



Draft Determination

Application for authorisation AA1000584

lodged by

The City of Hobart Council & Ors

in respect of

the collective tender and contract for recyclables processing services

Authorisation number: AA1000584

Date: 9 December 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes to grant authorisation to enable the City of Hobart Council and 11 other southern Tasmanian councils to collectively tender and contract for recyclables processing services, including acceptance, sorting, and disposal.

The ACCC proposes to grant authorisation for 15 years and 6 months.

The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of environmental benefits, increased competition among recyclable material processors, transaction cost savings, and economies of scale.

The ACCC considers that the Proposed Conduct is likely to result in minimal, if any, public detriment due to its limited scope and the ability for Participating Councils to not participate in the arrangements if they choose.

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 14 October 2021, the City of Hobart Council, on behalf of itself and 11 southern Tasmanian councils, lodged application for authorisation AA1000584 with the Australian Competition and Consumer Commission (the **ACCC**). The City of Hobart Council is seeking authorisation to collectively tender and contract for recyclables processing services. This application for authorisation AA1000584 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. The City of Hobart Council also requested interim authorisation to enable itself and the 11 southern Tasmanian councils to progress a collective tender for recyclables processing services, but not to enter into any contracts arising from the tender process, while the ACCC is considering the substantive application (see paragraph 1.14).

The Participating Councils

- 1.4. The City of Hobart Council seeks authorisation on behalf of itself and:
 - Clarence City Council
 - Glenorchy City Council
 - Kingborough Council
 - Glamorgan Spring Bay Council
 - Tasman Council
 - Brighton Council
 - Huon Valley Council
 - Central Highlands Council

- Southern Midlands Council
- Sorell Council
- Derwent Valley Council

(together, the **Participating Councils**)

- 1.5. The City of Hobart Council submits that the Participating Councils intend to establish a joint authority under section 30 of the *Local Government Act 1993* (Tas) for the management of waste in the southern region of Tasmania (the **Joint Authority**). One of the Joint Authority's functions would be the administration of any contracts arising from the collective tender process. The City of Hobart Council also seeks authorisation for this Joint Authority, if established. Should the Joint Authority not be established, the City of Hobart Council would remain responsible for the administration of these contracts.
- 1.6. The City of Hobart Council also seeks authorisation to extend to the preferred tenderer and ultimate service provider.

The Proposed Conduct

- 1.7. The City of Hobart Council is seeking authorisation on behalf of the Participating Councils to engage in a collaborative tender process in respect of the Relevant Services (as defined at 1.9).
- 1.8. Once the preferred tenderer is selected, the Participating Councils seek authorisation to negotiate on a joint basis with the preferred tenderer, for the City of Hobart Council to enter into, and the Participating Councils to give effect to, a single procurement contract with the ultimate service provider, and the ongoing administration and management of that contract. If established, the Joint Authority may undertake the management of the contract with the service provider.
- 1.9. The City of Hobart Council submits that the following recyclable materials are likely to be handled by the successful tenderer:
 - empty food and liquid containers from household use such as glass bottles and jars
 - aluminium cans
 - foils and food trays
 - steel cans and aerosol cans
 - HDPE and PET bottles and containers
 - PVC, and
 - paper cardboard items including newspapers, magazines, leaflets and junk mail, stationery and office paper, envelopes and telephone books.

(the **Relevant Materials**)

- 1.10. The recyclables processing services to be the subject of the tender services include:
 - accepting and processing Relevant Materials at the provider's receiving facility
 - sorting Relevant Materials
 - storing Relevant Materials in a manner which does not breach applicable environmental laws and does not create a nuisance

- disposing of Relevant Materials, or on-supplying the Relevant Materials in ways which do not breach applicable environmental laws and do not create a nuisance, and which achieve the best possible recycling outcome
- maintaining detailed and accurate records of quantities of Relevant Materials delivered to the recycling facility, and
- complying with general reporting obligations, including but not limited to, reporting on volumes received and discarded by the provider, sales reports, contaminants identified, market information and intelligence, and details of incidents that may impact on the provider's social and regulatory licenses to operate.

