



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for authorisation

lodged by

Metropolitan Waste Management Group

in respect of

jointly procuring, negotiating and contracting for the  
supply of organic waste processing services

Date: 27 August 2014

Authorisation number: A91445 & A91446

Commissioners: Sims  
Rickard  
Court  
Featherston  
Walker

## Summary

The ACCC proposes to grant authorisation to the Metropolitan Waste Management Group (MWMG) on behalf of itself and five metropolitan Melbourne councils to enable them to:

- jointly procure, negotiate and contract for the supply of organic waste processing services; and
- make joint decisions regarding the ongoing administration and management of the contracts (including the allocation of volumes of organic waste from particular participating councils to particular suppliers).

The ACCC is proposing to grant authorisation for eighteen years which is the period requested by the Applicants to enable the tender process and contract negotiations, the construction of any new processing facilities and a fifteen year contract term.

The ACCC has also decided to grant interim authorisation for MWMG and the Participating Councils to commence the tender and contract negotiation process, but not to enter into contracts.

### Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

## The application for authorisation

1. On 16 July 2014, the Metropolitan Waste Management Group (MWMG) on behalf of itself and Knox City Council, Maroondah City Council, Yarra Ranges Shire Council, Manningham City Council and Whitehorse City Council (Participating Councils) (together, the Applicants) lodged applications A91445 and A91446 with the ACCC under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the CCA).
2. The Applicants are seeking authorisation to:
  - a. Jointly procure, negotiate and contract for the supply of organic waste processing services.

It is proposed that MWMG and the Participating Councils will jointly conduct a tender process and negotiate with potential suppliers of organic waste processing services (Processors) regarding the contractual terms for the supply of organic waste processing services to the Participating Councils. The Participating Councils will then enter into separate agreements with Processors on the terms negotiated by MWMG.

- b. Make joint decisions regarding the ongoing administration of the contracts, including decisions regarding the allocation of certain volumes of organic waste from particular Participating Councils to particular Processors.

A group comprising representatives from each of the Participating Councils and MWMG will be established to make certain decisions if required (User Group). The primary purpose of the User Group will be to optimise the processing of organic waste and, in that context, it may seek to allocate volumes from particular Participating Councils to particular Processors.<sup>1</sup>

3. The Applicants seek authorisation for 18 years, comprising a three year period for the joint procurement process, the negotiation/execution of the contracts, and the construction/commissioning of the new facilities, and a 15 year operating term.
4. The Applicants also requested interim authorisation to enable them to commence the tender and contract negotiation process to procure organic waste processing services, but not to enter into contracts to engage in the proposed conduct.

## Background

5. MWMG is a Victorian statutory body corporate established under section 50 of the *Environment Protection Act 1970* (Vic) which is responsible for municipal solid waste management and planning in Melbourne, and works with Victorian metropolitan councils to facilitate best practice in waste management.
6. The Participating Councils are responsible for, amongst other things, providing residential waste collection services, recyclables processing services and organic waste processing services to their respective local communities.<sup>2</sup>
7. The two main forms of organic waste are (i) green (garden) waste – grass clippings and tree prunings, and (ii) food waste – fruit, vegetable, meat scraps.

## Similar authorisations

8. The ACCC has previously considered a number of similar authorisation applications for joint tendering and contracting for waste management services, including an application by MWMG earlier this year (A91414 & A91415). MWMG sought authorisation for similar conduct on behalf of itself and eight metropolitan councils in Melbourne (Bayside City Council, Cardinia Shire Council, Casey City Council, Frankston City Council, Glen Eira City Council, Greater Dandenong City Council, Kingston City Council, and Monash City Council). On 18 June 2014, the ACCC granted authorisation to MWMG for a period of 18 years.

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<sup>1</sup> By way of example, it may be determined that a particular supplier's facility is best placed to accommodate additional volumes of organic waste because, for technological reasons, it is better suited to the processing of a particular type of organic waste such as food waste.

