



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Metropolitan Waste and Resource Recovery Group

in respect of

joint procurement of recyclables receiving and
processing services

Date: 11 June 2015

Authorisation numbers: A91489 & A91490

Commissioners: Sims
Rickard
Cifuentes
Court
Featherston
Walker

Summary

The ACCC proposes to grant authorisation to the Metropolitan Waste and Resource Recovery Group (MWRRG) and four Melbourne city councils for 12 years to enable the joint procurement of recyclables receiving and processing services.

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 applications for authorisation

1. On 8 April 2015, the Metropolitan Waste and Resource Recovery Group (MWRRG) on behalf of itself and Brimbank City Council, Melbourne City Council, Port Phillip City Council, and Wyndham City Council (Participating Councils) (together, the Applicants) lodged applications A91489 and A91490 with the ACCC under subsections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the CCA).
2. MWRRG¹ 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. MWRRG works with councils in metropolitan Victoria to facilitate best practice in waste management, and has a role in coordinating the joint procurement of waste management services on behalf of these councils.
3. The Participating Councils are local government authorities in metropolitan Victoria whose functions are governed by the *Local Government Act 1989* (VIC). The councils are responsible for among other things, providing residential waste collection services, recyclables processing services and organic waste processing services to their respective local communities.
4. The Applicants seek authorisation to:
 - a. jointly tender, negotiate, and contract, for the supply of recyclables receiving and processing services
 - b. make joint decisions regarding variations to the contract for the supply of recyclables and receiving processing services, and if necessary, about the allocation of recyclables volumes amongst suppliers.

The Applicants explain that if more than one supplier is contracted, MWRRG and/or the Participating Councils may make decisions regarding the allocation of particular volumes of recyclables amongst the contracted suppliers. For example, MWRRS and/or the Participating Councils may

¹ MWRRG was formerly known as the Metropolitan Waste Management Group.

decide that it would be appropriate for particular volumes of recyclables to be allocated to one or more suppliers for capacity or efficiency reasons.

(Proposed Conduct)

5. It is proposed that MWRRG will conduct the tender process and also negotiate with potential suppliers regarding the contractual terms for the supply of recyclables receiving and processing services to the Participating Councils. After this, the Participating Councils will enter into separate agreements with a supplier or suppliers on the terms negotiated by MWRRG.
6. The Applicants seek authorisation for 12 years. This period covers a maximum 11-year operating term and an additional 12 months for the completion of the tender and the negotiation/execution of new contracts and interim supply arrangements.
7. The Applicants also requested interim authorisation to enable them to progress the joint tendering and negotiation process. Proposed Conduct while the ACCC considers the substantive applications. The ACCC granted interim authorisation on 11 May 2015 on the basis that no contracts will be entered into for the provision of the services until the ACCC's final determination is made.

Previous authorisations

8. The ACCC has previously considered a number of applications for authorisation involving joint tendering and contracting for various waste management services which include the collection and processing of materials such as dry recyclables, organics and household waste.
9. Previous applicants have included groups of councils in Sydney, metropolitan Melbourne and regional NSW. There have previously been two applications lodged by MWRRG (then the Metropolitan Waste Management Group) (A91445-6 and A91414 -5), which involved MWMG seeking authorisation for similar conduct on behalf of itself and other metropolitan councils in Melbourne.²
10. Previous authorisations have been granted for periods ranging from 7 to 20 years. The two most recent matters involving MWRRG were respectively authorised for 12 and 18 years.

ACCC evaluation

11. 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 21 interested parties potentially affected by these applications, including waste-services providers, local councils, industry associations and government authorities.

² For A91445-6, the councils involved were Knox City Council, Manningham City Council, Maroondah City Council, Whitehorse City Council, and Yarra Ranges Shire Council. For A91414-5 the councils of Bayside, Cardinia Shire, Casey, Frankston, Glen Eira, Greater Dandenong, Kingston, and Monash were involved.

12. The ACCC did not receive any public submissions regarding the substantive or interim authorisation applications.
13. The ACCC's evaluation of the Proposed Conduct is in accordance with the relevant net public benefit tests³ contained in 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.
14. In its evaluation of the applications the ACCC has taken into account:
 - a. the applications and submissions received from the Applicants and 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 council would tender for the services independently;
 - d. the relevant areas of competition likely to be affected by the Proposed Conduct. While the ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in assessing these applications the ACCC notes that the Proposed Conduct will primarily affect the supply of services for receiving and processing recyclable material in the Melbourne metropolitan area; and
 - e. the period for which authorisation has been sought.

