG, *Implementation Plan*, p2

¹⁰ Sustainability Victoria, *Victorian Local Government Annual Waste Services Report 2015-16*, June 2017, <http://www.sustainability.vic.gov.au/Government/Victorian-Waste-data-portal/Victorian-Local-Government-Annual-Waste-Services-report>

¹¹ Estimates are based on publically available data published by each of the participating councils: see, for example, table 1 in the City of Greater Bendigo Waste & Resource Management Strategy 2014-2019 https://www.bendigo.vic.gov.au/sites/default/files/2016-08/Waste_Resource_Management_Strategy_2014-2019.pdf

20. Domestic kerbside waste collected by the participating councils that is not classified as either recyclable or organic waste is sent to landfill. There are currently 14 landfills in the Region.¹²
21. Recyclables are collected through kerbside collection services provided by the councils or dropped off by the public at recycling facilities. The Applicants only seek authorisation in relation to recyclables which are collected by kerbside collection services.
22. There are 42 facilities in the Region where recyclables are accepted, sorted, decontaminated and compacted. These are located across the Loddon Mallee Region, with reprocessing capacity clustered around Mildura and Bendigo.¹³ One facility located in Bendigo can manage co-mingled recyclables. The Implementation Plan states that the resource recovery centres/transfer stations are likely to have sufficient capacity to meet demand over the next ten years with some minor upgrades.¹⁴
23. After recyclables are accepted, sorted, decontaminated and compacted, they are ready for manufacturing into new products. In most but not all council areas, acceptance and processing services are operated by the same service provider who undertakes the kerbside collection.
24. There are two main forms of organic waste: garden waste (such as grass clippings, pruning material, weeds and leaves) and food waste and scraps. Management of household and industrial food organics is identified in the LMWRRG Implementation Plan as a particular area of priority.
25. None of the participating councils collect both forms of organic waste, and some do not collect organic waste at all. Several councils are considering whether to introduce such services within the next three years. In 2013-14, approximately 7,600 tonnes of food organics were collected within the region. This is projected to rise to 63,300 tonnes once all councils in the region introduce kerbside collections.¹⁵ In 2013-14, approximately 7,400 tonnes of garden organics were collected in the Region. This is projected to increase to 11,100 tonnes per annum by 2045.
26. There are current no food organics processing facilities within the Loddon Mallee Region. Currently, food organics are processed outside the region. Garden organics processing is established in the Loddon Mallee Region, but is approaching capacity. The Implementation Plan aims to increase recovery of organics from households and also to investigate solutions for organics reprocessing.¹⁶
27. Each of the participating councils offer bulk bins and skips in their council areas. The participating councils propose to jointly tender for a provider to supply and collect bulk bins and skips on their behalf.
28. The participating councils are considering jointly procuring collection and processing services for specific material streams such as tyres, mattresses, e-waste and plastics. Joint procurement may take place every one to three years when the need arises. Currently these services are procured by each council individually on an ad-hoc basis. They submit that the low residual value of these materials, and distances and costs involved in collecting them in the region, makes it difficult to attract service providers.

¹² LMWRRG, *Implementation Plan*, p2

¹³ A map is in the LMWRRG, *Implementation Plan*, p36

¹⁴ LMWRRG, *Implementation Plan*, p38

¹⁵ LMWRRG, *Implementation Plan*, p12

¹⁶ LMWRRG, *Implementation Plan*, p39

Other authorisations

29. The ACCC has authorised a number of other groups of councils around Australia to jointly tender and contract for waste management services. Many of these have involved the procurement of collection and processing services.
30. For example, the ACCC has previously granted authorisations to two of the seven waste and resource recovery groups in Victoria established under the Vic EPA. Further details about the authorisations granted to North East Waste and Resource Recovery Group and Metropolitan Waste Management Group are available on the ACCC's Public Register.¹⁷
31. Authorisations for the joint procurement of collection and processing services have been granted for periods ranging from 5 to 21 years.

