



# Draft Determination

Application for Authorisation  
lodged by  
Metropolitan Waste and Resource Recovery Group  
in respect of  
joint procurement of recycling sorting services  
Authorisation number: AA1000451

5 December 2019

Commissioners:

Ridgeway

Keogh

Rickard

## Summary

The ACCC proposes to grant authorisation to enable the Metropolitan Waste and Resource Recovery Group (MWRRG) and 30 councils in metropolitan Melbourne to conduct a collaborative tender process to procure sorting services for commingled household recyclable waste collected from kerbsides.

The ACCC considers the Proposed Conduct is likely to result in public benefits in the form of transaction costs savings, increased efficiencies, environmental benefits and increased competition.

The ACCC considers that the Proposed Conduct is likely to result in minimal public detriment due to a number of mitigating factors including: the tender process will be competitive and transparent; the majority of potential suppliers of sorting services under the Proposed Conduct operate either nationally or internationally; and there will continue to be other future opportunities to supply sorting services in Australia and elsewhere.

Overall the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh any likely public detriment.

The ACCC proposes to grant authorisation for 12 months to conduct the tender process, negotiate contracts and execute contract(s); and 20 years to give effect to the contract(s) for the supply of sorting services to the councils (including the administration of ongoing contract(s)). The ACCC considers that the upgrade of existing sorting facilities or construction of new sorting facilities would be facilitated by long-term contracts involving more than one Participating Council.

The ACCC invites submissions in relation to this draft determination by 20 December 2019.

## 1. The application for authorisation

- 1.1. On 22 August 2019, the Metropolitan Waste and Resource Recovery Group (**MWRRG**), on behalf of itself and 30 councils in metropolitan Melbourne (together, the **Applicants**), lodged application for authorisation AA1000451 with the Australian Competition and Consumer Commission (the **ACCC**).<sup>1</sup> The Applicants are seeking authorisation to jointly investigate, and potentially procure, sorting services for commingled household recyclable waste collected from residents' kerbsides.
- 1.2. The Applicants seek authorisation for 12 months to conduct the tender process, and 20 years to give effect to the contract(s) for the supply of sorting services to the Participating Councils (including the ongoing administration of contract(s)).
- 1.3. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

## The Applicants

- 1.4. MWRRG is a Victorian statutory body corporate,<sup>2</sup> and is responsible for municipal solid waste management and planning. This management includes coordination of

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<sup>1</sup> This application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth).

<sup>2</sup> Established under section 50 of the *Environmental Protection Act 1970* (Vic).

joint procurement processes for waste disposal services for the 31 councils comprising metropolitan Melbourne.

- 1.5. The councils that form part of this application (the **Participating Councils**) are 30 of the 31 councils in metropolitan Melbourne. The Participating Councils are: Banyule City, Bayside City, Boroondara City, Brimbank City, Cardinia Shire, Casey City, Darebin City, Frankston City, Glen Eira City, Greater Dandenong City, Hobsons Bay City, Hume City, Kingston City, Knox City, Manningham City, Maribyrnong City, Maroondah City, Melbourne City, Melton City, Monash City, Moonee Valley City, Moreland City, Mornington Peninsula Shire, Nillumbik Shire, Port Phillip City, Stonnington City, Whitehorse City, Whittlesea City, Yarra City, and Yarra Ranges Shire.<sup>3</sup>

## The Proposed Conduct

- 1.6. The Applicants are seeking authorisation for:

- MWRRG, on behalf of the Participating Councils, to conduct a collaborative competitive tender process for the procurement of sorting services, evaluate responses in collaboration with the Participating Councils, and negotiate contract(s) with the potential supplier(s)
- a Special Purpose Vehicle<sup>4</sup> (**SPV**) to be established by the Participating Councils to enter into contract(s) with the successful supplier(s), and
- the ongoing administration of the resulting contract(s).

(the **Proposed Conduct**)

- 1.7. The Proposed Conduct is voluntary for the Participating Councils and for any proposed supplier(s). The Proposed Conduct does not restrict any successful supplier(s) from supplying sorting services to non-Participating Councils or to businesses within other waste streams (e.g. commercial and industrial, or construction and demolition); nor does it restrict any Participating Councils from procuring sorting services outside of the proposed procurement process (see paragraph 2.10).
- 1.8. In this application, 'sorting'<sup>5</sup> refers to the various processes used at Material Recovery Facilities (**MRFs**) to separate commingled recyclable waste into different specific types of materials (such as paper, plastic, aluminium and glass). The sorted materials are sent from the MRFs to the re-processors for further processing into recycled raw materials and consumer goods, while the reject materials are sent to landfill.