<sup>2</sup> The functions and powers of the Participating Councils are set out in the Local Government Act 1989 (Vic)

## ACCC evaluation

9. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC sought submissions from 18 interested parties potentially affected by the applications, including waste-services providers, local councils, industry associations and government authorities. The ACCC received one submission from Veolia (Vic/Tas). Veolia advises that it has no concerns with the proposed conduct.
10. Copies of public submissions may be obtained from the ACCC's website: [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).
11. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests<sup>3</sup> contained in the *Competition and Consumer Act 2010* (the CCA). In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public, including the detriment constituted by any lessening of competition that would be likely to result.
12. In its evaluation of the applications the ACCC has taken into account:
  - a. the applications and submissions received from interested parties;
  - b. information available to the ACCC from consideration of previous matters;
  - c. the likely future without the proposed conduct for which authorisation is sought. The ACCC considers that without the joint arrangement, each Participating Council would be likely to tender for the services independently as they have done so previously;
  - d. the relevant areas of competition likely to be affected by the proposed conduct. The ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in assessing the applications. The ACCC considers that the relevant area of competition likely to be affected is the supply and acquisition of organic waste processing services in metropolitan Melbourne; and
  - e. the period for which authorisation has been sought.

## Public benefit

13. Public benefit is not defined in the CCA. 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 principle elements ... the achievement of the economic goals of efficiency and progress.<sup>4</sup>

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<sup>3</sup> Subsections 90(5A), 90(6) and 90(8). The relevant tests are set out in Attachment A.

<sup>4</sup> *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.

14. The Applicants submit that the proposed conduct will deliver public benefits, including:
- a. environmental and health benefits;
  - b. improved investment viability and reduced operational risk;
  - c. transaction cost savings;
  - d. improved purchasing power for Participating Councils; and
  - e. efficiencies and capacity utilisation.
15. The ACCC considers that the proposed conduct is likely to result in some public benefits, including:
- a. **Transaction cost savings:** The combined tendering and contracting process is likely to lead to some efficiency savings for the Participating Councils (including the collective use of MWMG's expertise in technical waste management issues and procurement of waste management services), relative to the scenario where each Participating Council engages separately with potential Processors.
  - b. **Potential for increased competition:** The combined volume of Participating Councils is likely to underwrite the investment needed to encourage the entry of new suppliers of organic waste processing services in metropolitan Melbourne
  - c. **Potential for improved economies of scale for Processor/s:** The aggregation of a larger volume of organic waste is likely to enable the Processor to achieve improved economies of scale.
  - d. **Environmental benefits:** By facilitating investment in increased capacity for organic waste processing, the proposed conduct may result in some environmental benefits by reducing the amount of organic waste diverted to landfill, thereby reducing environmental externalities.

## Public detriment

16. Public detriment is also not defined in the CCA 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.<sup>5</sup>
17. The Applicants submit that the proposed conduct does not result in any significant public detriment and that any public detriment would be outweighed by the substantial public benefits. In making this submission the Applicants note:

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<sup>5</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- a. there are a number of potential Processors of organic waste processing services in and around metropolitan Melbourne and competition between those Processors to secure contracts is aggressive;
  - b. the proposed conduct involves only five of the 31 councils located in the Melbourne metropolitan area, a large volume of demand for organic waste processing in Melbourne is unaffected;
  - c. the tender process to select the Processor/s will be competitive and transparent, and will have regard to detailed objective criteria and be subject to an independent audit procedure; and
  - d. participation in the joint procurement and negotiation process is voluntary.
18. The ACCC considers that the proposed conduct is likely to result in limited, if any, public detriment for the following reasons:
- a. While the processing of organic waste for the Applicants will not be contestable for the duration of the contract period, the tender process will ensure that there will be competition 'for the market' (i.e. competition to win the contract).<sup>6</sup>
  - b. A significant volume of organic waste collected by Melbourne councils is not subject to the proposed conduct will remain available to alternative Processors who were not successful tenderers for the contract.
  - c. Any joint decisions by MWMG and the Participating Councils (including through the User Group) will be limited to allocating particular volumes of organic waste to particular waste processing service suppliers who are already contracted to the Participating Councils and who will have their commercial positions protected by contractual minimum volume obligations.
  - d. Participating Councils are free to elect not to enter into the joint contractual framework and, instead, to independently select, negotiate and contract with any suppliers of organic waste processing services.