Submissions received by the ACCC

32. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the applications for authorisation.
33. The ACCC invited submissions from a range of potentially interested parties including a number of waste and resource recovery service businesses. The ACCC received four submissions (three public and one confidential). Public submissions were made by Cleanaway, J.J. Richards & Sons Pty Ltd (J.J. Richards) and the Victorian Waste Management Association (VWMA).
34. All four submissions oppose authorisation. Broadly, these parties submit that the Proposed Conduct will result in small, if any public benefits, and will result in anti-competitive detriment associated with a lessening of competition. The public submissions are available on the ACCC's public register and their reasons for opposing authorisation are summarised below.

Submissions from the Applicants

35. The Applicants consider that the proposed conduct will result in substantial public benefits for the communities in the Loddon Mallee region, including the following:
 - a. Transaction cost savings for each participating council compared with each council separately running its own procurement. The participation of LMWRRG will provide technical expertise to each council and avoid the costs of each council engaging separate expert advice.
 - b. Efficiency improvements will result from combining volumes of waste and recyclables across the participating councils. In addition, it will enable the allocation of waste and resource recovery to underutilised facilities in the region, and reduce transport costs by allowing service providers to service multiple locations through combined programs.
 - c. Enhanced competition as the combination of volumes and services for the participating councils will incentivise additional service providers to bid for services.

¹⁷ North East Waste and Resource Recovery Group (A91551 & A91585) and Metropolitan Waste Management Group (A91414 & A91415; A91489 & A91490; and A91445 & A91446).

- d. Service delivery improvements resulting from increased investment in services and facilities. This is likely to provide innovations to services, for example in the acceptance, sorting and reprocessing of materials where private service providers are better equipped than the councils.
 - e. Environmental and health benefits through improved waste management and recovery rates, reducing the amount of waste sent to landfill, and improving the treatment of hazardous or environmentally unsafe waste.
 - f. LMWRRG's statutory objectives: the proposed conduct will support the key statutory functions of the LMWRRG under the Vic EPA and the objectives of the Victorian government in respect of waste and resource recovery planning, including under the Framework.
 - g. Inclusion of smaller service providers by allowing them to bid for only one of the participating councils, or only certain waste and resource recovery services. Service providers will not be required to bid for multiple services although they may choose to do so.
36. The Applicants consider that the Proposed Conduct will not result in any discernible public detriments for the following reasons:
- a. The joint procurement process will be competitive and transparent, and the Applicants will have regard to objective criteria in evaluation proposals by service providers.
 - b. The participation of smaller players or new entrants will enhance competition for the supply of services in the region.
 - c. The participation of each council is voluntary. Councils may ultimately decide to determine their own arrangements with service providers.
 - d. Service providers will remain free to compete to provide waste and resource recovery services to customers other than the participating councils. The proposed conduct only affects a maximum of eight local councils in Victoria out of a total of 79.
 - e. Service providers will be able to bid for one or multiple participating councils, or to provide multiple services across participating councils.

Submissions from interested parties

Public benefits

- 37. VWMA and Cleanaway submit that transportation efficiencies are likely to be limited due to the significant size of the Loddon Mallee region.
- 38. VWMA submits that transaction cost savings are also likely to be limited. Each council will still be required to have a separate agreement with the service provider. The VWMA and Cleanaway also submit that councils will have the option to be involved or not in the joint procurement for all streams or individually, meaning that in theory each council may need to manage several contracts.
- 39. VWMA and J.J. Richards submit that authorisation is not required for the councils to deliver improved services for residents of the council areas, and that the claimed benefits are assumed only and should not be counted as 'likely' public benefits of the Proposed Conduct.

Public detriments

- 40. VWMA and Cleanaway submit that the Proposed Conduct will reduce competition. They submit that the proposed contract length and significant size of the Loddon

Mallee region will prevent smaller service providers from bidding. Further, that those service providers which are not awarded a contract will be excluded from the market and may close down or sell their businesses.

41. J.J. Richards submits that collective tendering may lessen competition and stifle innovation and the introduction of new technology.