## Rationale for the Proposed Conduct

- 1.9. MWRRG submits that the objective of the Proposed Conduct is consistent with relevant Government policies,<sup>6</sup> in particular the:

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<sup>3</sup> Wyndham City Council is the only council in metropolitan Melbourne not participating in this application.

<sup>4</sup> The Participating Councils are considering potentially procuring this project utilising a SPV. If such a structure is utilised, the SPV would enter into final contracts with the selected supplier(s).

<sup>5</sup> As described on page 13 of the application for authorisation, sorting services are separate to the collection services and re-processing services in respect of recyclable materials. At the collection stage, several contractors collect waste from residential kerbsides and deliver the waste to MRFs directly or transfer stations (where waste is aggregated before being delivered to MRFs). In terms of re-processing, MRFs typically arrange sorted materials (according to the different types of waste) to be sent to the re-processors.

<sup>6</sup> The other relevant policies mentioned by MWRRG are on pages 7-8 of its application: the Victorian Government's 30 year Statewide Waste and Resource Recovery Infrastructure Plan (first announced in 2015, and later revised in 2018), and the Federal Government's 2018 National Waste Policy.

- Victorian Government's Recycling Industry Strategic Plan, which is aimed at addressing the current challenges (including the importation ban mentioned in paragraph 2.5 regarding overseas governments' ban on low-quality recyclable waste) faced by the recycling sector in Victoria, and
  - Council of Australian Governments' resolution to establish a timeline to ban the export of recyclable waste and strengthen Australia's capacity to generate high value recycled commodities.
- 1.10. MWRRG submits that the Proposed Conduct will seek to establish a resilient recycling industry through a strategic procurement process for sorting services. In this context, MWRRG submits the current contractual model with suppliers (on an individual council basis) will not be practical going forward, as no individual council will be able to offer a sufficient volume of recyclable waste to incentivise the necessary private investment to upgrade to or build new sorting facilities to provide more innovative and higher quality sorting services compared to that provided under existing facilities.
- 1.11. MWRRG notes that currently approximately 450,000 tonnes of recyclable materials are collected annually from Melbourne households. MWRRG considers that an aggregated annual quantity of at least 50,000 tonnes of commingled recyclable waste is required to prompt upgrades of existing MFRs; and 100,000 tonnes per year is needed to attract new entrants to the market and construct new sorting facilities.

### Interim authorisation

- 1.12. The Applicants also requested interim authorisation to enable them to commence the tender and contract negotiation process while the ACCC is considering the substantive application.
- 1.13. On 25 September 2019, the ACCC granted interim authorisation under subsection 91(2) of the Act.<sup>7</sup> Interim authorisation will remain in place until the date of the ACCC's final determination comes into effect or until interim authorisation is revoked. Interim authorisation does not permit the Applicants to enter into, or give effect to, any legal arrangements or contracts.

### Related applications for authorisation

- 1.14. MWRRG has lodged three other applications for authorisation on behalf of itself and groups of councils in metropolitan Melbourne. These applications are currently under consideration by the ACCC.
- **AA1000448 – Metropolitan Waste and Resource Recovery Group and Ors (advanced waste processing) – lodged 23 July 2019:** proposed collaborative, competitive tender process for the procurement of advanced waste processing services.<sup>8</sup>

There are 16 councils involved in this application, which are a subset of the 30 Participating Councils involved in the application for authorisation AA1000451. On 20 November 2019, the ACCC issued a draft determination proposing to grant authorisation for application AA1000448.

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<sup>7</sup> See the ACCC's decision of 25 September 2019 available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/metropolitan-waste-and-resource-recovery-group-ors-recycling-sorting>.

<sup>8</sup> Advanced waste processing refers to the processes employed to recover alternative resources (such as electricity or fuel) from municipal residual waste which is not recyclable and is typically destined for landfill.

