



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Clarence City Council
Glenorchy City Council
Hobart City Council

in respect of

collective tendering for
recycling processing services

Date: 2 April 2014

Authorisation number: A91408

Commissioners: Sims
Schaper
Rickard
Cifuentes
Court
Walker

The ACCC proposes to grant authorisation to Clarence City Council, Glenorchy City Council and Hobart City Council for 9 years and 6 months to enable them to jointly tender for kerbside recycling services and enter into related contracts.

The ACCC has also decided to grant interim authorisation, which will remain in place until either the date the ACCC's final determination comes into effect, or until the ACCC decides to revoke interim authorisation.

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 31 January 2014, Clarence City Council, Glenorchy City Council and Hobart City Council (the Applicants) lodged application A91408 with the ACCC seeking authorisation for the conduct described below. The Applicants also requested interim authorisation to enable them to engage in the proposed conduct while the ACCC considers the substantive application.
2. The Applicants are local government authorities and bodies corporate incorporated under the *Local Government Act 1993* (Tas).
3. The Applicants are seeking authorisation to jointly tender and subsequently enter into individual contracts comprising common terms for:
 - a. the acceptance and processing of recyclable materials from the Applicants' kerbside collection services; and
 - b. in the case of Glenorchy City Council and Hobart City Council, collection of recyclable materials from their "drop off" recycling centres, if required,(the **Services**).
4. The Applicants propose to enter into contracts with the successful tenderer of five years, with the option of two further extensions of two years in duration each.
5. Authorisation has been sought for a minimum period of 9 years.

Similar authorisations

6. The ACCC has previously considered a number of similar authorisation applications for joint tendering and contracting for various waste management services which include the collection and processing of dry recyclable materials, organics and household waste. These applications have generally been made by groups of councils in Sydney (such as the Southern Sydney Regional Organisation of Councils, and the Northern Sydney Regional Organisation of Councils), and groups of councils in regional NSW and Queensland.

7. The ACCC has granted authorisation to each of these applications with terms ranging from 7 to 20 years.

ACCC evaluation

8. 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 received no submissions from interested parties. The key points from the submissions made by the applicant are discussed in the analysis below.
9. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.
10. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests¹ contained in the Act. 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 constituted by any lessening of competition that would be likely to result.

The relevant area of competition

11. The Applicants submit that the relevant market is that "for the acceptance and sorting of kerbside/roadside collected recyclable materials for either disposal or onward transfer for ultimate recycling".²
12. The ACCC understands that the sorting and processing of recyclables materials involves a number of steps, including the removal of waste and contamination and the sorting of the materials into different streams (e.g. paper/cardboard, plastic, glass, aluminium, steel). The sorted materials are then baled and transported to various national or international processing facilities for either further sorting or to be processed into materials that can then be made into new products.
13. The ACCC does not consider it necessary to precisely identify the relevant areas of competition in assessing the likely public benefits and detriments. However, for the purpose of assessing this application, the ACCC considers that the relevant area of competition likely to be affected is the provision of sorting and processing services for recyclable materials in, or otherwise able to service, southern Tasmania. The Applicants advise that the current main service provider operates the only sorting and processing facility in southern Tasmania.

The future with and without

14. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the

¹ Subsections 90(5A), 90(5B) 90(6) and 90(7). The relevant tests are set out in Attachment A.

² Applicants, Supporting Submission, 31 January 2014.

authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.

15. The ACCC considers that without the proposed conduct each council would select their provider of the Services independently, as they have done previously.

Public benefit

16. 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 principle elements ... the achievement of the economic goals of efficiency and progress.³

Applicants' submission

17. The Applicants submit that the arrangements will deliver public benefits, including:
 - a. Incentive for new entry into the market by an alternative provider as the collective arrangement, including the proposed contract term of 9 years, will provide incentives for new service providers to enter the market from the mainland which will in turn increase the competitiveness of the competition for the supply of these services.
 - b. Reduced fees and/or higher quality services through any new entry or increase in the bargaining position of the councils. Any increase in the competitiveness of the tender process, is likely to result in lowered fees and/or increased service levels. These benefits will then be passed onto rate payers.
 - c. Transaction cost savings are likely to be achieved through the joint tendering arrangements as the councils will save administrative, legal and other staffing costs by not each completing a separate tender and contracting process. The Applicants submit that these time and resources would then be used for other council functions for the benefit of rate payers.
18. The Applicants also submit that if these arrangements are authorised, this may encourage other councils to also undertake collective tender process which will have benefits for those councils and their rate payers.