Applicants' response to submissions

42. The Applicants made submissions in response to interested party submissions:
- a. The Applicants acknowledge that transaction cost savings from contract management will be limited. Rather, they consider that savings will be achieved through the joint procurement process itself. They submit that procurement can carry significant costs, and savings will be achieved whether or not any joint contracts are ultimately entered into.
 - b. The Proposed Conduct will deliver innovations and improvements to waste and resource recovery services in the Loddon Mallee Region. Combining the participating councils' respective waste volumes will deliver economies of scale which will encourage innovation, improved service and new investment by service providers. Tender design will also enable the participating councils to consider proposals from service providers for service and technology improvements.
 - c. The Proposed Conduct will not preclude smaller service providers from bidding for contracts. The Applicants note that a number of smaller service providers have registered to participate in the joint tender which has commenced under interim authorisation. The Applicants expect that a number of smaller service providers will submit bids for either one or multiple services for each, or several, of the participating councils.
 - d. Bids will be assessed according to tender evaluation criteria that specifically take into account service providers' local service capabilities, employment, and investment in the region. Further, the tender process will be an open process and provide flexibility in tendering. Service providers will have choice in terms of how they respond to tenders. They may bid for one or multiple service streams. Tender evaluation criteria will include the employment of local staff, use of local-subcontractors and use of local materials. This will facilitate the participation by smaller service providers.
43. The Applicants submit that the Proposed Conduct will not affect existing contracts between service providers and participating councils. Joint procurement of those services will only commence once those contracts and extensions expire.
44. The Applicants also responded to interested party concerns about the length of authorisation by reducing the period of authorisation sought from 16 years to 12 years.

ACCC assessment

45. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant net public benefit test¹⁸ contained in the *Competition and Consumer Act 2010* (Cth) (the CCA). In broad terms, the ACCC may grant authorisation if it is

¹⁸ Subsections 90(7), 90(8).

satisfied that the likely benefit to the public from the Proposed Conduct would outweigh the likely detriment to the public, including from any lessening of competition.

Relevant areas of competition

46. The ACCC considers that the relevant areas of competition for assessing the Proposed Conduct include:
- a. domestic kerbside waste, recyclables and organic waste collection and transport in the Loddon Mallee Region;
 - b. domestic kerbside waste, recyclables and organic waste processing (noting that in 2013-14, 49 per cent of some waste and resources recovered in the Loddon Mallee Region were transported for processing outside the Region¹⁹);
 - c. the supply and collection of bulk bins and skips in the Loddon Mallee Region; and
 - d. the collection and processing of specific material waste streams, including tyres, mattresses, e-waste and plastics in the Loddon Mallee Region.

Future with and without

47. To assist in its assessment of the Proposed Conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.
48. In the future without the Proposed Conduct, the ACCC considers that each council would individually procure waste services. They would tender for individual service streams or may include multiple service streams in a single tender.

Public benefit

49. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it 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.”²⁰
50. The ACCC’s assessment of the likely public benefits from the Proposed Conduct follows.

Efficiencies

51. The ACCC has previously recognised that the aggregation of waste volumes and collection points through joint procurement of waste services by councils can result in public benefits by facilitating suppliers’ realisation of efficiencies. For example, joint procurement may make it easier for suppliers to achieve a minimum efficient

¹⁹ LMWRRG Implementation Plan p32. LMWRRG’s submission also notes, for example, that domestic food organic waste is reprocessed outside the region. The Implementation Plan p48-51 states that existing landfill capacity in the Region will not meet growing demand. Growing demand will be met by expanding three existing landfill sites, only one of which is located in the Region.

²⁰ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

scale of operation, access available scale economies, and/or reduce uncertainty or risk associated with investment in upgraded or new facilities and technologies.

52. The ACCC has accepted such public benefits are likely to result where service providers are not already achieving available economies of scale, and aggregating demand or appointing a single service provider meaningfully impacts each supplier's ability to realise scale economies.
53. The councils submit that in the past they have individually experienced difficulties attracting bids for the collection and processing of specific material waste streams (such as e-waste, mattresses, tyres and certain plastics). The ACCC considers that the aggregation of all the participating councils' requirements for these services is a likely public benefit because it is likely to make it more attractive for service providers to bid for contracts.
54. In relation to the domestic kerbside waste, recyclables and organic waste collection and processing service streams, the ACCC has assessed the Proposed Conduct against the scenario where the councils procure services individually.
55. As noted above, the management of food organics is identified as a priority area for the councils and there is currently no reprocessing capacity for food organics in the region. The ACCC considers that aggregating volumes under the Proposed Conduct is likely to reduce the risk associated with investment in food organics reprocessing facilities and make it easier for an incumbent or new entrant to achieve or maintain an efficient scale of operation in food organics reprocessing.
56. In relation to waste and recyclables collection and processing, limited information has been provided to support claimed efficiency benefits, and no waste services providers have indicated that they consider the contracts would allow them to realise efficiencies. On the other hand, submissions from a number of service providers and their representatives argue that the proposed conduct is unlikely to result in significant efficiencies in providing these services.
57. The ACCC recognises that the geographic region covered by the eight councils involved in the application is large, and given this, efficiencies in the regular collection of waste and recyclables collection and processing may be challenging to achieve. The ACCC invites further information from the Applicants and interested parties about whether (and why or why not) the Proposed Conduct is likely to:
 - a. make it easier for an incumbent or new entrant resource recovery service provider to achieve or maintain an efficient scale of operation in the relevant service streams and
 - b. reduce the risk associated with investment in waste and resource recovery technology and facilities.

