



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Southern Metropolitan Regional Council

in respect of

conducting a joint procurement process for the selection of a purchaser for their Materials Recovery Facility, and then jointly negotiating and contracting with the new owner for the provision of recyclable waste processing services

Date: 23 March 2016

Authorisation number: A91518

Commissioners: Featherston
Court
Rickard

Summary

The ACCC has decided to grant authorisation to Southern Metropolitan Regional Council (SMRC) and its member councils in the City of Cockburn, City of Fremantle, City of Melville and Town of East Fremantle (the Project Participants) for 21 years to conduct a joint procurement process for the selection of a purchaser for their Materials Recovery Facility (MRF) and enter into agreements with the new MRF Operator for the processing of the Project Participants' recyclable waste.

The ACCC grants authorisation until 14 April 2037.

The application for authorisation

1. On 22 October 2015, Southern Metropolitan Regional Council (SMRC) on behalf of itself and its member councils, the City of Cockburn, City of Fremantle, City of Melville and Town of East Fremantle (together, the **Applicants**) lodged application A91518 with the Australian Competition and Consumer Commission (ACCC).
2. On 11 February 2016, the ACCC issued a draft determination¹ proposing to grant authorisation for the Proposed Conduct for 21 years.

The Proposed Conduct

3. The Applicants seek authorisation for:
 - a. the SMRC, on behalf of the Project Participants to conduct a competitive procurement process for the selection of a purchaser of their MRF who will operate the MRF for the receiving and processing of recyclables collected by the Applicants;
 - b. the entry by each of the Applicants into an agreement with the Operator of the MRF for the processing of recyclable waste delivered by the Project Participants; and
 - c. the making of joint decisions regarding service and operation matters and ongoing administration, including decisions on implementation of the agreement.
4. The Applicants seek authorisation for 21 years comprising:
 - a. one year to conduct the tender process; and
 - b. the maximum term of the Agreement to be entered into with the successful tenderer of up to 20 years.
5. At the time of lodging the application the Applicants also requested interim authorisation to enable them to conduct the joint tender process for the disposal

¹ Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

of their MRF and negotiate the terms of contracts with the preferred Operator(s) for the processing of their recyclable waste. The ACCC granted interim authorisation on 18 November 2015. Interim authorisation was not sought, or granted, for the making or entering into of any contracts.

Background

The Local Government Areas

6. The SMRC is a Western Australian local government authority established under the *Local Government Act 1995 (WA)* by local governments in the southern region of metropolitan Perth. It is comprised of five member councils, being the City of Cockburn, City of Fremantle, City of Melville, Town of East Fremantle and City of Kwinana (Member Councils). While the City of Kwinana is a member council of the SMRC, it is not an applicant for the purposes of this application for authorisation.
7. The SMRC region encompasses 340 km² within Perth's southern metropolitan area and has a combined population of over 275 000 people and over 105 000 households.
8. The Applicants estimate that currently approximately 160 000 tonnes of recyclable waste are collected each year in the Perth metropolitan area. The SMRC Member Councils currently collect approximately 34 000 tonnes of recyclable waste per annum.
9. Attachment B contains a map of the locality of the SMRC Member Councils.

The MRF

10. The SMRC owns and operates the Regional Resource Recovery Centre (RRRC) in Canning Vale, WA. One of the three core waste processing facilities located at the RRRC is the MRF², which processes all of the recyclable waste collected by the SMRC Member Councils. The Project Participants initially funded the construction of the MRF. The City of Kwinana did not participate in the establishment or funding of the MRF but does have a waste supply agreement with the MRF.
11. Currently the SMRC delivers waste management solutions to the Member Councils by receiving, recycling and processing their recyclable waste. The MRF processes recyclable materials such as paper, cardboard, plastic bottles, glass, aluminium and tin cans that are placed in yellow topped recycling bins by residents and collected by the Member Councils.
12. The Member Councils are each responsible for, amongst other things, providing residential waste collection services within their respective districts, guaranteeing all loans and funding the operations of the SMRC.
13. The MRF has a maximum design capacity of 24 tonnes per hour, which equates to 120 000 tonnes per annum (based on the MRF running for 16 hours per day, 6 days per week). In 2014-15, approximately 40 000 tonnes of recyclable waste

² Two other facilities at the RRRC – Waste Composting Facility and Green Waste Processing Facility – are not part of this application.

was collected for processing by the MRF comprising of 34 000 tonnes from SMRC Member Councils and 6 000 tonnes from other councils.

