



Draft Determination

Application for revocation of AA1000451
and the substitution of authorisation AA1000581
lodged by
Metropolitan Waste and Resource Recovery Group
in respect of
a collaborative tender process for recycling sorting services
Authorisation number: AA1000581

Date: 16 December 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes to authorise the Metropolitan Waste and Resource Recovery Group (MWRRG) and 3 regional waste and resource recovery groups (regional WRRGs) (and any successor appointed for MWRRG and the 3 regional WRRGs), and 27 metropolitan Melbourne councils and 8 regional Victorian councils (together, the Participating Councils) to conduct a collaborative tender process to procure sorting services for commingled household recyclable waste collected from residents' kerbsides (Proposed Conduct).

The conduct that the ACCC proposes to authorise is similar to conduct authorised by the ACCC since 2020, by authorisation AA1000451. Due to recent changes in Commonwealth and Victorian government policies and changes in the composition of participating councils, MWRRG has sought revocation of AA1000451 and the substitution with a new authorisation, AA1000581.

The ACCC considers the Proposed Conduct is likely to result in public benefits in the form of transaction costs savings, increased efficiencies, increased competition and environmental benefits

The ACCC considers that the Proposed Conduct is not likely to result in a public detriment due to a number of factors including: the tender process will be competitive and transparent; participation in the procurement is voluntary for the Participating Councils and the suppliers; the majority of current and potential suppliers of sorting services operate either nationally or internationally; and the "common gate fee" mechanism (if used) will not be likely to affect the bidding of suppliers to supply recycling sorting services.

Overall, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh any likely public detriment.

The ACCC proposes to grant authorisation for 7 years and 8 months which encompasses 8 months to conduct the tender process, negotiate contracts and execute contract(s); and 7 years to give effect to the contract(s) for the supply of sorting services to the Participating Councils (including the administration of ongoing contract(s)).

The ACCC has also granted interim authorisation to enable MWRRG, 3 regional WRRGs and the Participating Councils to commence the tender process while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 21 January 2022 before it proceeds to make its final determination.

1. The application for revocation and substitution

- 1.1. On 11 October 2021, the Metropolitan Waste and Resource Recovery Group (MWRRG) lodged an application with the Australian Competition and Consumer Commission (the ACCC) for revocation of authorisation [AA1000451](#)¹ and its

¹ Authorisation AA1000451 was granted to enable MWRRG and 30 metropolitan Melbourne councils to conduct a collaborative tender process to procure sorting services for kerbside recyclable waste. The ACCC granted authorisation until 7 March 2041 which comprised 12 months to conduct the tender process and negotiate and enter into contracts, and 20 years to give effect to the contracts.

substitution with a new authorisation AA1000581. For convenience, this process is referred to as **re-authorisation**.²

- 1.2. MWRRG seeks re-authorisation to enable itself and 3 regional waste and resource recovery groups (**regional WRRGs**) (and any successor appointed for MWRRG and the 3 regional WRRGs), and 27 metropolitan Melbourne councils and 8 regional Victorian councils (together, the **Participating Councils**) to conduct a tender process for the joint procurement of sorting services for commingled, recyclable waste collected from residents' kerbsides. MWRRG seeks re-authorisation for the same period as that granted under authorisation AA1000451 (21 years ending on 7 March 2041), or alternatively a shorter period (8 months for the tender process, and up to 7 years for giving effect to the contracts) if the ACCC considers this to be more appropriate.³
- 1.3. 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.
- 1.4. On 10 November 2021, the ACCC granted interim authorisation under subsection 91(2) of the Act.⁴ Interim authorisation was granted to enable MWRRG, the Participating Councils and 3 regional WRRGs to commence a joint tender process (but not to execute any binding contracts) for the procurement of sorting services for commingled, kerbside recyclable waste, while the ACCC considers the substantive application. Interim authorisation will remain in place until the date of the ACCC's final determination comes into effect or until interim authorisation is revoked.

The application for re-authorisation

- 1.5. The parties sought to be covered by the application for re-authorisation are:
 - MWRRG, a Victorian statutory body⁵ responsible for waste management planning and resource recovery across Metropolitan Melbourne
 - 27 metropolitan Melbourne councils: Banyule City Council, City of Bayside, City of Boroondara, Brimbank City Council, Cardinia Shire, City of Casey, City of Frankston, the City of Greater Dandenong, City of Glen Eira, Hobsons Bay City Council, City of Kingston, City of Knox, City of Manningham, Maribyrnong City Council, City of Melton, Moreland City Council, City of Monash, Moonee Valley City Council, Mornington Peninsula Shire, Nillumbik Shire Council, City of Port Phillip, City of Stonnington, City of Whitehorse, City of Whittlesea, Wyndham City Council, Yarra City Council, Shire of Yarra Ranges
 - 8 regional Victorian councils: Borough of Queenscliff, City of Greater Geelong Council, Colac Otway Shire Council, Corangamite Shire, Golden Plains Shire Council, Mildura Rural City Council, Southern Grampians Shire Council, Surf Coast Shire Council

² This application was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

³ MWRRG's application for re-authorisation, para 5.5, p.9.

