



Australian
Competition &
Consumer
Commission

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: 18 June 2014

Authorisation numbers: A91414 & A91415

Commissioners: Sims
Schaper
Rickard
Cifuentes
Court
Featherston

Summary

The ACCC grants authorisation for 18 years from the date this authorisation comes into effect to the Metropolitan Waste Management Group (MWMG) on behalf of itself and eight metropolitan Melbourne councils to enable them to:

- jointly procure, negotiate and contract for the supply of organic waste processing services; and
- make joint decisions to allocate volumes of organic waste from particular participating councils to particular suppliers.

The application for authorisation

1. On 7 March 2014, Metropolitan Waste Management Group (MWMG) on behalf of itself and 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 (Participating Councils) (together, the Applicants) lodged applications A91414 & A91415 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 considered the substantive application.

Background

2. MWMG is a Victorian statutory body corporate which is responsible for municipal solid waste management and planning. In August 2012, it issued a competitive tender for an Organics Processing Facility for use by councils in the south eastern suburbs of Melbourne. After reviewing responses to the tender, a tender evaluation panel (Panel) recommended three suppliers¹ of waste processing services (suppliers) for consideration by the executives of the Participating Councils. The Participating Councils have subsequently passed separate resolutions independently approving the suppliers recommended by the Panel. It is proposed that each of the suppliers will receive a portion of the total volume of organics to be delivered for processing by the Participating Councils (although each Participating Council will remain free to determine which facility or facilities it will use).

The conduct

3. 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 conclude the tender process and MWMG will negotiate with potential suppliers regarding the terms for the supply of organic waste processing services to the Participating Councils.

¹ The three suppliers recommended were Transpacific Cleanaway Pty Ltd, Veolia Environmental Services (Aust) Pty Ltd and Sacyr Industrial Pty Ltd.

The Applicants seek authorisation of this conduct as it may have the effect of substantially lessening competition.

- b. Make joint decisions to allocate volumes of organic waste from particular Participating Councils to particular suppliers.

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 suppliers.²

The Applicants consider that this conduct may constitute a contract, arrangement or understanding between the Participating Councils which has the purpose of excluding or limiting dealings with the three suppliers who enter into contracts with MWMG and the Participating Councils for the supply of organic waste processing services. However, they submit that any such contract, arrangement or understanding is limited in scope, given that it would:

- only be made between those Participating Councils that ultimately enter into the contractual framework proposed;
- only relate to the supply of organic waste to, or allocation of organic waste volumes between, any of the suppliers that choose to enter into that contractual framework;
- not extend to waste processing service suppliers other than those which have entered into a contract with the Applicants; and
- not involve any variation or proposed variation to the contractual rights of waste processing service suppliers (eg varying the contracted gate fees or minimum quantities of organic waste to be delivered to each waste processing supplier).

The Applicants seek authorisation of this arrangement as it may contain an exclusionary provision (within the meaning of section 45 of the CCA) that may also be a cartel provision.

4. The Applicants seek authorisation for 18 years, comprising a three year period for the remainder of the joint procurement process, the negotiation/execution of the contracts and the construction/commissioning of the new facilities and a 15 year operating term.
5. On 22 May 2014, the ACCC issued a draft determination proposing to grant authorisation to enable the Applicants to jointly tender jointly procure, negotiate and contract for the supply of organic waste processing services and make joint decisions to allocate volumes of organic waste from particular participating councils

² 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.

to particular suppliers. The ACCC also granted interim authorisation to allow the councils to commence the tender process.

6. No parties requested a conference in relation to the draft determination.

Similar authorisations

7. The ACCC has previously considered a number of similar authorisation applications for joint tendering and contracting for waste management services. 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. The ACCC has granted authorisation to each of these applications with terms ranging from 7 to 20 years.
8. This is the first time that an exclusionary provision has been included in an application for authorisation relating to waste management services.

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 this application, including waste-services providers, local councils, industry associations and government authorities. The ACCC received one submission, from Environment Protection Authority Victoria (EPA), supporting the application.
10. The ACCC invited submissions from interested parties following the release of the draft determination and did not receive any.
11. Copies of the public submissions made by the Applicants may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.
12. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests³ 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 constituted by any lessening of competition that would be likely to result.