(the **Relevant Services**)

1.11. Together, paragraphs 1.7 to 1.10 form the **Proposed Conduct**.

1.12. The Participating Councils have established a Tender Review Committee comprising of representatives of the Participating Councils. The Tender Review Committee will jointly develop the tender specification and prepare the tender documentation, conduct the tender itself and evaluate tenders received, develop recommendations for determining the tenders received and prepare the contract documentation. Evaluation of the tender responses will culminate in the appointment of a preferred tenderer, with whom the City of Hobart will negotiate.

1.13. The City of Hobart Council advises that the collection of the Participating Councils' recyclables falls outside of the scope of the application for authorisation, with arrangements in each Council area to remain separately administered by each Council.

Interim authorisation

1.14. The City of Hobart Council also requested interim authorisation to enable the Participating Councils to progress a collective tender process for recyclables processing services with a view to identifying the preferred tenderer(s), commencing the negotiation process with the preferred tenderer(s) and preparing the ensuing contractual documents, while the ACCC is considering the substantive application. On 10 November 2021, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act.¹

1.15. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or interim authorisation is revoked.

2. Background

Current arrangements for recyclables processing

2.1. On 4 June 2014, the ACCC granted authorisation A91408 to three of the Participating Councils (Clarence City Council, Glenorchy City Council, and the City of Hobart Council) to jointly tender and contract for recycling waste processing services until 26 December 2023. The City of Hobart Council submits that the three councils contracted with the successful tenderer SKM Recycling, which jointly operated the Derwent Park

¹ See ACCC decision of 10 November 2021 available on the ACCC's public register: [City of Hobart Council & Ors](#).

Material Recovery Facility (**MRF**) in Hobart with Veolia Environmental Services until SKM was placed into administration in late 2019.

- 2.2. Following Cleanaway’s acquisition of SKM Recycling’s assets, Cleanaway has taken over operations of the Derwent Park MRF, which is the sole recycling facility in southern Tasmania, and maintains contracts with the three original councils. The other Participating Councils have also established independent arrangements with Cleanaway’s Derwent Park MRF, either directly or through another Council.
- 2.3. There are three other MRFs in Tasmania. Northern Tasmania is serviced by two MRFs in Launceston, one operated by JJ Richards & Sons, and one operated by Veolia. North West Tasmania is serviced by an MRF in Spreyton operated by Veolia.
- 2.4. The Participating Councils are each responsible for the management of recyclables in their respective municipal areas, which together collect and process 20,300 tonnes of recyclable materials for processing each year. The estimated volumes of recyclable materials processed each year by each Participating Council is set out in Table 1. The volume of recycling in southern Tasmania exceeds the combined total of both the North and North West regions (11,000 and 6,700 tonnes per annum respectively).

Table 1 – Estimated volumes of recyclable materials per annum by Council

Participating Council	Annual tonnages
Clarence	4700
Hobart	4600
Glenorchy	4200
Kingborough	3000
Sorell	1200
Derwent Valley	600
Glamorgan-Spring Bay	500
Brighton	500
Huon Valley	500
Southern Midlands	200
Central Highlands	200
Tasman	100
Total of group	20300
Total of Tasmania	38000

- 2.5. The City of Hobart Council submits that the Participating Councils are exposed to shifts in the international market for recycled materials from:
 - the 2018 China import restrictions on the level of contamination allowed in recyclable materials imported from Australia, and
 - the 2021 introduction of the *Recycling and Waste Reduction Act 2020* (Cth) having the effect that mixed (unsorted) plastics cannot be sent overseas from 1 July 2021.

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 potential tenderers, waste management industry associations, state and federal government bodies, and the participating councils
- 3.3. The ACCC received three submissions in support of the application for authorisation; one submission from a recycling processor, and two submissions from participating councils.
- 3.4. Re.Group, a supplier of recycling processing services and a potential tenderer, submits that it supports the joint process for recycling materials by the Participating Councils, and has no objection to the application for authorisation.
- 3.5. Glamorgan Spring Bay Council submits that it is costly for it to provide some services within its municipal area due to its small population and large geographic area, which leads to some recyclable waste streams going to landfill. It considers that there are insufficient volumes of recyclable waste from individual councils to sponsor new businesses, and that the Proposed Conduct has come out of a necessity to provide a sufficient mass of recyclables to enable the lowest cost model for these services.
- 3.6. The City of Hobart Council affirms its support for the application.
- 3.7. Public submissions by the Applicant and interested parties are on the [Public Register for this matter](#).