⁴ See the ACCC's decision of 10 November 2021 available at: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/metropolitan-waste-and-resource-recovery-group-0>

⁵ MWRRG was established under section 50 of the *Environmental Protection Act 1970* (Vic). In this application, MWRRG acts on behalf of the original 30 metropolitan Melbourne councils in authorisation AA1000451, the Participating Councils and the 3 regional WRRGs.

- 3 regional WRRGs: Barwon South West, Loddon Mallee and Grampians Central West Regional Waste and Resource Recovery Groups,⁶ and
- any new waste authority or other successor entity appointed for MWRRG and the regional WRRGs.⁷

The Proposed Conduct

1.6. MWRRG seeks re-authorisation to:

- conduct a tender process to procure recycling sorting services, evaluate responses from suppliers and negotiate contracts, on behalf of the Participating Councils and with support from the regional WRRGs
- establish a panel for suppliers to provide standing offers to supply recycling sorting services to the Participating Councils, at prices that will be maintained for the duration of the panel
- manage a 'common gate fee' (**CGF**) mechanism between the Participating Councils (this is further discussed in paragraph 2.7 below) and
- provide ongoing administration and management of the resulting contracts.

(the **Proposed Conduct**).

1.7. The Proposed Conduct is voluntary for the Participating Councils and for any proposed supplier. The Participating Councils are not required to acquire sorting services from a supplier.

1.8. In this application, 'sorting' refers to the various processes used at Material Recovery Facilities (**MRFs**) to separate commingled recyclable waste into different types of materials.⁸ The sorted materials are sent from the MRFs to the re-processors for further processing into recycled raw materials, while the reject materials are sent to landfill.

Rationale for the Proposed Conduct

1.9. MWRRG has lodged the application for re-authorisation due to:

- changes in Commonwealth and Victorian government policies regarding recycling,⁹ which mean that long term contracts (such as the 20-year contract term approved in authorisation AA1000451) are no longer appropriate. The Proposed Conduct will enable Participating Councils to put in place a short-to-medium term arrangement for the joint procurement of recycling sorting services while important policy reforms are being implemented, and
- changes in the make-up of participating councils – 4 of the original 30 metropolitan Melbourne councils¹⁰ no longer wish to participant in joint procurement. However,

⁶ The regional WRRGs have similar responsibilities as MWRRG, but for the regional areas for which they are responsible.

⁷ MWRRG and all 6 regional WRRGs in Victoria will be transitioned into a new waste and recycling business unit (Recycling Victoria) within the Department of Environment, Land, Water and Planning by 1 July 2022.

⁸ Such as paper, plastic, aluminium and glass. Sorting services are separate to the collection services in respect of recyclable materials. At the collection stage, several contractors collect waste from residential kerbsides and deliver the waste to MRFs directly or to transfer stations (where waste is aggregated before being delivered to MRFs).

⁹ The Victorian Government has released its Recycling Victoria Circular Economy Policy. The policy requires segregation of glass collection by 2027, diversion of 80% of waste from landfill by 2030 and introduction of a Container Deposit Scheme by 2023, among other things.

¹⁰ City of Darebin, Hume City Council, City of Maroondah and City of Melbourne.

1 new metropolitan Melbourne council,¹¹ 8 regional Victorian councils¹² and 3 Regional WRRGs¹³ wish to participate in the Proposed Conduct.

2. Background

- 2.1. The 27 metropolitan Melbourne councils account for the majority of municipal recyclable waste in metropolitan Melbourne. Due to smaller population in regional areas, the 8 regional Victorian councils contribute only an incremental amount of recyclable waste.¹⁴ Collectively, the total volume of recyclable waste available from the Participating Councils is 410,000 tonnes per annum. That is less than the total volume of recyclable waste (510,000 tonnes per annum) expected to be aggregated by the original 30 metropolitan Councils under authorisation AA1000451.
- 2.2. Most of the Participating Councils are supplied by 3 large incumbent suppliers of recycling sorting services – Cleanaway (who took over the assets of the now-insolvent supplier, SKM Recycling, in 2019), Visy Recycling and PolyTrade. These suppliers operate their own MRFs to provide sorting services to the councils. Most of the Participating Councils' contracts for recycling sorting services with these suppliers are scheduled to end in or around June 2022.
- 2.3. The recycling sorting sector has undergone significant changes in recent years. Many countries in Asia have imposed strict requirements on the quality of imported sorted materials. As a result, existing MRF operators have faced increased costs to meet these requirements (including due to the need to improve their sorting facilities or slow down the sorting process), given the significant market changes.
- 2.4. In response to these challenges, both the Victorian and the Commonwealth governments have announced policies to reduce waste, increase the amount and quality of materials recovered through recycling programs and promote a better market for recycled materials.¹⁵ Furthermore, the Victorian Government has announced that, from 1 July 2022, a new statutory entity will oversee and regulate Victoria's waste and recycling sector, and will take over the roles of MWRRG and all 6 regional WRRGs.¹⁶