The relevant area of competition

13. The Applicants submit that the relevant area of competition is at least as large as the market for the supply of organic waste processing services in the Melbourne metropolitan area. Other types of waste collection and resource recovery services are not able to be easily or quickly modified to provide organic waste processing

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

services because of the specialised processes and equipment required for decontaminating, treating and composting organic material.

14. The Applicants note that the Participating Councils require the receiving facility to be located within the Melbourne metropolitan area to minimise the distance travelled by the council to deliver its organic waste collection. However, the Applicants consider that it is possible for subsequent stages of processing, such as composting, to be performed at a facility located outside of the Melbourne metropolitan area.
15. The ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in assessing this application. However, the ACCC considers that the relevant area of competition likely to be affected is the supply and acquisition of organic waste processing services in Melbourne.

The future with and without

16. 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 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.
17. The Applicants consider that there are at least two possible future scenarios in the absence of the conduct for which authorisation is sought:
 - a. each of the Participating Councils could individually negotiate their respective contracts for the supply of organic waste processing services;
 - b. the Participating Councils could explore some form of modified collaboration which would rely on the CCA's joint venture or collective acquisition exceptions.
18. 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.

Public benefit

19. Public benefit is not defined in the CCA. However, the Australian Competition 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.⁴
20. The Applicants submit that the arrangements will deliver public benefits, including:

⁴ *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.

- a. Environmental and health benefits - By introducing greater capacity to accommodate the anticipated growth in organic waste volumes, improved and more efficient processing technology and the capability to handle food organic waste, the proposed conduct ensures that environmental benefits from diverting organic waste from landfill, including those highlighted by the Commonwealth in relation to CO₂ emissions, are maximised.
 - b. Investment viability and operational risk - The substantial investment involved in establishing an organics processing facility that utilises best practice technology and is capable of processing the requisite volumes of organic waste is made viable through aggregating the Participating Councils' demand for processing services.
 - c. Transaction cost savings - The joint procurement of organic waste processing services will deliver considerable transaction cost savings to each of the Participating Councils compared with each Participating Council engaging separately with potential suppliers. MWMG's expertise in technical waste management issues can be utilised collectively by the eight Participating Councils rather than each of them separately securing specialist tendering and contract management services.
 - d. Improved purchasing power of Participating Councils - The aggregated processing requirements of the Participating Councils will place them in a stronger bargaining position.
 - e. Efficiencies and capacity utilisation - The processing of combined quantities of organic waste from the Participating Councils will deliver efficiencies and economies of scale in the delivery of processing services, lowering the cost per tonne of organic material received.
21. EPA submits that joint procurement of waste services supports a healthy environment and creates the opportunity for industry to develop and operate larger, better equipped and managed waste management facilities. This in turn drives improvement in the waste industry's compliance with legislation.
22. 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 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 council engages separately with potential suppliers.
 - b. Potential for increased competition: The combined volume of Participating Councils is likely to underwrite the investment needed to encourage a new supplier to enter the market. The ACCC understands that one of the suppliers recommended by the Panel has not previously operated organic waste processing facilities in Australia and is expected to construct a new facility should it be successful in securing a portion of the combined processing volumes.

- c. Potential for improved economies of scale for suppliers: The aggregation of a larger volume of organic waste is likely to enable the service provider to achieve improved economies of scale. These efficiencies could be achieved if the processing costs per tonne of organic material decrease the higher the volume processed.
- 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

23. 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.⁵

24. 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.

25. The Applicants consider that there are a number of current potential suppliers of organic waste processing services in the relevant markets and competition between those suppliers to secure contracts is aggressive.