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 Act.
- 4.2. The City of Hobart Council has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, 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 assessing the Proposed Conduct, the ACCC considers:
 - the relevant area of competition likely to be impacted by the Proposed Conduct is recyclables processing services in southern Tasmania, and
 - in the likely future without the Proposed Conduct, each Participating Council would likely separately negotiate contract terms for recyclables processing services with Cleanaway, the operator of the Derwent Park MRF, which is the sole MRF in southern Tasmania. Individual councils would unlikely be able to offer sufficient volumes of recyclable material to support the investment in new processing facilities by other recyclables processing service providers. The ACCC notes that three of the Participating Councils (the City of Hobart Council, Clarence City Council, and Glenorchy City Council) would remain protected under

authorisation A91408 to jointly tender for recycling processing services until 26 December 2023. The City of Hobart advised that the relevant councils would not engage in conduct under authorisation A91408, should the current application for authorisation be granted. The ACCC considers it is unlikely that the three relevant councils would engage in conduct under authorisation A91408, given there is only two years remaining for this authorisation and the need for longer term contracts to ensure entry by a new recyclables processor. Therefore, the ACCC considers it likely that these three councils would also separately negotiate contract terms for recyclables processing with Cleanaway.

Public benefits

4.4. The Act 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.²

4.5. The ACCC has considered the following public benefits:

- Environmental benefits
- Increased competition among processors of recyclable materials
- Transaction cost savings
- Economies of scale

Environmental benefits

4.6. The City of Hobart Council submits that the Proposed Conduct will likely result in some or all recyclable waste avoiding being diverted to landfill, which should reduce pressure on existing and new landfills and enable them to manage waste that cannot be recycled or diverted. The City of Hobart Council submits that the Proposed Conduct will increase the recycling and resource recovery rate and increase the supply of high quality sorted recyclable materials. The City of Hobart Council submits that the Proposed Conduct will decrease the stockpiling of low-quality recyclables waste and reduce the export of waste to overseas markets and/or other parts of Australia.

4.7. The City of Hobart Council submits that these factors combine to reduce the generation and emission of greenhouse gases and odours, reduce vermin, and reduce the risk of localised contamination.

4.8. The City of Hobart Council submits that without the Proposed Conduct the processing and disposal of recyclables would be adversely affected, and that if the Participating Councils lacked appropriate facilities for the processing of recyclables, they would need to individually make arrangements for their domestic export, or otherwise dispose of such materials as landfill.

4.9. The ACCC considers that although the Participating Councils currently process recyclables through the Derwent Park MRF and are likely to continue to do so without

² 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.

the Proposed Conduct, it accepts that recently introduced restrictions upon the export of recyclable materials has likely affected the Participating Councils' requirements for recycling processing services. The ACCC considers that the Proposed Conduct will likely facilitate the eventual construction of more appropriate MRFs that can meet this changed processing need.

- 4.10. The ACCC considers that the Proposed Conduct is likely to present public benefits in the form of an improved recyclables processing capacity which will, in turn, help avoid the use of landfill and reduce the environmental impacts associated with the export of unprocessed recyclables to other states for processing.

Increased competition among processors of recyclable materials

- 4.11. The City of Hobart Council submits that the Proposed Conduct will encourage new processors seeking to compete to supply recyclables processing services, as the combined volume of the Participating Councils and the certainty of long-term contracts is more likely to encourage new entry from processors who have not entered the market previously.
- 4.12. The ACCC considers that there are instances where individual councils cannot provide recyclables waste in volumes that would be sufficient to sponsor the creation of an MRF. In these instances, combining recyclables volumes with other councils under a joint tender can provide sufficient volumes for alternate suppliers to tender for the combined contract, or for existing suppliers to invest in new or upgraded facilities. The ACCC considers that the Proposed Conduct is likely to enable additional processors to tender for Participating Council's recyclable processing services, which is in turn likely to encourage greater competition among these processors to win the service contract.

Transaction cost savings

- 4.13. The City of Hobart Council submits that there is likely to be significant transaction cost savings during both the procurement process and in the long-term contract management through the reduction of duplicated costs associated with the tender process and a reduced administrative burden for the ultimate service provider.
- 4.14. The ACCC accepts that the Proposed Conduct is likely to result in transaction cost savings for the Participating Councils and the tenderers. Councils would be able to combine resources to negotiate common terms for the contract and the tenderer would negotiate a single set of common terms rather than individual terms for each council. 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 process. A single process where costs are shared between parties can also facilitate more efficient outcomes.

