



Draft Determination

Application for revocation of A91414 and A91415 and the substitution of authorisation AA1000458

lodged by

Metropolitan Waste and Resource Recovery Group

in respect of

joint procurement of organic waste processing services

Authorisation number: AA1000458

12 February 2020

Commissioners: Sims
Keogh
Rickard
Cifuentes
Court
Ridgeway

Summary

The ACCC proposes to revoke authorisations A91414 and A91415 and grant substitute authorisation AA1000458 to enable the Metropolitan Waste and Resource Recovery Group (MWRRG), on behalf of itself, eight metropolitan Melbourne councils who are currently part of the South Eastern Organics Group and the Mornington Peninsula Shire Council (together, the Applicants), to jointly procure organic waste processing services.

MWRRG and the existing South Eastern Organics Group member councils have been authorised since 18 June 2014 to collectively procure organic waste processing services and to allocate volumes of organic waste material generated by particular councils to particular service providers. Authorisation was granted until 10 July 2032.

The Applicants are now seeking authorisation to add the Mornington Peninsula Shire Council to the bargaining group. No other changes to the previously authorised conduct are being sought.

The ACCC proposes to authorise the Applicants to continue to jointly procure organic waste processing services, and include the Mornington Peninsula Shire Council in the bargaining group, until 10 July 2032.

The ACCC invites submissions in relation to this draft determination by 28 February 2020.

1. The application for revocation and substitution

- 1.1. On 8 November 2019, Metropolitan Waste and Resource Recovery Group (**MWRRG**), on behalf of itself and nine councils in metropolitan Melbourne (together, the **Applicants**), lodged an application to revoke authorisations A91414 and A91415 and substitute authorisation AA1000458 for those revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (**ACCC**).¹ Although authorisations A91414 and A91415 are not due to expire until 10 July 2032, the Applicants are seeking re-authorisation to allow the existing councils to continue to collectively procure organic waste processing services and to make joint decisions regarding the allocation of waste material, and to add the Mornington Peninsula Shire Council to the bargaining group.
- 1.2. The Applicants seek the re-authorisation to extend until 10 July 2032 (the date the existing authorisations are due to expire).
- 1.3. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

The Applicants

- 1.4. MWRRG is a Victorian statutory body corporate,² and is responsible for municipal solid waste management and planning. This management includes coordination of joint

¹ This application for re-authorisation was made under subsection 91C(1) of the Competition and Consumer Act 2010 (Cth) (the Act).

² Formerly known as Metropolitan Waste Management Group and established under section 50 *Environmental Protection Act 1970* (Vic).

procurement processes for waste disposal services for the 31 local councils in metropolitan Melbourne.

- 1.5. The councils that form part of this application are Bayside City, Cardinia Shire, Casey City, Frankston City, Glen Eira City, Greater Dandenong City, Kingston City, Monash City (the existing **South Eastern Organics Group**) and the Mornington Peninsula Shire (referred to as the **Participating Councils**).

The Conduct

- 1.6. The Applicants seek re-authorisation to enable them to continue the same joint procurement activities that are the subject of authorisations A91414 and A91415 but with the addition of the Mornington Peninsula Shire Council to the South Eastern Organics Group. Specifically, the Applicants seek authorisation to:
 - jointly procure organic waste and processing services, and
 - make certain joint decisions regarding the administration of ongoing contracts for organic waste management services.(the **Conduct**).
- 1.7. A group comprising representatives from each of the councils in the **South Eastern Organics Group** and MWRRG primarily makes decisions regarding the optimisation of the processing of the collected organic waste. This includes the procurement of services, allocation of volumes, or administration of service contracts.³ It is intended that this representative group will also be expanded to include Mornington Peninsula Shire.
- 1.8. The Applicants submit that no material change to the existing authorisations is sought, beyond adding the Mornington Peninsula Shire Council to the bargaining group. The Applicants are also not seeking any changes to the term of authorisation, with re-authorisation sought for a term ending on the same date as the existing authorisations.
- 1.9. This application relates to organic waste produced by, and collected from, households. The two main forms of organic waste generated by households are green (garden) waste (i.e. grass clippings, leaves, weeds and tree off-cuts) and food waste (i.e. foods and vegetables, food scraps and meat).
- 1.10. The Applicants submit that organic waste material will continue to be collected as a part of the Participating Councils' kerbside collection services under the Conduct. The Applicants further submit that current providers of organic waste processing services to the South Eastern Organics Group will continue to provide the same services and use the same facilities and infrastructure as currently is the case under the existing authorisation. The suppliers are: Cleanaway Pty Ltd (**Cleanaway**), Veolia Environmental Services (Aust) Pty Ltd (**Veolia**) and Sacyr Environment Australia Pty Ltd (**Sacyr**). The Applicants also submit that the methods by which the councils procure organic waste services and manage ongoing contracts with service providers will not change.
- 1.11. Participation in the arrangements is voluntary for each council. Each Participating Council's decision to enter into any arrangements with service providers under arrangements negotiated by the group is independent of MWRRG and the other Participating Councils.
- 1.12. Mornington Peninsula Shire Council's participation will be implemented via a bi-lateral deed between it and each service provider and an agreement between it and MWRRG