26. The Applicants submit that the proposed arrangements are not anticompetitive for the following reasons:

- a. as the proposed conduct involves only eight of the 30 councils located in the Melbourne metropolitan area, a large volume of demand for organic waste processing in Melbourne is unaffected. It is estimated that the combined volume of bin based organic waste to be collected by the Participating Councils at the commencement of the proposed contracts in 2016 will be 140,000 tonnes per annum out of a total of approximately 380,000 tonnes per annum for all councils in metropolitan Melbourne.
- b. the suppliers recommended by the Panel were selected following a competitive and transparent tender process, having regard to detailed objective criteria and subject to an independent audit procedure;
- c. the Participating Councils' participation in the joint procurement and negotiation process is voluntary, and Participating Councils are free to independently select and negotiate with an alternative supplier for organic waste processing services if they consider that this would result in a more favourable outcome;

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

- d. the Participating Councils are also free to select and contract with any one or more of the three suppliers recommended by the Panel and are not restricted or directed to contract with any one or more particular suppliers;
- e. the suppliers are free to compete for contracts to supply other consortia of Melbourne metropolitan councils;
- f. the proposed suppliers will also be able to offer services to customers other than the Participating Councils, including industry clients and other Victorian local councils. There are 79 Victorian local councils, of which 30 are located in the Melbourne metropolitan area; and
- g. the Participating Councils have input into the terms of the Processing Deed to be negotiated by MWMG and may propose variations or additions to the terms.

27. The ACCC considers that the proposed conduct is likely to result in limited 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 relevant contract period, the tender process will ensure that there will be competition 'for the market' (e.g. competition to win the contract).⁶
- b. A significant volume of organic waste collected by Melbourne councils not subject to the proposed conduct will remain available to alternative suppliers 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 contractual framework and, instead, to independently select, negotiate and contract with any supplier of organic waste processing services.

Balance of public benefit and detriment

28. 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.

29. For the reasons outlined in this 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

⁶ This is in contrast to ongoing competition 'in the market'.

arrangements are likely to result in such a benefit to the public that those arrangements should be allowed.

30. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

31. The CCA allows the ACCC to grant authorisation for a limited period of time.⁷ 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.

32. In this instance, the Applicants seek authorisation for 18 years, comprising a three year period for the remainder of 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 three recommended suppliers, particularly given that each of the suppliers will be required to design and construct a new processing facility, or make substantial modifications to an existing facility.

33. The ACCC grants authorisation for a period of 18 years from the date this authorisation comes into effect to enable the Applicants to complete the tender process and enter into the proposed contracts with a term of up to 15 years.

Determination

The application

34. On 7 March 2014 the Applicants lodged application for authorisation A91414 with the ACCC. Application A91414 was made using Form A Schedule 1, of the Competition and Consumer Regulations 2010. Application A91415 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The applications were made under subsection 88 (1 and 1A) of the CCA to enable the Applicants 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 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 suppliers.

⁷ Subsection 91(1).

35. 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 CCA. The arrangements may also contain an exclusionary provision (within the meaning of section 45 of the CCA) that may also be a cartel provision.

The net public benefit test

36. For the reasons outlined in this 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. In addition, the ACCC is satisfied that the proposed arrangements 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 grants authorisation

37. The ACCC grants authorisation to the Applicants for 18 years from the date this authorisation comes into effect (that is, until **10 July 2032**) to:

- a. jointly procure, negotiate and contract for the supply of organic waste processing services; and
- b. make joint decisions to allocate volumes of organic waste from particular Participating Councils to particular waste processing services suppliers.

38. The 18 year period comprises three years for the completion of the joint procurement process, the negotiation of contracts and the construction of new facilities; and the proposed 15 year operating term of the contracts.

39. This determination is made on 18 June 2014.

Interim authorisation

40. At the time of lodging the application, the Applicants requested interim authorisation in order to:

- a. conclude the tender process;
- b. negotiate contracts with suppliers and Participating Councils; and
- c. negotiate agreements for the ongoing administration of the contracts.

41. On 22 May 2014, the ACCC granted interim authorisation under section 91(2) of the CCA to enable the Applicants to engage in the conduct as described above.

42. 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.

Date authorisation comes into effect

43. This determination is made on **18 June 2014**. If no application for review of the determination is made to the Australian Competition Tribunal, the determination will come into force on **10 July 2014**.

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.