Transaction cost savings

58. The ACCC considers that the Proposed Conduct is likely to result in transaction cost savings compared to the scenario where each council conducts its own separate tender processes. The Proposed Conduct will likely enable each council to avoid expending time and resources associated with calling separate tenders, including a number of duplicated administrative costs.
59. The ACCC considers that the transaction cost savings from joint procurement are likely to be offset to some degree by the following factors:
 - a. the councils are likely to incur additional costs to coordinate internally within the bargaining group. The ACCC considers that the need for and costs of coordination within a bargaining group are likely to be higher where there are more participating councils and service streams.

- b. the Proposed Conduct will involve two successive joint tenders.
 - c. the councils are likely to individually incur costs associated with being actively involved in decision making and performance of their own due diligence, and
 - d. each council may enter into separate contracts with selected service providers.
60. Overall, the ACCC considers that the Proposed Conduct is likely to result in small transaction cost savings relative to each council individually tendering for the services.

Improved environmental outcomes

61. The ACCC notes the Proposed Conduct is consistent with the Victorian Waste and Resource Recovery Planning Framework, which has the objective (among other things) of protecting the environment and public health from the risks that arise from waste materials. The strategies utilised under this policy by LMWRRG and other similar groups include:²¹
- a. minimising the environmental and public health impacts of waste and resource recovery facilities
 - b. prioritising actions that minimise the short and long term environmental impacts of organic waste
 - c. facilitating the long term purpose of hubs²², such as landfills to be for receiving and treating residual waste, and ensure a range of support mechanisms for closed landfills.
62. The Victorian Government further notes that the move from landfilling towards resource recovery has seen an increase in the numbers of waste transfer stations, composting facilities and waste to energy and other new waste technologies.
63. The ACCC considers that the Proposed Conduct is likely to result in public benefit in the form of improved environmental outcomes to the extent that it assists diverting waste from landfill into alternative waste and resource recovery programs.

Summary of public benefits

64. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of improved efficiencies, particularly in the collection and processing of specific material streams and food organics, small transaction cost savings, and the potential for improved environmental outcomes.

Public detriment

65. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

“...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.”²³

²¹ Victorian State Government, Getting Full Value – The Victorian Waste and Resource Recovery Policy (VWRRP), April 2013, p. 42.

²² Hubs are a facility or group of facilities that manage waste and material streams. They can undertake a range of activities including sorting, consolidation, reprocessing or landfill: Sustainability Victoria, FAQs for Statewide Waste and Resource Recovery Infrastructure Plan June 2015, p. 5.