- **AA1000449 – Metropolitan Waste and Resource Recovery Group and Ors (landfill) – lodged 2 August 2019:** proposed collaborative, competitive tender process for the procurement of services for receiving residual waste and ancillary services (landfill services).

There are 31 councils involved in this application, including the 30 Participating Councils involved in the application for authorisation AA1000451.<sup>9</sup> On 20 November 2019, the ACCC issued a draft determination proposing to grant authorisation for application AA1000449.

- **AA1000458 – Metropolitan Waste and Resource Recovery Group and Ors (Organic) – lodged 8 November 2019:** application for revocation of authorisations A91414 and A91415 and substitution of a new authorisation, to enable itself and a group of nine councils to collectively procure organic waste processing services.

- 1.15. MWRRG has also previously sought, and been granted, authorisation for joint procurement of similar recyclable waste sorting services. On 1 August 2018, the ACCC granted authorisation AA1000422 to MWRRG and five councils in respect of their joint procurement of recyclable waste management services (described in similar terms to the sorting services, the subject of AA1000451) until 31 July 2027.<sup>10</sup> Four of these five councils are part of the group of Participating Councils which have applied for the current authorisation AA1000451.<sup>11</sup>
- 1.16. For the purposes of the current application, MWRRG submits that these four councils' contracts with their previous supplier, SKM Recycling, have been terminated; and they therefore will not continue with their joint procurement for recyclable waste sorting services under authorisation AA1000422. MWRRG states that the four councils are instead seeking to be part of authorisation AA1000451 to engage in the Proposed Conduct.

## 2. Background

- 2.1. The 30 Participating Councils in metropolitan Melbourne cover a population of approximately 4.7 million people.<sup>12</sup> The only council in metropolitan Melbourne that is not participating in the Proposed Conduct is Wyndham City Council, with a population of approximately 255,322 people.<sup>13</sup> The Participating Councils account for the vast majority (approximately 96%) of municipal recyclable waste volume in metropolitan Melbourne.
- 2.2. Outside metropolitan Melbourne, there are 48 councils in rural and regional Victoria, covering an estimated population of 1.5 million people.<sup>14</sup>

<sup>9</sup> The City of Greater Geelong is participating in the application for authorisation AA1000449 for the collective procurement of landfill services, but not in the current application for authorisation AA1000451.

<sup>10</sup> Authorisation AA1000422 was granted in substitution of previous authorisations A91489 and A91490, which were granted in July 2015. Further details of this application are available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/metropolitan-waste-and-resource-recovery-group>

<sup>11</sup> The four councils are: Brimbank City, Melbourne City, Port Phillip City and Nillumbik Shire.

<sup>12</sup> This has been calculated by subtracting the estimated population in metropolitan Melbourne in 2018 by the population of residents living in the municipality of Wyndham City Council in 2018. The total population in metropolitan Melbourne is estimated by the Australian Bureau of Statistics to be 4.96 million as at 30 June 2018, see <https://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/3218.0?OpenDocument>, viewed 25 November 2019.

<sup>13</sup> As at 2018. See Wyndham City Council's website, at <https://www.wyndham.vic.gov.au/about-Council/wyndham-community/research-and-statistics>.

<sup>14</sup> This is estimated by the Australian Bureau of Statistics, see <https://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/3218.0?OpenDocument>, viewed 25 November 2019.

- 2.3. Based on the information provided by the Applicants, three suppliers were contracted to provide sorting services to the Participating Councils in respect of municipal commingled recyclable waste at the time of the application – SKM Recycling (contracted with 17 councils), PolyTrade (contracted with 4 councils) and Visy Recycling (contracted with 9 councils).
- 2.4. In July 2019, due to the regulatory action taken against it by the Environment Protection Authority Victoria (**EPA**), SKM Recycling ceased accepting recyclable waste from the councils to whom it was contracted.<sup>15</sup> In August 2019, SKM Recycling was placed into receivership;<sup>16</sup> and in October 2019, SKM Recycling was acquired by another waste company, Cleanaway.