³ *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.

ACCC consideration

19. The ACCC considers that the proposed conduct is likely to result in some public benefits, including:
- a. **Potential for increased competition:** The aggregated tonnage of recyclable materials from the three councils may encourage increased competition for the tender (from existing providers or new entrants), as the volume and certainty of the contract term may be more attractive to processors than if the councils were to tender individually. Processors who are able to achieve improved economies of scale (as described in (c) below), may be able to offer increased service quality or lower prices.
 - b. **Transaction cost savings:** The combined tendering and contracting process is likely to lead to some efficiency savings for the councils, relative to the scenario where each council conducts its own individual tender process. The joint tender may also lead to a more consistent approach for the management of this waste stream including audits and community education programs to reduce contamination.⁴ The ACCC considers that the transaction costs are lower where a single process is employed, relative to a situation where each Council conducts its own individual tender process. A single process where costs are shared between parties can also facilitate more efficient outcomes.
 - c. **Potential for improved economies of scale for processors:** The aggregation of a larger volume of recyclable materials may enable the service provider to achieve improved economies of scale. These efficiencies could be achieved if the processing costs per tonne of recyclable materials decrease the higher the volume processed. Further, higher volumes may allow processes to invest in new, more efficient processing technologies. However, it is unclear whether the expected volume of recyclable materials from the Applicants will be sufficient for these benefits to be realised.

Public detriment

20. 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.⁵

Applicants' submission

21. The Applicants submit that there will be no public detriments from the arrangements, as "the effect and intention... is to increase competition in the

⁴ Applicants, Further Submission to the ACCC, 12 March 2014.

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

market and reduce the costs of the services to the rate payers of the respective Councils”⁶.

ACCC consideration

22. The ACCC considers that the proposed conduct is likely to result in limited public detriment for the following reasons:
 - a. While the Applicants’ recyclable collecting and processing services will not be contestable for the duration of the relevant contract periods, the tender process will ensure that there will be competition ‘for the market’ (e.g. competition to win the contract).⁷
 - b. Each council has voluntarily chosen to participate in the tender process.⁸

Balance of public benefit and detriment

23. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
24. For the reasons outlined in this draft determination the ACCC 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.
25. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

26. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ This allows 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.
27. In this instance, the Applicants seek authorisation for a minimum of 9 years.
28. The ACCC proposes to grant authorisation for 9 years and 6 months to enable the Applicants to complete the tender process and enter into the proposed contracts with a term of up to 9 years.

⁶ Applicants, Supporting Submission, 31 January 2014.

⁷ This is in contrast to ongoing competition ‘in the market’.

⁸ Applicants, Supporting Submission, 31 January 2014.

⁹ Subsection 91(1).

Draft determination

The application

29. On 31 January 2014 the Applicants lodged application for authorisation A91408 with the ACCC. Application A91408 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1 and 1A) of the Act for authorisation to enable the Applicants to jointly tender, and subsequently enter into individual contracts comprising common terms for the Services.
30. The Applicants seek authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
31. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

32. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed arrangements for which authorisation is sought are 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.

Conduct for which the ACCC proposes to grant authorisation

33. The ACCC proposes to grant authorisation to the Applicants to jointly tender and subsequently enter into individual contracts comprising common terms for the Services for 9 years and 6 months.
34. This draft determination is made on 2 April 2014.

Interim authorisation

35. At the time of lodging the application, the Applicants requested interim authorisation to enable the councils to commence the tender process while the ACCC considers the merits of the application for authorisation.
36. When considering 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.

37. The ACCC **grants** interim authorisation under section 91(2) of the Act to enable the Applicants to:
 - a. finalise and advertise the tender and contract documentation for invitation for tenders under section 333A of the *Local Government Act 1993* (Tas) for the Services; and
 - b. receive and evaluate any tender responses and prepare a recommendation for senior management and for the respective councils tender panel for approval.
38. This interim authorisation does not provide the Applicants with authorisation to enter into contracts with the successful tenderer for the Services.
39. The ACCC considers that it is appropriate to grant interim authorisation at this time as:
 - a. Interim authorisation is limited to commencing and conducting the tender process. The Applicants will not enter into contracts until after the ACCC issues a final determination granting authorisation.
 - b. Interested parties did not raise any objections with the ACCC.
40. Interim authorisation will commence immediately 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

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

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide 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, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) 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, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state 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 in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) 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, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Section 91 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.