²³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

66. The ACCC notes concerns raised by interested parties that smaller service providers may be excluded from bidding for contracts in the region due to the size of the region and period of authorisation initially sought by the Applicants.
67. The ACCC also notes the Applicants' response to these concerns:
- a. The Applicants submit that smaller service providers will not be excluded and state that a number of smaller service providers have registered to participate in the joint tender which has commenced under interim authorisation.
 - b. The Applicants expect that a number of smaller service providers will submit bids for either one or multiple services for each, or several, of the participating councils. Bids will be assessed according to tender evaluation criteria that specifically take into account service providers' local service capabilities, employment, and investment in the region.
 - c. As noted above, the Applicants also responded to interested party concerns and now seek authorisation for 12 years rather than the 16 years originally sought.
68. Overall, the ACCC considers that the Proposed Conduct is likely to result in minimal public detriment because
- a. It does not remove a significant number of opportunities for service providers to bid to supply waste and resource recovery services. Service providers who are not awarded contracts to supply services to one or more of the participating councils will still have the opportunity to pursue alternative opportunities to supply waste and resource recovery services.
 - i. The Proposed Conduct only involves eight out of 79 local councils in Victoria.
 - ii. The Applicants have confirmed that, except for specific material streams (such as tyres, mattresses and e-waste), they do not intend to tender jointly on behalf of all eight councils. Rather, tenders will be conducted in two groups of three and five councils. Tenders will be staggered several years apart.
 - b. Tenders will be conducted by a competitive and transparent process using Requests for Tender rather than Requests for Proposal. Each tender will be open to all suitably qualified operators and/or suppliers to bid for the contracts and for each process, LMWRRG will follow state government guidelines for procurement including establishment of a probity plan.

Length of authorisation

69. The CCA allows the ACCC to grant authorisation for a limited period of time.²⁴ 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.
70. The Applicants originally sought authorisation for 16 years. This comprised an initial period to conduct joint procurement processes for the City of Greater Bendigo, Mount Alexander Shire and Macedon Ranges Shire, and an operating term of 11 years.

²⁴ Subsection 91(1).

71. VWMA and Cleanaway made submissions that the proposed contract length combined with the size of the Loddon Mallee Region would prevent smaller service providers from bidding. Those service providers which are not awarded a contract will be excluded from the market and may close down or sell their businesses.
72. In responding to interested party submissions, the Applicants revised the period of authorisation sought to 12 years. This would provide for an initial period to conduct joint procurement processes for contracts that are proposed to commence in 2022. Contracts would be awarded for an initial five year period with an option to extend for another two years.
73. The ACCC invites submissions from interested parties about the Applicants' revised period of authorisation sought.
74. Given the assessment of public benefits and detriments outlined above, the ACCC proposes to grant authorisation to the Applicants for 12 years.

Draft Determination

The applications

75. On 17 August 2017, Loddon Mallee Waste and Resource Recovery Group (LMWRRG) lodged applications A91596 and A91597. The applications were made using Forms A and B under subsection 88(1) and (1A) of the CCA.²⁵

The net public benefit test

76. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsections 90(7) and 90(8) of the CCA, that in all the circumstances the proposed conduct for which authorisation is sought would result or be likely to result in a public benefit that would outweigh any detriment to the public that would result or be likely to result from the conduct.²⁶

Conduct which the ACCC proposes to authorise

77. The ACCC proposes to grant authorisations A91596 & A91597 to LMWRRG, the City of Greater Bendigo, Macedon Ranges Shire, Mount Alexander Shire, Rural City of Mildura, Rural City of Swan Hill, Gannawarra Shire, Loddon Shire and Buloke Shire to jointly develop requests for tenders (RFTs) for the Specified Services, jointly negotiate arrangements for the delivery of the Specified Services, and engage in the ongoing administration and management of contracts for the Specified Services as a result of joint negotiation of the arrangements.

78. The Specified Services are domestic kerbside waste, recyclables and organic waste collection; domestic kerbside recyclables acceptance and processing; domestic organic waste acceptance and processing (including food organics and green waste); the supply and collection of bulk bins and skips; and the collection and processing of specific material waste streams, being e-waste, mattresses, tyres and certain plastics.

79. The proposed conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.²⁷

80. The ACCC proposes to grant authorisations A91596 & A91597 for a period of 12 years.

²⁵ On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 182(3), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

²⁶ As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

²⁷ As s 4D has been repealed pursuant to the amendments referenced above it has been excluded from the description of the proposed conduct. The reference to “within the meaning of section 45 of the CCA” includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect of substantially lessening competition.

Interim authorisation

81. On 14 September 2017, the ACCC granted interim authorisation under subsection 91(2) of the CCA to enable the LMWRRG, the City of Greater Bendigo, Macedon Ranges Shire, and Mount Alexander Shire to collectively negotiate, execute and give effect to relevant agreements while the ACCC is considering the substantive application.
82. Interim authorisation does not extend to enter into or give effect to any contracts.
83. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Next steps

84. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.