## Recent changes affecting the recycling sector

- 2.5. Prior to 2018, operators of MRFs in Australia (including Victoria) sold large volumes of low-quality municipal recyclable materials, which are difficult and costly to sort, to overseas markets.<sup>17</sup> In 2018, the Chinese Government and, subsequently, other neighbouring jurisdictions in North and South-East Asia, imposed strict contamination limits on imported recyclable materials.<sup>18</sup> These changes have driven down the prices of some recovered recyclable materials;<sup>19</sup> reduced revenue for MRF operators (as they had difficulty selling low-quality recyclable waste overseas);<sup>20</sup> and increased their costs of operating the sorting facilities (due to the need to improve the capability of their sorting facilities and/or slow down the sorting processes).<sup>21</sup>
- 2.6. The ACCC understands that these challenges contributed in part to the difficulties experienced by SKM Recycling prior to its insolvency.<sup>22</sup> With SKM Recycling being unable to accept kerbside recyclable waste from Victorian councils due to the EPA's regulatory action mentioned in paragraph 2.4 above, many councils had to negotiate alternative arrangements with other suppliers. Where these negotiations were unsuccessful, councils had to divert the collected recyclable waste to landfill.<sup>23</sup>
- 2.7. In response to these challenges, the Victorian Government announced a Recycling Industry Strategic Plan in 2018-19<sup>24</sup>, which aims to stabilise the kerbside recycling sector (including relief funding for councils to meet the increased costs of recycling

<sup>15</sup> See Australian Broadcasting Corporation, 10 July 2019, <https://www.abc.net.au/news/2019-07-10/epa-slaps-skm-laverton-north-waste-ban/11289820>, viewed 25 November 2019.

<sup>16</sup> See E Cure, Australian Broadcasting Corporation, 2 August 2019, <https://www.abc.net.au/news/2019-08-02/skm-recycling-declared-insolvent-by-supreme-court-of-victoria/11377446>, viewed 29 October 2019.

<sup>17</sup> Victorian Government, Recycling Industry Strategic Plan 2018, July 2018, page 12; and D Cansdale, ABC news, 11 January 2019, <https://www.abc.net.au/news/2019-01-11/australias-recycling-crisis-one-year-on-whats-changed/10701418>, viewed 29 October 2019.

<sup>18</sup> MWRRG's application for authorisation, page 6.

<sup>19</sup> Infrastructure Victoria report, October 2019, page 12, available at <http://www.infrastructurevictoria.com.au/project/advice-on-waste-infrastructure-in-victoria/>.

<sup>20</sup> MWRRG's application for authorisation, page 13.

<sup>21</sup> Ibid, page 13.

<sup>22</sup> See E Cure, Australian Broadcasting Corporation, 2 August 2019, <https://www.abc.net.au/news/2019-08-02/skm-recycling-declared-insolvent-by-supreme-court-of-victoria/11377446>, viewed 29 October 2019.

<sup>23</sup> C Lucas and B Preiss, The Age, 8 August 2019, <https://www.theage.com.au/politics/victoria/massive-warehouses-filled-with-recyclable-materials-that-no-one-wants-20190808-p52f2o.html>, viewed 29 October 2019. Following Cleanaway's acquisition of Visy, Cleanaway has resumed sorting services to a number of Victoria Councils that previously contracted with SKM Recycling. For instance, see Nillumbik Shire Council's announcement dated 10 October 2019, <https://www.nillumbik.vic.gov.au/News/Household-recycling-update>.

<sup>24</sup> Other Government plans and policies established to address issues of increasing waste are outlined on pages 7-8 of MWRRG's application for authorisation.

services), increase the quality of recycled materials, improve the diversity and productivity of the recycling sector, and develop new markets for recycled materials.<sup>25</sup>

- 2.8. In August 2019, the Council of Australian Governments announced their commitment to establish a timeline to ban the export of recyclable materials and develop markets for high quality recycled commodities in Australia.<sup>26</sup>

## The tender process

- 2.9. MWRRG proposes to issue a Request for Outline Solutions to identify interested suppliers, and evaluate responses together with the Participating Councils' representatives. The Participating Councils would establish a SPV to contract with the successful supplier(s).<sup>27</sup>
- 2.10. In the early stages of the tender process, the Participating Councils may choose to not be a member of the SPV, but still participate in the proposed procurement by entering into a separate contract with the SPV. They may also separately decide their own arrangements with their chosen supplier(s).
- 2.11. MWRRG submits that existing suppliers, and any proposed new entrants, may offer to supply sorting services to as many Participating Councils as they wish. MWRRG submits that as the Participating Councils' contracts with existing suppliers have different expiry dates, the proposed new contract(s) would allow for staggered contract commencement dates for individual councils.
- 2.12. The proposed procurement will leave open the choice of new sorting technologies (such as optical scanning) that may be utilised. It will instead specify the required outcomes and performance indicators, such as specific quality standards for sorted materials.