³ See Application – Melbourne Waste and Resource Recovery Group 18 November 2019 pg 8.

which will facilitate the joint arrangements between Morning Peninsula Shire Council, MWRRG and the other Participating Councils.

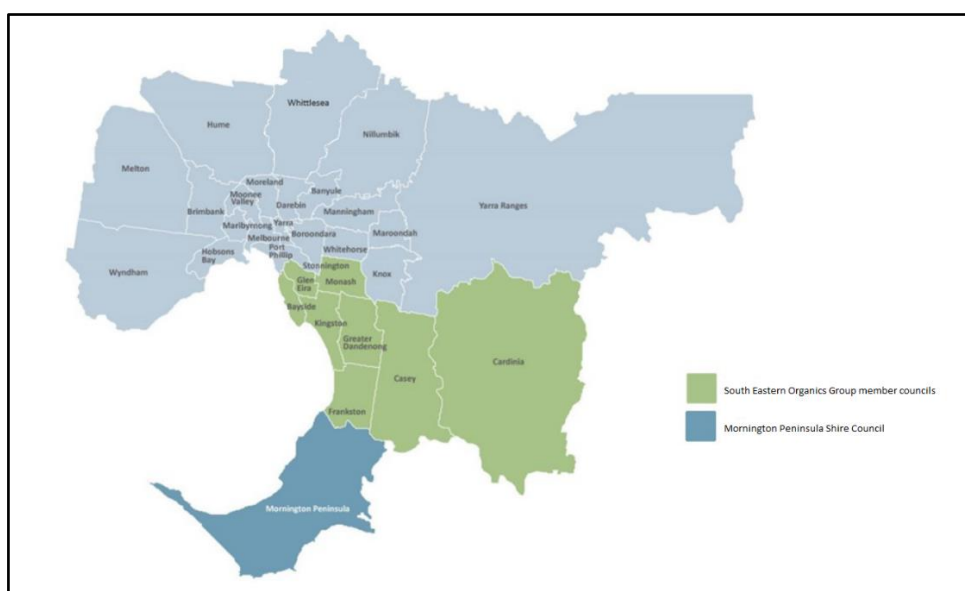
Rationale for the Conduct

- 1.13. When the South Eastern Organics Group was formed in 2014 the Mornington Peninsula Shire Council opted not to participate as it sought to continue its pre-existing organics waste service agreement with Enviromix. This agreement ended in May 2019 when Enviromix closed its processing facility at Dingley. Accordingly, the Mornington Peninsula Shire Council is now seeking to join the South Eastern Organics Group. In the meantime, Mornington Peninsula Shire Council has agreed interim processing arrangements with Cleanaway.
- 1.14. More generally, the rationale for the Conduct submitted by the Applicants in their original 2014 application was that the establishment and operation of facilities with sufficient capacity to process increasing quantities of organic waste was essential to continued diversion of organic waste from landfills, and consequently, compliance with government environmental policies.⁴ At that time the Applicants submitted that the aggregation of waste volumes across multiple municipalities would ensure that investment in organic waste processing facilities was viable and that economies of scale and cost savings would be generated.

2. Background

- 2.1. The Participating Councils are local government authorities located in south-east metropolitan Melbourne, the roles and functions of which are governed by the *Local Government Act 1989 (Vic)*. The councils are responsible for, among other things, the provision of waste collection and processing services, delivery and maintenance of community services and facilities, and enforcement of local laws and regulations within their respective municipalities.

Figure 1: Map of participating councils



Source: Adapted from MWRRG, AA1000458 Application document, page 13.

⁴ Including the Statewide Waste and Resource Recovery Infrastructure Plan and Metropolitan Waste and Resource Recovery Strategic Plan. The final drafts of both Plans were released 2014 by the Victorian Government and formed key aspects of the broader 'Getting Full Value: the Victorian Waste and Resource Recovery Policy'.