Economies of Scale

- 4.15. The City of Hobart Council submits that the aggregation of a larger volume of recyclables is likely to enable the ultimate service provider to achieve operating efficiencies and economies of scale in delivering the recycling processing services, which should facilitate lower average costs for each Participating Council and encourage tenderers to offer improved quality service offerings than may otherwise be the case.
- 4.16. The Participating Councils also submit that Tasmania has an unusually large number of councils compared to other Australian states, leading to each council servicing relatively smaller population sizes and geographic areas. The Participating Councils

submit that this makes servicing local municipal areas harder in Tasmania than in other states, and serves to underline the economies of scale that can be achieved through the Proposed Conduct.

4.17. The ACCC considers that the Participating Councils' joint negotiation and aggregated recyclables volumes under the Proposed Conduct is likely to result greater operating efficiencies and lower operating costs than if the Participating Councils were each serviced under individual contracts. This in turn is likely to lower costs for Participating Councils.

Public detriments

4.18. The Act 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.³

4.19. The Participating Councils acknowledge that the Proposed Conduct will mean that for the term of the authorisation new entrants will be unable to provide recycling processing services to southern Tasmanian councils.

4.20. However, the Participating Councils note that each council retains the option to opt-out of the process, either before the commencement of the procurement contract, or following the contract's commencement pursuant either to the rules of the Joint Authority, or, if the Joint Authority is not established, the memorandum of understanding between the Participating Councils.

4.21. The ACCC considers that public detriment may arise as a result of a joint procurement process that comprises a substantial portion of the market as it reduces the opportunity for processors to provide the relevant services.

4.22. However, in this case the ACCC considers that the Proposed Conduct is likely to result in minimal, if any public detriment, as:

- It is limited in scope to the joint procurement of the Relevant Services. Service providers that do not win this contract will continue to be able to compete to supply councils with non-recyclable waste services in southern Tasmania
- The Participating Councils can decide not to participate in the arrangement, or decide to leave the arrangement, for example if they can individually negotiate a better arrangement
- The detriment from a loss of competition for the provision of recyclable processing services is likely to be mitigated by an increase in competition by processors tendering to win the contract with the Participating Councils.

Balance of public benefit and detriment

4.23. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- Environmental benefits

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

- Increased competition among processors of recyclable materials
- Transaction cost savings
- Economies of scale

4.24. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any, public detriment due to its limited scope and the ability for Participating Councils to not participate in the arrangements if they choose. Further, the detriment from a loss of competition to provide recyclable processing services is mitigated by an increase in competition by processors tendering to win the contract with the Participating Councils.

4.25. Therefore, 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

4.26. The Act allows the ACCC to grant authorisation for a limited period of time.⁴ 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.

4.27. In this instance, the City of Hobart Council seeks authorisation for 15 years and 6 months, based on:

- six months to undertake the tender process and to negotiate and enter the procurement contract
- ten years, being the proposed initial term of the procurement contract; and
- five years, being the maximum period for which the procurement contract may be extended pending future arrangements.

4.28. The City of Hobart Council submits that this term reflects the time required to support the investment that the successful tenderer will need to make to ensure the Relevant Services are provided in a sustainable and efficient manner.

4.29. The ACCC recognises that long term contracts are commonly required to support investment and enable contractors to have a sufficient return to underwrite investment. Therefore, the ACCC considers that the requested term of authorisation is likely to be necessary for the Proposed Conduct to achieve this outcome and the associated public benefits.

4.30. The ACCC proposes to grant authorisation for 15 years and 6 months.

5. Draft determination

The application

5.1. On 14 October 2021, the City of Hobart Council lodged application AA1000584 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

⁴ Subsection 91(1)

- 5.2. Subsection 90A(1) of the Act 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 Act, 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.
- 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 AA1000584 to the Participating Councils, to collectively tender, including entering into and giving effect to a contract for recyclables processing services, as described in paragraphs 1.7 to 1.10 and defined as the Proposed Conduct. The proposed authorisation would also extend to the Joint Authority, preferred tender and ultimate service provider⁵.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000584 for 15 years and 6 months.
- 5.9. This draft determination is made on 9 December 2021.

6. Next steps

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

⁵ Subsection 88(2).