## 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 waste management firms, industry associations and government bodies.<sup>28</sup> The ACCC received submissions from two Participating Councils supporting the application, and a submission raising issues for consideration but not opposing the application.
- 3.3. Bayside City Council submits that the proposed joint procurement is necessary as the recycling sector is undergoing significant change and that Bayside City Council, acting alone, is unable to offer a sufficient recyclable waste volume to generate change in the sector.
- 3.4. Whitehorse City Council submits that the proposed multi-council procurement approach may incentivise new sorting infrastructure to be built and attract new

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<sup>25</sup> The Victorian Government has boosted the program for establishing and expanding markets for recyclable materials to \$4.5 million. See <https://www.environment.vic.gov.au/sustainability/victorians-urged-to-keep-recycling>.

<sup>26</sup> Council of Australian Governments, Meeting Communiqué, 9 August 2019, available at <https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-09-august-2019>, viewed 29 October 2019.

<sup>27</sup> The Participating Councils would also manage arrangements between themselves under a separate shareholder agreement.

<sup>28</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/metropolitan-waste-and-resource-recovery-group-ors-recycling-sorting>

suppliers to the recycling sorting sector, which currently only has a limited number of suitably experienced recycling sorters. Whitehorse City Council further submits that the proposed joint procurement is supported by its residents; is expected to achieve financial benefits through 'bulk purchasing', and the environmental benefits of higher recycling standards, contributing to a more 'circular economy'; and will add local capacity for processing kerbside recyclable waste, rather than continuing to export waste overseas.

- 3.5. Australian Industry Group (AIG)<sup>29</sup> raises concerns about the voluntary nature of the collective tender process. AIG submits that the councils' ability to opt out prior to contract completion creates uncertainty for potential suppliers about which councils they would ultimately contract with and the key terms of the contract(s) (e.g. tonnages and prices). AIG is concerned that councils may use the confidential information received during the tender process to independently negotiate with suppliers for a lower price outside the collective tender process. AIG suggests that the ACCC should conduct a 'post-tender review' of the contract(s).
- 3.6. In response to AIG's submission, MWRRG considers that it would not be reasonable nor commercially viable for the councils to 'pre-commit' before the commercial terms offered by potential suppliers are provided or confirmed. However, it also states that, in practice, at the later stage of entering into contract(s), the councils will need to commit to the chosen provider(s) and agreed to provide their recyclable waste volumes in return for particular pricing. MWRRG submits that the councils will be subject to confidentiality obligations and restrictions on the use of the information, both during and after the procurement. MWRRG considers a post-tender review by the ACCC unnecessary.
- 3.7. Public submissions by the Applicants and interested parties are available on the ACCC's [Public Register](#) for this matter.

## 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 and may substantially lessen competition within the meaning of section 45 of the Act.
- 4.3. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all circumstances, that the Proposed 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).
- 4.4. In making its assessment of the Proposed Conduct, the ACCC has considered:
  - the application and submissions received from interested parties
  - other relevant information available to the ACCC, including other relevant applications for authorisation

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<sup>29</sup> AIG is a peak industry body representing businesses across Australia. AIG's submission is provided on behalf of itself and the Waste Industry Alliance Victoria (WIA) which is part of AIG. AIG also provided submissions in response to two separate, MWRRG applications for authorisation AA1000448 and AA1000449, raising the same issues.



- the relevant areas of competition are likely to be the supply and acquisition of sorting services for municipal recyclable waste in metropolitan Melbourne
- that absent the Proposed Conduct, it is likely that each of the Participating Councils will individually conduct a tender process to procure sorting services. This would include the four councils who were the subject of previous authorisation AA1000422 (see paragraphs 1.15 and 1.16).

## Public benefits

4.5. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>30</sup>

4.6. The Applicants submit that the Proposed Conduct is likely to result in public benefits including:

- procurement process benefits, including transaction cost savings.
- increased efficiencies
- increase in competition
- environmental benefits
- investment in the state
- achievement of government objectives

4.7. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

## Transaction cost savings

4.8. The ACCC accepts that the Proposed Conduct is likely to provide transaction cost savings, including by reducing or eliminating the duplication of administrative, legal and evaluation costs associated with each Participating Council conducting separate tenders.