14. While some spare capacity at the MRF is used by non-Member Councils, the Applicants submit that capacity at the MRF is not fully utilised because the SMRC Member Councils priority in operating the MRF is focused on providing core services to their ratepayers rather than commercial operations such as providing recyclable waste processing services to third parties.

Other recycling facilities

15. There are currently five MRFs in Perth, and three operators. These are the:
 - a. Bayswater, Maddington and Mandurah MRF's – operated by Cleanaway;
 - b. Bibra Lake MRF – operated by Perthwaste; and
 - c. Canning Vale MRF – operated by the SMRC.
16. The City of Wanneroo operated the Wangara MRF until it closed in late 2014.
17. Attachment B contains a map of Perth MRF locations.

Previous authorisations

18. The ACCC has previously considered a number of authorisation applications involving joint tendering and contracting for various waste management services.
19. Previous applicants have included groups of councils in Brisbane (e.g. Redland City Council & Brisbane City Council), Sydney (e.g. the Southern Sydney Regional Organisation of Councils and the Northern Sydney Regional Organisation of Councils), metropolitan Melbourne (e.g. matters involving the Metropolitan Waste Management Group), and groups of councils in regional NSW and Queensland.
20. Most previous applications have involved joint tendering for the collection and processing of waste. Some have involved collection only while others have involved processing only. The current application relates only to the processing of waste.
21. A key difference between this application and the previous authorisations granted is that the successful tenderer will operate and process waste from the MRF currently owned by the Applicants and the tender process also involves the selection of a purchaser for the MRF.
22. Previous authorisations concerning waste management have typically been granted for periods ranging from 6 to 20 years.

Submissions

23. The ACCC tests the claims made by the Applicant in support of an application for authorisation through an open and transparent public consultation process.

24. Prior to the draft determination, the ACCC sought submissions from a number of interested parties potentially affected by this application, including waste-services providers, local councils, industry associations and government authorities. No submissions were received.
25. The ACCC also received no submissions in response to the draft determination and no pre-decision conference was called.

ACCC evaluation

26. The ACCC's evaluation of the proposed arrangements 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 constituted by any lessening of competition that would be likely to result.
27. In its evaluation the ACCC has taken into account:
 - a. the application and submission received from the Applicants;
 - 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 the most likely outcome without the Proposed Conduct is that the SMRC would separately evaluate prospective purchasers of the MRF and each Project Participant would individually negotiate with the purchaser of the MRF for the provision of waste recycling resources. Other possible alternatives are the SMRC continuing to operate the MRF on behalf of the Project Participants or the SMRC and the Project Participants exploring alternative models for collaboration using the MRF. However, the ACCC notes the Project Participants intention in selling the MRF is twofold: to reduce their waste disposal costs through debt reduction from the MRF sale proceeds; and reduce future recycled waste processing costs from the realisation of efficiencies that having an operator with expertise and a commercial interest in recyclable waste processing operate the facility may generate. These objectives will not be achieved if the SMRC and/or the Project Participants continue to operate the MRF;
 - 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 application. The ACCC considers that the relevant areas of competition likely to be affected are the provision of recyclable waste processing services in the Perth Metropolitan region in Western Australia; and
 - e. the period for which authorisation has been sought.

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

Public benefit

28. 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

29. The Applicants submit that the Proposed Conduct will deliver public benefits, including economics benefits and environmental benefits.