Public benefit

15. 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.⁴
16. 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 the Participating Councils
 - e. efficiencies and capacity utilization
 - f. increased recovery of productive uses from kerbside waste collections.

³ Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8).

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.

17. The ACCC considers that the Proposed Conduct is likely to result in some public benefits, including:

- a. **Transaction cost savings:** the joint tendering and contracting process is likely to lead to some efficiency savings for the Participating Councils (including those arising from 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 suppliers.
- b. **Potential for improved economies of scale:** the aggregation of a larger volume of recyclables is likely to enable the successful supplier or suppliers to achieve improved economies of scale, e.g. through lower costs per tonne of recyclables received and processed. The ACCC notes that this benefit was claimed by the Applicants under the heading of 'efficiencies and capacity utilization.'
- c. **Potential for increased competition:** the combined volume of the Participating Councils is likely to underwrite the investment needed to encourage the entry of new suppliers of recyclables receiving and processing services in metropolitan Melbourne through improved viability of their investment and reducing operational risk.
- d. **Environmental benefits:** the aggregation of a larger volume of recyclables may help to underwrite the investment required to upgrade an existing facility or develop a new facility utilising newer and more efficient technology. This may reduce the amount of resources used to process the recyclables collected and increase recovery rates for recyclables collected by the Councils (which the Applicants characterise as generating increased recovery of productive uses from kerbside waste collection centres).

Public detriment

18. 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

19. 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:

- a. the Proposed Conduct involves a maximum of four of the 31 councils located in the Melbourne metropolitan area, which in aggregate accounts for approximately 51,300 tonnes of the total 1.5 million tonnes of recyclables collected by Melbourne metropolitan councils annually;

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

- b. there are a number of potential suppliers of recyclables receiving and processing services in and around metropolitan Melbourne and competition between those suppliers to secure contracts is aggressive;
- c. the tender process to select the supplier(s) will be competitive and transparent, and will have regard to detailed objective criteria and be subject to an independent audit procedure;
- d. participation in the joint procurement and negotiation process is voluntary, and Participating Councils will be free to independently select and negotiate with an alternative supplier if they consider this would lead to a more favourable outcome; and
- e. the selected supplier(s) will also be able to offer recyclables receiving and processing services to customers other than the Participating Councils.

20. The ACCC considers that the Proposed Conduct is likely to result in limited, if any, public detriment for the following reasons:

- a. While the receiving and processing of recyclables for the Participating Councils 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).⁶
- b. A significant volume of recyclable waste collected by Melbourne councils is 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 MWRRG and the Participating Councils regarding the allocation of volumes of recyclables to particular suppliers will only extend to those suppliers that are already contracted to the Participating Councils and who will therefore 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 recyclables receiving and processing services.

Balance of public benefit and detriment

21. 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.

22. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public resulting from the Proposed Conduct would outweigh the detriment to the public constituted by any lessening of competition, and that the Proposed Conduct is likely to result in such a benefit to the public that the Proposed Conduct should be allowed.

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

⁶ This is in contrast to ongoing competition ‘in the market’.

Length of authorisation

24. The Applicants seek authorisation for 12 years, comprising 12 months for the completion of the tender and negotiation/execution of the new contracts and interim supply arrangements, and also a maximum operating term of 11 years.
25. The Applicants consider that a 11-year operating term is required to incentivise potential suppliers (including those that would be required to make capital investments) to participate in the tender.
26. The ACCC proposes to grant authorisation for 12 years, as requested.

Draft determination

The applications

27. On 8 April 2015 the Metropolitan Waste and Resource Recovery Group on behalf of itself and Brimbank City Council, Melbourne City Council, Port Phillip City Council, and Wyndham City Council (together, the Applicants) lodged applications for authorisation A91489 and A91490 with the ACCC.
28. Application A91489 was made using Form A Schedule 1, of the Competition and Consumer Regulations 2010 as the Proposed Conduct may contain a cartel provision which may also be an exclusionary provision. Application A91490 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010 as the Proposed Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition.
29. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test⁷

30. 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 benefit to the public that would outweigh the detriment to the public constituted by any lessening of competition that would result. 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 Proposed Conduct should be allowed to take place.

Conduct for which the ACCC proposes to grant authorisation

31. The ACCC proposes to grant authorisation to the Applicants for 12 years to:
 - a. jointly tender for, negotiate, and contract for the supply of recyclables receiving and processing services

⁷ Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8).

- b. make joint decisions regarding variations to the contract for the supply of recyclables and receiving processing services, and if necessary, about the allocation of recyclables volumes amongst suppliers.

32. This draft determination is made on 11 June 2015.

Further submissions

33. The ACCC will now seek further submissions from 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 CCA.