4.9. The ACCC also considers the Proposed Conduct is likely to deliver transaction cost savings to potential supplier(s) of sorting services, including by reducing or eliminating the administrative burden of dealing with the procurement processes of multiple Participating Councils.

## Increased efficiencies

4.10. The ACCC considers that the aggregation of the Participating Councils' recyclable waste volumes is likely to result in supplier(s) of sorting services achieving operating efficiencies and economies of scale in the delivery of sorting services, which may facilitate lower average costs for each Participating Council.

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<sup>30</sup> 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.

## Increased competition

- 4.11. The ACCC considers that the combined volumes of recyclable waste from the Participating Councils, together with the certainty of long-term contract(s) provided under the Proposed Conduct, may attract the interest of suppliers who may not have entered the market previously.<sup>31</sup> It may also support capital investment, and greater feasibility of upgrading existing MRFs or constructing new sorting facilities in order to deliver the higher sorting standards required to meet the demand of the Participating Councils. It is also possible that, as indicated in the application,<sup>32</sup> there will be opportunities for several contracts to be awarded (potentially to different suppliers). This may lead to more tender responses from potential suppliers, resulting in greater competition to supply sorting services to Participating Councils than without the Proposed Conduct.
- 4.12. The ACCC considers that existing MRFs may be upgraded, or new sorting facilities constructed, without the Proposed Conduct, i.e. providers of sorting services may be able to contract with individual councils to a sufficient extent to support the upgrade or new construction. However, the ACCC considers that the combined procurement approach under the Proposed Conduct is likely to facilitate the delivery of (upgraded or new) sorting facilities with more sophisticated technologies, higher sorting standards and/or operating efficiency, and make such outcome more likely to occur.<sup>33</sup> If higher standards or efficiency results, this may also promote competition in the supply of sorting services to third parties (i.e. to non-participating councils and/or customers in other sectors), and increase the supply of high-quality, sorted recyclable materials.
- 4.13. The ACCC considers the Proposed Conduct may assist in the establishment of a more viable recycling industry in metropolitan Melbourne, and support achievement of various government policies in relation to waste management and more effective recycling and resource recovery.

## Environmental benefits

- 4.14. To the extent that the Proposed Conduct results in the upgrade of existing facilities or construction of new facilities with enhanced sorting capacities, the ACCC considers there is likely to be significant public benefits arising from: higher quality of sorted recyclable materials, increase in recycling and the resource recovery rate, diversion of recyclable waste from landfill, decrease in stockpiling of low-quality recyclables waste and/or decrease in the export of such waste to overseas markets.
- 4.15. To the extent that the Proposed Conduct aligns with relevant government strategies on environmental preservation, the ACCC considers the achievement of government objectives may be supported by the Proposed Conduct.

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<sup>31</sup> Whitehorse City Council submits that the aggregation of the recyclable waste volumes of the Participating Councils will attract new suppliers to the market to provide higher quality sorting services. Annexure B to MWRRG's application for authorisation includes a list of potential tenderers, which includes existing and potential new suppliers of sorting services for recyclable waste. The ACCC also notes that the aggregation of recyclable waste volumes from all Participating Councils are sufficiently large to support a combination of upgrades to existing sorting facilities and construction of new sorting facilities.

<sup>32</sup> MWRRG's application, page 16.

<sup>33</sup> The ACCC has considered MWRRG's claim that the current market for sorting of recyclable materials (where councils individually contract with suppliers) as a "failing market" (see page 13 of the application for authorisation). The ACCC considers that, under the Proposed Conduct, the Participating Councils would be able to directly co-ordinate with each other in their negotiation and agreement of the collective contract(s) with the supplier(s) (including in relation to the required higher standards for sorting service). This contractual approach would be more efficient. Together with the long-term certainty of municipal recyclable waste volumes provided to the supplier(s), this approach will be more likely to facilitate the upgrade or construction of more sophisticated sorting facilities.