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

a. **Transaction cost savings:** The combined tendering process for the selection of a purchaser for the MRF and combined contracting process for the future supply of recyclable waste processing services is likely to lead to some cost savings (including the removal of some duplicated administrative costs) for the Applicants relative to the scenario where each council negotiates and contracts bilaterally.

b. **Potential for increased competition:** The combined recyclable waste volume of the Project Participants is likely to encourage increased competition for the tender. The ACCC understands that a number of the potential tenderers do not currently operate recyclable waste processing facilities in the Perth Metropolitan Region. The combined volume is also likely to underwrite further investment and maintenance in the MRF. In particular, the Applicants state that the MRF has a useful life of at least 10 years from the date it was officially opened (November 2012) and considerably longer if properly maintained and invested in. The Project Participants propose a maximum term of their agreement with the successful tender of up to 20 years thereby providing certainty of volumes to the operator beyond the existing estimated useful life of the MRF.

31. The Applicants argue that having the MRF run by a private operator will also produce other efficiency and environmental benefits because the successful tenderer is like to have more expertise in operating the MRF and commercial incentives to maximise throughput from third parties, thereby realising economies of scale and environmental benefits through increased recycling. The ACCC accepts that the procurement process for the selection of a purchaser may facilitate the realisation of these public benefits. However, these public benefits are likely to be realised through the disposal of the MRF to a private sector operator whether it proceeds through the process the subject of the application for authorisation or by other means.

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.

Public detriment

32. 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

33. The Applicants submit that the joint tendering and contract arrangements will not result in any significant public detriment and that any public detriment that does arise would be outweighed by the substantial public benefits.

34. The Applicants submit that any possible reduction in competition will be mitigated by the following factors:

- a. the tender will be competitive and transparent, with the process allowing the maximum number of suppliers to compete, all operators within the waste industry will be encouraged to apply and the successful tenderer will be selected based on detailed objective criteria;
- b. the Proposed Conduct covers only 4 of the 30 local governments within the Perth Metropolitan area, which aggregates to approximately 20 percent of the recyclable waste collected by local governments in the Perth metropolitan area;
- c. with or without the Proposed Conduct the Project Participants will still deliver their recyclable waste to the MRF; and
- d. the options open to the City of Kwinana, which is a SMRC Member Council but not a Project Participant, will not change with or without the Proposed Conduct - it may choose to enter into a new waste supply agreement with the new Operator or supply its recyclable waste to another MRF.

35. The ACCC considers that the proposed joint tender for the selection of a purchaser for the MRF and future supply of recyclable waste processing services to the Project Participants by the successful tenderer is likely to result in some public detriment in the form of Project Participants' recyclable waste processing services not being contestable for the duration of the contract period. However this detriment is limited for the following reasons:

- a. the tender process will ensure that there will be competition between suppliers to win the contract; and
- b. the Proposed Conduct involves a relatively small proportion of recyclable waste from the Perth Metropolitan region. As such, a significant volume of recyclable waste collected and processed by other local councils is not subject to the conduct and may remain available to alternative suppliers who are not successful tenderers for the contract.

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

Balance of public benefit and detriment

36. 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, including any lessening of competition.
37. For the reasons outlined in this 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.
38. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

39. The Applicants seek authorisation for 21 years, one year for the tender process and the maximum term of the agreement with the successful tender of up to 20 years.
40. The Applicants submit that a minimum initial 10 year term is required in order to incentivise potential operators to participate in the tender for the purchase of the MRF and the subsequent supply of recyclable waste processing to the Project Participants.
41. As noted, the Applicants further submit that the operational life of the MRF could be considerably longer than 10 years with proper maintenance and investment. They argue however that the expansion or upgrading of the MRF towards the end of its operational life requires a substantial investment and carries significant operational risk for the Operator. The Applicants argue that a contract of up to 20 years would provide certainty and a sufficient volume of recyclable waste to the Operator to provide incentives for ongoing maintenance and investment to extend the useful life of the MRF.
42. The Applicants also argue that a 20 year contract will make the acquisition more attractive to potential tenderers increasing competition between tenderers for the purchase of the MRF.
43. The ACCC has decided to grant authorisation for 21 years.