2.2. The total population of metropolitan Melbourne is estimated to be approximately 4.96 million as at 30 June 2018. The combined resident population of the eight councils participating in the existing South Eastern Organics Group is estimated to be approximately 1.38 million as at 30 June 2018. The population of the Mornington Peninsula Shire Council is approximately 165,800.⁵

Table 1 – Annual organic waste volumes of relevant councils

Council / Shire	Organic waste (tonnes per annum)
Bayside City	9827
Cardinia Shire	7611
Casey City	35,336
Greater Dandenong City	12,791
Frankston City	18,529
Glen Eira City	11,793
Kingston City	14,397
Monash City	21,959
Mornington Peninsula Shire	25,000
Total	157,243

Source: Adapted from MWRRG, AA1000458 Application document, page 14 and Sustainability Victoria, Victorian Local Government Annual Waste Services Workbook 2017–18.

2.3. The total volume of organic waste collected by all 31 councils across the metropolitan Melbourne area is approximately 363,000 tonnes annually. As indicated by Table 1, the eight councils in the existing South Eastern Organics Group collect approximately 36% of this material. The addition of the Mornington Peninsula Shire Council would raise the amount collected to approximately 43% of the municipal total.⁶

2.4. The organic waste and resource recovery industry broadly incorporates three stages:

- **Collection:** Councils collect organic waste (along with residual waste and recyclables) from household kerbsides as part of their kerbside collection services,
- **Transport:** waste service providers transport the collected waste material to receiving and processing facilities, and
- **Receiving, sorting and processing:** processing services firms receive the organic waste and decontaminate, sort or process the material (for example, re-processing organic waste into compost).

2.5. Typically service providers charge a fee per tonne of organic material received or processed, which is subject to an adjustment for the contamination level of the material.

⁵ See <https://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/3218.0?OpenDocument>

⁶ Sustainability Victoria, Victorian Local Government Annual Waste Services Workbook 2017–18, <https://www.sustainability.vic.gov.au/Government/Victorian-Waste-data-portal/Victorian-Local-Government-Annual-Waste-Services-report>, viewed 18 December 2019. Noting the Applicants' typographical error on page 14 of their application which states that the Participating Councils' are responsibly for approximately 23% of Melbourne municipal kerbside organics collected.

2.6. The Applicants submit that, due to the specialised equipment and processes required to de-contaminate, treat and process organic waste material, other areas of waste collection and resource recovery services are not able to be easily, quickly or economically modified to deliver organic waste processing services.

Previous authorisations

2.7. MWRRG has lodged previous applications for authorisation on behalf of itself and groups of metropolitan Melbourne councils for the collective procurement of other waste management services. The most recent include:

- **AA1000448 – Metropolitan Waste and Resource Recovery Group and Ors (advanced processing) – granted 17 December 2019:** joint competitive tender process to investigate, and potentially procure, the provision of Advanced Waste Processing⁷ services.
 - There were 16 councils involved in this application, including the nine Participating Councils in the current application AA1000458.
- **AA1000449 – Metropolitan Waste and Resource Recovery Group and Ors (landfill) – granted 17 December 2019:** joint procurement of services for receiving residual waste and ancillary services (landfill services).
 - There were 31 councils involved in this application, including the nine Participating Councils in the current application AA1000458.
- **AA1000448 – Metropolitan Waste and Resource Recovery Group and Ors (recycling sorting) – lodged 22 August 2019, draft determination proposing to grant released 5 December 2019:** collaboratively investigate, and potentially procure, the provision of sorting services for commingled recyclable material that is collected from residents' kerbsides.
 - There are 30 councils involved in this application, including the nine Participating Councils in the current application AA1000458.

2.8. The Goulburn Valley Waste and Resource Recovery Group (**GVWRRG**) also lodged an application for authorisation AA1000453 on 1 October 2019, to jointly conduct tender processes and negotiate contract for a range of waste and resource recovery services, including domestic kerbside organic waste collection, acceptance and processing and the supply of organics kitchen caddies and liners. GVWRRG lodged the application AA1000453 on behalf of itself and eight Victorian and New South Wales councils located in the Goulburn Valley region. A draft determination proposing to grant authorisation was released on 5 December 2019.

3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.

3.2. The ACCC invited submissions from a range of potentially interested parties including waste management firms, industry associations and government bodies⁸.

⁷ Advanced Waste Processing refers to the processes which are employed to recover alternative resources (such as electricity or fuel) from residual waste (waste which would otherwise go to landfill).

⁸ A list of the parties consulted and the public submissions received is available from the ACCC's public register at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/metropolitan-waste-and-resource-recovery-group-ors-organic>

3.3. The ACCC did not receive any submissions from interested parties regarding the application for revocation and substitution.

4. Assessment

4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. The Applicants have sought re-authorisation for 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.