## Public detriments

4.16. 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.*<sup>34</sup>

4.17. The Applicants claim that there should be no public detriment associated with the Proposed Conduct, and any potential detriment would be outweighed by the public benefit. In particular, they submit:

- The existing suppliers, as well as any proposed new suppliers, may bid to supply sorting services to the Participating Councils.
- All bidders may offer to supply as many Participating Councils as they wish. The proposed procurement aims to achieve resilience of supply, which may well be assisted by having multiple suppliers (with some associated capacity for addressing possible outages at any one operation).<sup>35</sup> MWRRG also submits it will be able to manage workable contingency arrangements with multiple suppliers.<sup>36</sup>
- The tender process will be competitive and conducted in accordance with best practice probity standards, including transparency and audit requirements. Selected suppliers will not be restricted from offering services to other councils.
- The services only relate to sorting services (as opposed to collection or re-processing services); relate to commingled recyclable materials (as opposed to other waste streams); and relate to metropolitan Melbourne area, and do not extend to regional Victoria or other States. There remains significant opportunity for potential suppliers to participate in the wider waste industry in Victoria and beyond.

4.18. The Participating Councils may be considered to be each other's competitors for the acquisition of sorting services for municipal recyclable waste in metropolitan Melbourne. By conducting their procurement jointly rather than individually, the Participating Councils are agreeing to no longer compete. The Proposed Conduct therefore will lessen competition in the acquisition of sorting services for municipal recyclable waste in metropolitan Melbourne.

4.19. The ACCC recognises that the Participating Councils account for the vast majority of municipal recyclable waste volumes in metropolitan Melbourne.<sup>37</sup> However, the ACCC considers that any detriment resulting from the Participating Councils' enhanced buying power is likely to be limited because:

- The tender process will be competitive and transparent, supporting the countervailing power of suppliers of recyclable waste sorting services.

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<sup>34</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>35</sup> MWRRG's application for authorisation, the second paragraph under section 9 on pages 16-17.

<sup>36</sup> MWRRG's application for authorisation, at paragraph 8.1(a) on page 14.

<sup>37</sup> The Participating Councils are 30 councils out of a total of 31 councils in metropolitan Melbourne. Based on the information provided in MWRRG's application for authorisation, the ACCC estimates that the Participating Councils' recyclable waste volumes account for 96% of the total volumes of recyclable waste collected in metropolitan Melbourne.

- The majority of existing and potential sorting suppliers identified by the Applicants operate either nationally or internationally and there will continue to be other future opportunities to supply sorting services in Australia and elsewhere.
  - Participation in the Proposed Conduct is voluntary for the Participating Councils and for potential suppliers.
- 4.20. The ACCC has also considered the effect of the Proposed Conduct on the supply of sorting services for municipal recyclable waste in metropolitan Melbourne. In particular, the ACCC has considered the potential for the Proposed Conduct to result in the municipal recyclable waste volumes of the Participating Councils (who account for the vast majority of volumes in Metropolitan Melbourne) being contracted to a single supplier for an extended period of time. If this occurred, the appointment of a single supplier for an extended period may result in public detriment by reducing the number of parties competing to supply sorting services in the future.
- 4.21. The ACCC considers that the extent of this public detriment is likely to be limited for the following reasons.
- Potential suppliers may bid to supply as many Participating Councils as they wish, and for smaller volumes than the aggregated volumes of all Participating Councils. The ACCC considers that the net effect of this approach is likely to be to stimulate greater competition for the proposed contract(s), by leading to more tender participants than would otherwise be the case and by incentivising potential tenderers (both existing and new entrants) to compete more vigorously to supply the Participating Councils.<sup>38</sup>
  - Aggregating recyclable waste volumes is needed to support the upgrade of existing MRFs or construction of new sorting facilities, and no single council produces the requisite volume.
  - Given the volume requirements mentioned in paragraph 1.11, it is possible that anywhere between four and nine contracts may be awarded under the Proposed Conduct. As stated in the application, a goal of the Proposed Conduct is resilience of supply, providing the possible appointment of more than one supplier.<sup>39</sup> The ACCC also notes that a goal of the Victorian Government's Recycling Industry Strategic Plan is to improve the diversity of the recycling sector and ensure it is competitive, transparent, and responsive to market challenges and opportunities (amongst other things).<sup>40</sup>
  - As noted above, the majority of existing and potential sorting suppliers operate either nationally or internationally, and there will continue to be other future opportunities to supply sorting services (or other waste services) in other parts of Australia and elsewhere.
  - As also noted above, participation in the Proposed Conduct is voluntary for the Participating Councils and for potential suppliers.