Determination

The application

44. On 22 October 2015, the Applicants lodged application for authorisation A91518 with the ACCC. Application A91518 was made using Form B Schedule 1 of the CCA. The Application was made under subsections 88(1) and 88(1A) of the CCA for the Applicants to make and give effect to contracts, arrangements or understandings in relation to:
 - a. a joint procurement process, including the joint procuring and joint evaluation of tenders received and the selection of a purchaser for the

MRF who will operate the MRF for receiving and processing of recyclables collected by the Project Participants;

- b. entry by each of the Applicants into agreements with the Operator of the MRF for the processing of recyclable waste delivered by the Project Participants. The Agreements will:
 - i. provide the Operator with the right to process all of the recyclable waste collected by the Project Participants within their respective districts;
 - ii. require the Operator to use the SMRC weighbridge for all recyclable waste delivered to the MRF by the Project Participants; and
 - iii. provide that the Project Participants will pay a gate fee to the Operator for the processing of the waste; and
- c. the making of joint decisions regarding service and operation matters and ongoing administration, including decisions on implementation of the Agreement.

45. 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 net public benefit test⁶

46. For the reasons outlined in this determination, the ACCC is satisfied 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 grants authorisation

47. The ACCC grants authorisation to the Applicants for 21 years for the Proposed Conduct as outlined in paragraph 44 until 14 April 2037.

Conduct which the ACCC has not authorised

48. The authorisation does not extend to the acquisition of the MRF by the successful tenderer(s). That acquisition may be subject to assessment by the ACCC under section 50 of *Competition and Consumer Act 2010*.

Interim authorisation

49. At the time of lodging the application, the Applicants requested interim authorisation to enable them to conduct a joint procurement process for the

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

disposal of the MRF and negotiate contracts with the preferred Operator(s) for the processing of their recyclable waste. Interim authorisation was not sought for the making or entering into of any contracts. The ACCC granted interim authorisation under subsection 91(2) of the CCA on 18 November 2015.

50. 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

51. This determination is made on 23 March 2016. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 14 April 2016.

Attachment A - Public benefit tests in CCA

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:

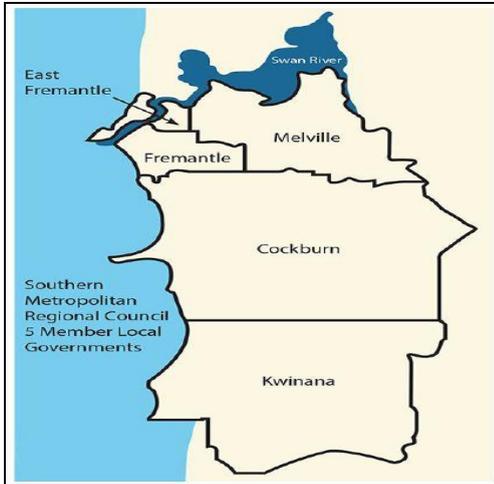
- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any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

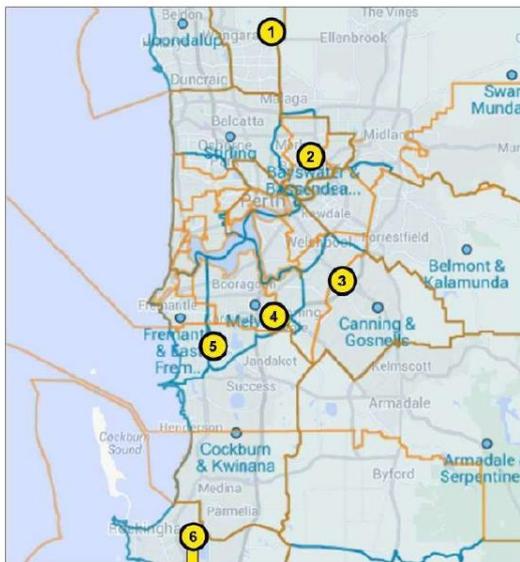
Attachment B

Map of the locality of SMRC Member Councils



Map of Perth MRF locations

Perth MRF locations



1. City of Wanneroo, Wangara MRF (closed late 2014)
2. Cleanaway, Bayswater MRF
3. Cleanaway, Maddington MRF
4. SMRC, Canning Vale MRF
5. Perthwaste, Bibra Lake MRF
6. Cleanaway, Mandurah MRF

Source: EY (2014)