4.3. Consistent with subsection 90(7) and 90(8) of the Act⁹, the ACCC must not grant authorisation unless it is satisfied, in all 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).

4.4. In making its assessment of the Conduct, the ACCC has considered:

- the application and other relevant information available to the ACCC, including other relevant applications for authorisation
- the relevant areas of competition are likely to be the supply and acquisition of processing services for organic waste in metropolitan Melbourne, and
- the public benefits and detriments likely to arise if the Conduct occurs relative to the Conduct not occurring, i.e. if each of the Participating Councils individually procured and administered their respective contracts. In granting authorisations A91414 and A91415, the ACCC found that the conduct contemplated by those authorisations was likely to result in a net public benefit. Absent any evidence counter to this finding, for the purposes of the present authorisation application, the ACCC has also considered the incremental public benefits and detriments likely to result from the Mornington Peninsula Shire Council joining the South Eastern Organics Group.

Public benefits

4.5. 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 the term should be given its widest possible meaning, and includes:

*"...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."*¹⁰

4.6. The Applicants submit that the arrangements will deliver public benefits, including:

- transaction cost savings (improvement in contract management) economic efficiencies environmental and health benefits

⁹ See subsection 91C(7).

¹⁰ 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.

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

- **Transaction cost savings:** The combined contracting process is likely to lead to some efficiency savings for the Mornington Peninsula Shire Council (including the collective use of MWRRG's expertise in technical waste management issues and procurement of waste management services leading to improvements in contract management), relative to the scenario where it engages separately with potential suppliers.
- **Potential for improved economies of scale for suppliers:** The aggregation of a larger volume of organic waste is likely to enable service providers to achieve operating efficiencies and economies of scale in delivering processing services, which may facilitate lower average costs for each Participating Council. These efficiencies could be achieved if the processing costs per tonne of organic material decrease the higher the volume processed. Mornington Peninsula Shire Council joining the South Eastern Organics Group is likely to allow these efficiencies to be realised over a greater volume of organics waste processing (the 25,000 tonnes per annum of domestic organic waste collected annually from the Mornington Peninsula Shire Council) which may facilitate lower average costs for the processing of these 25,000 tonnes.
- **Environmental and health benefits:** The Applicants submit that under the existing authorisations, additional planning has gone into selecting safer locations for newly constructed resource recovery facilities. The Applicants submit that these new facilities are strategically located to reduce the environmental risks to residential areas from the accumulation of waste volumes (such as pollution, fire, or pests), and to improve access for the delivery of organic waste. The ACCC considers that the availability of these facilities to process domestic organic waste collected from the Mornington Peninsula Shire Council, as facilitated by the Conduct, is likely to extend the scope of these improved environmental outcomes.

Public detriments

4.8. 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.¹¹

4.9. The Applicants submit that, relative to the conduct authorised under the existing authorisations, the Conduct will not result in any discernible public detriments.

4.10. The Participating Councils may be considered to be each other's competitors for the acquisition of organic waste processing services in metropolitan Melbourne. By joining the South Eastern Organics Group, Mornington Peninsula Shire Council and the other Participating Councils are agreeing to no longer compete. The Conduct therefore will lessen competition in the acquisition of processing services for organic waste in metropolitan Melbourne.

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

¹¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- a. The addition of the Mornington Peninsula Shire Council to the South Eastern Organics Group will result in the processing of an additional 25,000 tonnes of organic waste annually not being contestable for the duration of the relevant contract period. A significant volume of organic waste in metropolitan Melbourne not subject to the Conduct will remain available to alternative suppliers who were not successful tenderers for the contract.
- b. Mornington Peninsula Shire Council (and the other Participating Councils) will remain 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

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

5. Draft determination

The application

- 5.1. On 8 November 2019, MWRRG, on behalf of the Applicants, lodged an application to revoke authorisations A91414 and A91415 and substitute authorisation AA1000458 for those revoked (referred to as a variation of the authorisation). This application for authorisation AA1000458 was made under subsection 91C(1) of the Act.
- 5.2. The Applicants seek authorisation for the Conduct. 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 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 Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the 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 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 revoke authorisations A91414 and A91415 and grant authorisation AA1000458 in substitution. Authorisation AA1000458 is granted to enable the Applicants to collectively procure organic waste processing services and to make joint decisions regarding the allocation of waste material, and to add the Mornington Peninsula Shire Council to the bargaining group, as described in paragraph 1.6 and defined as the Conduct.

- 5.7. The 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 AA1000458 until 10 July 2032.
- 5.9. This draft determination is made on 12 February 2020.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 28 February 2020. 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.