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<sup>38</sup> As stated in the application and in Whitehorse City Council's submission, the proposed procurement is expected to attract the interests of new service providers.

<sup>39</sup> The ACCC considers that reliability of supply would be a factor likely to be considered by the Participating Councils during the course of the proposed procurement, in light of the recent challenges (including those faced by SKM) which led to some of the Participating Councils disposing recyclable waste in landfill.

<sup>40</sup> Victorian Government's Recycling Industry Strategic Plan 2018, July 2018, page 16.

- 4.22. Apart from the issues outlined above, the ACCC notes AIG's concerns about the voluntary nature of the collective tendering process, including the risk of misuse of confidential information by councils. On the latter point, the ACCC understands MWRRG intends to impose requirements that limit the use of the commercially sensitive information to the joint tendering process. More generally, the ACCC considers the voluntary nature of a collective bargaining arrangement can limit the potentially anti-competitive effects of the group.
- 4.23. AIG also recommends that the ACCC conduct a 'post tender review' of any contracts, on the basis that 'terms and conditions suggested during the tender may be dramatically altered in the lead up to the signing of the contract'. The role of the ACCC in the authorisation process is limited to assessing whether the Proposed Conduct is likely to result in a net public benefit rather than assessing the contract that may be executed as part of the Proposed Conduct.
- 4.24. Overall, the ACCC considers that the Proposed Conduct is likely to result in some limited public detriment.

### Balance of public benefit and detriment

- 4.25. For the reasons outlined in this determination, the ACCC considers that the Proposed Conduct is likely to result in public benefits and that these public benefits would outweigh any likely detriment to the public from the Proposed Conduct.

### Length of Authorisation

- 4.26. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>41</sup> 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.
- 4.27. In this instance, the Applicants seek authorisation for 12 months to complete the tender process and negotiation/execution of contract(s), and a further 20 years to give effect to the contract(s) for the supply of sorting services for recyclable waste (including the ongoing administration of contract(s)).
- 4.28. The Applicants submit that the proposed term of the contract(s) is necessary to support investment in upgrading existing sorting facilities or the construction of new facilities. The ACCC did not receive any submissions in relation to the length of authorisation sought.
- 4.29. The ACCC notes that the Proposed Conduct will not necessarily result in the upgrade of existing MRFs or construction of new sorting facilities. However, compared to the likely future without the Proposed Conduct, the ACCC considers that aggregating the Participating Councils' recyclable waste volumes is more likely to facilitate this outcome.
- 4.30. The ACCC considers that contract(s) with a term of 20 years may be required to support the private investment required to undertake upgrade or new construction of sorting facilities to provide higher standards of sorting services. The long-term nature of the contract(s) is likely to provide certainty to the Participating Councils, and to suppliers regarding long-term access to recyclable waste materials.

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<sup>41</sup> Subsection 91(1)

- 4.31. The ACCC welcomes further submissions on the proposed length of authorisation.
- 4.32. In light of its assessment of the public benefits and detriments likely to result from the Proposed Conduct, the ACCC proposes to grant authorisation for 12 months to complete the tender process and negotiation/execution of contract(s), and a further 20 years to give effect to the contract(s) for the supply of sorting services (including the ongoing administration of contract(s)).

## 5. Draft Determination

### The Application

- 5.1. On 22 August 2019, the Applicants lodged application AA1000451 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicants seek authorisation for the Proposed Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under 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 Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC considers 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.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000451 to enable the Applicants to conduct a joint competitive tender process to investigate, and potentially procure, sorting services for commingled recyclable waste collected from kerbsides, as described in paragraph 1.6 and defined as the Proposed Conduct.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act and may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000451 for 12 months to conduct the tender process, negotiate contract(s) and execute contract(s), and 20 years to give effect to the contract(s) for the supply of sorting services for recyclable waste (including the ongoing contract(s) administration).
- 5.9. This draft determination is made on 5 December 2019.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 20 December 2019. In addition, consistent with section 90A of the Act, the Applicants or

an interested party may request that the ACCC hold a conference to discuss the draft determination.