## **Balance of public benefit and detriment**

19. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
20. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public resulting from the proposed arrangements would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the proposed arrangements, and that the proposed arrangements are likely to result in such a benefit to the public that those arrangements should be allowed.
21. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

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<sup>6</sup> This is in contrast to ongoing competition 'in the market'.

## **Length of authorisation**

22. The Applicants seek authorisation for 18 years, comprising a three year period for the joint procurement process, the negotiation/execution of the contracts and the construction/commissioning of the new facilities and a 15 year operating term. The Applicants consider that a 15-year operating term is required to underwrite the investment of the recommended Processors, particularly given that the Processors will be required to design and construct a new processing facility, or make substantial modifications to an existing facility.
23. The ACCC proposes to grant authorisation for a period of 18 years.

## **Draft determination**

### **The application**

24. On 16 July 2014 the Metropolitan Waste Management Group on behalf of itself and Knox City Council, Maroondah City Council, Yarra Ranges Shire Council, Manningham City Council and Whitehorse City Council (together, the Applicants) lodged applications for authorisation A91445 and A91446 with the ACCC. Application A91445 was made using Form A Schedule 1, of the Competition and Consumer Regulations 2010. Application A91446 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### **The net public benefit test**

25. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct. In addition, the ACCC is satisfied that the proposed conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.

### **Conduct for which the ACCC proposes to grant authorisation**

26. The ACCC proposes to grant authorisation to the Applicants for 18 years to:
- a. jointly procure, negotiate and contract for the supply of organic waste processing services; and

- b. make joint decisions regarding the ongoing administration of the contracts for the supply of organic waste processing services, including decisions regarding the allocation of volumes of organic waste to be delivered to an organic waste facility and, in that context, to allocate volumes from particular Participating Councils to particular Processors.

27. This draft determination is made on 27 August 2014.

## **Interim authorisation**

28. At the time of lodging the application, the Applicants requested interim authorisation in order to enter into a Memorandum of Understanding with each Participating Council, and to commence the tender and contract negotiation process to procure organic waste processing services that meet the requirements of the Participating Councils.

29. When considering any request for interim authorisation, the ACCC considers a range of factors, including harm to the applicant and other parties if interim authorisation is or is not granted, possible benefit and detriment to the public, the urgency of the matter and whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.

30. The ACCC considers that it is appropriate to grant interim authorisation at this time as:

- a. interim authorisation is limited to commencing the tender process and negotiating contracts and agreements. The Applicants will not enter into contracts until after the ACCC issues a final determination;
- b. interested parties did not raise any objections with the ACCC; and
- c. the ACCC currently considers that the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public, including the detriment constituted by any lessening of competition resulting from the conduct.

31. The ACCC grants interim authorisation under section 91(2) of the CCA to enable the Applicants to enter into a Memorandum of Understanding with each of the Participating Councils, and to commence the tender and contract negotiation process with Processors and Participating Councils.

32. This interim authorisation does not provide the Applicants with authorisation to enter into contracts with the successful tenderer/s.

33. Interim authorisation will commence on 27 August 2014 and remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## Further submissions

34. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.

## Attachment A - Summary of relevant statutory tests

**Subsections 90(5A)** provides that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to.

**Subsections 90(6)** states that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to.

**Subsection 90(8)** states, relevantly, that the ACCC shall not make a determination granting an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision, unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be.