



Draft Determination

Application for authorisation AA1000583

lodged by

Barwon Water & Ors

in respect of

collective bargaining conduct

Authorisation number: AA10000583

Date 9 December 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes to grant authorisation to enable the Borough of Queenscliff, City of Greater Geelong, Colac Otway Shire, Golden Plains Shire, Surf Coast Shire and Wyndham City Council (the Six Councils) to collectively bargain with Barwon Water Corporation (Barwon Water) about the terms of waste supply agreements covering the supply of waste processing services through a proposed Regional Renewable Organics Network (RRON).

The ACCC considers collective bargaining by the Six Councils is likely to result in public benefits in the form of: transaction cost savings, improved efficiencies and environmental benefits.

The ACCC considers that any public detriment is likely to be limited. The Six Councils are seeking to move to a more efficient, and environmentally friendly system of managing organic waste. The Six Councils submit that no current supplier is able to address their requirements in this respect and that the proposed arrangements with Barwon Water are cost effective and represent value for money. Notwithstanding this, each Council will evaluate the offer made by Barwon Water and decide whether to engage with Barwon Water or appoint another supplier.

The ACCC proposes to grant authorisation for 20 years.

The ACCC invites submissions in relation to this draft determination by 14 January 2022 before making its final decision.

1. The application for authorisation

- 1.1. On 13 October 2021, the Six Councils and Barwon Water (the **Applicants**) lodged application for authorisation AA1000583 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for the Six Councils to collective bargaining with Barwon Water about the procurement and management of organics waste processing services for 20 years. This application for authorisation AA1000583 was made under subsection 88(1) of the Competition and Consumer Act 2010 (*Cth*) (the **CCA**).
- 1.2. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the CCA for arrangements that may otherwise risk breaching those provisions in the CCA, but are not harmful to competition and/or are likely to result in overall public benefits.

The Proposed Conduct

- 1.3. The Applicants are seeking authorisation:
 - a) for collective bargaining conduct by the Six Councils in order to negotiate the terms of Waste Supply Agreements with Barwon Water (Collective Bargaining)
 - b) for, at the conclusion of the Collective Bargaining period, the Six Councils to discuss with each other whether any one or more of them will or will not enter into individual Waste Supply Agreements with Barwon Water (on the terms collectively negotiated), notwithstanding that each Council will ultimately make its own independent decision in accordance with its own approval processes, and
 - c) to enter into and give effect to the Waste Supply Agreements.(the **Proposed Conduct**)

Interim authorisation

- 1.4. The Applicants requested interim authorisation to enable them to engage in the Proposed Conduct while the ACCC is considering the substantive application. On 11 November 2021, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act.¹ Interim authorisation extends to the Six Councils entering into Waste Supply Agreements with Barwon Water where those Waste Supply Agreements include a condition precedent that they will not come into effect until such time as final authorisation is granted. Interim authorisation does not extend to the Six Councils giving effect to Waste Supply Agreements with Barwon Water. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn or until interim authorisation is revoked.

2. Background

- 2.1. The Six Councils are all Victorian local government authorities. Their roles and functions are governed by the *Local Government Act 2020 (Vic)* (**LGA Act**). The LGA Act establishes overarching governance principles, which Councils should give effect to in the performance of their roles. One of the overarching principles is that 'collaboration with other Councils and Government and statutory bodies is to be sought'.²
- 2.2. The location of the Six Councils is illustrated on the map below:

Map 1: Location of Councils



- 2.3. Barwon Water is a statutory corporation established under the *Water Act 1989 (Vic)*. It provides water, sewerage and recycled water services within a service area which covers much of the territory of the Six Councils.
- 2.4. The RRON is a proposed organics processing facility developed in a partnership between the Six Councils and Barwon Water. It is intended that the facility will use Barwon Water infrastructure to maximise the value of the organic waste and convert it to valuable end-products and renewable energy, reducing costs and emissions. The

¹ See ACCC decision of 11 November 2021 available at link. [Regional Renewable Organics Network Project - Public Register entry AA1000583](#).

² Local Government Act 2020 (Vic), s 9(2)(f)

Applicants submit that the RRON is crucial to the Six Councils to achieving the Victorian Government's 'Recycling Victoria' reforms.

- 2.5. The RRON will have the capacity to process a range of organic wastes including municipal organic waste, commercial and industrial organic waste and biosolids. The Applicants submit that a large percentage of this waste is currently sent to landfill. The end-products will be: new fertiliser and soil enhancing products aimed at providing benefit to agribusinesses in the region; and renewable energy.
- 2.6. The Applicants submit that the RRON will also be used to explore key research opportunities, including research that will continue to develop end markets for the products produced (e.g. advanced carbon materials). Barwon Water has already entered into a partnership with Deakin University to explore these opportunities.
- 2.7. The Applicants submit that having sufficient volumes of waste material pre-committed by the Six Councils over the medium to long term at agreed gate fees is critical to the commercial viability of the proposed RRON (as is a pre-requisite for the approval of the capital expenditure required to build the waste recycling facility). As part of the investigations into the viability of the RRON, the Applicants have entered into a memorandum of understanding and a non-binding heads of agreement under which the Six Councils will provide Barwon Water with information in order for Barwon Water to assess and determine the commercial viability and value for money derived from the RRON, including:
 - a) the volume of appropriate organic waste material which might be available to the RRON;
 - b) the composition of the relevant organic waste material;
 - c) the certainty as to the volume and composition of organic waste material;
 - d) the potential contamination in the organic waste material; and
 - e) the commercial terms upon which the waste material will be available.
- 2.8. The Applicants currently propose that following negotiations with Barwon Water each of the Six Councils will enter into an individual waste supply agreement with Barwon Water for the provision of organic waste material and supply of waste processing services through the RRON.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including major competitors, relevant industry associations and state regulatory bodies.³ The ACCC received no submissions from interested parties in relation to the application.
- 3.3. The Application and other relevant documents are on the Public Register for this matter.

³ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the CCA.
- 4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of section 45 of the CCA. Consistent with subsections 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 4.3. In making its assessment of the Proposed Conduct, the ACCC has considered:
 - the relevant areas of competition likely to be affected by the Proposed Conduct, particularly competition to supply and acquire organic waste processing services in the Barwon and Geelong region; and
 - that the likely future without the Proposed Conduct that is the subject of the authorisation is that each of the Six Councils would individually procure and administer their respective contracts for organic waste processing services.

Public benefits

- 4.4. The CCA does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁴

- 4.5. The ACCC considered that the Proposed Conduct is likely to result in public benefits in the form of:

- **Transaction cost savings**

The ACCC considers that the Proposed Conduct is likely to reduce the costs associated with the Six Councils entering into and administering organics waste processing agreements compared to each council individually negotiating with processors. Cost saving include standardisation of documents and procedures and avoidance of multiple negotiation processes.

- **Improved efficiencies**

The ACCC notes the Applicants' submission that having sufficient volumes of waste material pre-committed by the Six Councils is critical to the commercial viability of the proposed RRON. The ACCC considers that the Proposed Conduct, by aggregating the Six Councils' organic waste processing requirements and providing certainty over the volume of materials committed, will provide

⁴ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

economies of scale in processing waste and support the investment required for the RRON to proceed.

- **Environmental Benefits**

The ACCC notes the Applicants submission that:

- a large percentage of their organic waste is currently sent to landfill, and
- the volumes committed by the Six Councils is critical to the viability of the RRON.

As noted, the ACCC considers that absent the Proposed Conduct each of the Six Councils would likely make separate arrangements for the disposal (to landfill and/or processing) of organic waste. Given the significant capital investment necessary for the construction of the RRON processing facility the ACCC considers that it is less likely to proceed without the certainty of volumes that the combined councils can provided.

The ACCC considers that the RRON processing facility will promote environmental benefits through diversion of organic waste materials away from landfill, increased generation of renewable energy from waste, decreased emission of greenhouse gases and improved availability of soil enhancing products. The ACCC considers that the Proposed Conduct, through supporting the development of the RRON processing facility, supports these environmental benefits.

The ACCC also considers that environmental benefits may accrue from the ability of the RRON to support research into organics waste processing that would otherwise not occur.

Public detriments

4.6. The CCA does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...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

4.7. The ACCC notes that the Applicants may compete to some extent, in the acquisition of organic waste disposal and/or processing services. Collectively acquiring these services from Barwon Water may lessen competition in the supply of these services as it will exclude other organic waste processing service providers.

4.8. However, the Applicants submit that there is currently no facility in the region capable of fulfilling all of the functions proposed for the RRON. The Six Councils have decided to move away from sending as much waste to landfill in favour of converting organic waste to other products and to renewable energy. The Applicants submit that the proposed RRON is a cost effective process design which will represent value for money.

4.9. It therefore appears likely that contracting with Barwon Water is, in the current view of the Six Councils, the most cost effective option available having regard to the various criteria they have regard to (cost and service offering).

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

- 4.10. The ACCC also notes that notwithstanding this the individual councils will remain free to compare the results of the joint bargaining with their best alternative options and the councils will individually enter contracts with Barwon Water, or another supplier, based on this individual assessment.
- 4.11. Accordingly, the ACCC considers that while the Proposed Conduct may result in some reduction in competition for the supply of organic waste processing services, any resultant public detriment is likely to be limited.

Balance of public benefit and detriment

- 4.12. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

- 4.13. The CCA allows the ACCC to grant authorisation for a limited period of time.⁶ This enables 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.
- 4.14. In this instance, the Applicants seek authorisation for 20 years. The Applicants submit that this coincides with the 20 year term of the Waste Supply Agreements (which comprise two 10 year terms) and the period required to underpin the investment required to build the processing facility.
- 4.15. The ACCC recognises that long term contracts are commonly required to support investment in substantial infrastructure projects and enable contractors to have a sufficient return to underwrite investment. Therefore, the ACCC considers that the requested term of authorisation is likely to support the Proposed Conduct to achieve this outcome and the associated public benefits.

5. Draft determination

The application

- 5.1. On 13 October 2021, the Applicants lodged application AA1000583 with the ACCC, seeking authorisation under subsection 88(1) of the CCA.
- 5.2. Subsection 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

⁶ Subsection 91(1)

5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

5.6. The ACCC proposes to grant authorisation AA1000583 to enable the Six Councils to collectively bargain with Barwon Water as described in paragraph 1.3 and defined as the Proposed Conduct.

5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

5.8. The ACCC proposes to grant authorisation AA1000583 for 20 years.

5.9. This draft determination is made on 9 December 2021.

6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination by 14 January 2022. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.