The proposed procurement process

- 2.5. MWRRG (with the support of the 3 regional WRRGs) will establish a panel of suppliers of recycling sorting services. MWRRG will individually negotiate¹⁷ with each supplier regarding their prices and the volume of recyclable waste they can process, and any additional services, improvements or innovations they can offer, before entering into a contract¹⁸ with each supplier on the panel.
- 2.6. The Participating Councils will enter into a contract with MWRRG (or with the relevant regional WRRG).¹⁹ The Participating Councils will also separately enter into a Service Agreement with a supplier on the terms agreed between the supplier and MWRRG (or

¹¹ Wynham City Council.

¹² Set out in paragraph 1.5 above.

¹³ Set out in paragraph 1.5 above.

¹⁴ MWRRG also submits that there are 38 other regional Victorian Councils who will not participate in the Proposed Conduct.

¹⁵ The Victorian *Circular Economy (Waste Reduction and Recycling) Bill* was introduced into Parliament on 27 October 2021.

¹⁶ <https://www.mwrrg.vic.gov.au/news/mwrrg-welcomes-new-circular-economy-bill-and-recycling-victoria/>.

¹⁷ The individual negotiation between MWRRG and each potential supplier means that the supplier will not know the terms offered by other suppliers.

¹⁸ This is called the 'Master Contractor Panel Services Agreement'.

¹⁹ This is called the 'Master Council Panel Agreement'.

regional WRRG) (referred to in paragraph 2.5 above), if they wish to acquire recycling sorting services from the supplier.

- 2.7. MWRRG plans to (with the support of the 3 regional WRRGs) manage a CGF mechanism between the Participating Councils. This means, if the first council exhausted the available tonnage capacity of a supplier, such that the second council had to resort to a supplier with capacity but a higher price, the amount paid by the 2 councils would be averaged via MWRRG.²⁰ MWRRG considers this will result in less volatile prices for the Participating Councils over the duration of the panel arrangement.
- 2.8. The CGF mechanism will not affect suppliers of recycling sorting services, who will continue to receive the same terms and conditions (including prices) as agreed with MWRRG.

Previous authorisations

- 2.9. 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. These include:
 - [AA1000503 organic waste processing](#) – On 25 February 2021, MWRRG and 13 metropolitan Melbourne councils were granted authorisation to collectively procure organic waste processing services until 10 July 2032.
 - [AA1000449 landfill services](#) – On 19 December 2020, MWRRG and 31 metropolitan Melbourne councils were granted authorisation to collectively procure residual waste and related ancillary services (landfill services) until 8 January 2030.
 - [AA1000448 advanced waste processing](#) – On 17 December 2019, MWRRG and 16 councils located in south-eastern Melbourne were granted authorisation to collectively procure advanced waste processing services until 8 July 2052.

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 waste management firms, industry associations and government bodies.²¹ The ACCC received five submissions from interested parties in relation to the application.
- 3.3. Moonee Valley City Council and Environment Protection Authority Victoria each submit they have no comment on the application.
- 3.4. Cleanaway opposes the application on the basis that:
 - compared to the existing authorisation, the Proposed Conduct does not provide suppliers with significant guaranteed volumes and long-term contracts. It will therefore reduce existing suppliers' willingness to offer attractive prices and/or to invest in new or upgraded sorting technology

²⁰ Each council will be invoiced by MWRRG for the services ordered, and MWRRG will pay the suppliers, on behalf of the councils, for the services provided.

²¹ The public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- councils will incur more costs due to the proposed CGF mechanism,²² and
 - the Proposed Conduct will result in competitive harm, due to the councils' substantial buyer power.
- 3.5. SUEZ, an existing provider of landfill services to the councils, is interested in becoming a new supplier of recycling sorting services. Suez expresses a concern that the proposed contract term is too short, which will prevent it from making the necessary investment to enter the market.
- 3.6. Great Southern Waste Technology (**GSWT**), a company specialising in generating resources using residual waste diverted from landfill (i.e. advanced waste processing services), opposes the application for authorisation. GSWT considers MWRRG has failed to run previous procurement processes fairly, and that MWRRG should not make public expenditure decisions given it will be replaced by a new Victorian waste authority. GSWT disagrees with the need for joint procurement, as it considers councils could extend their existing contracts instead. GSWT submits that the proposed procurement will give the Participating Councils too much market power; and considers that MWRRG acting as a 'middle-man' will increase councils' costs. GSWT objects to the proposed 'common gate fee' on the basis of lack of clarity, and the likelihood that it will negatively affect competitive tendering, the suppliers and the councils. It also submits that the length of the tender process is too long, which will allow for potential collusion and unfair tendering to occur.
- 3.7. In response to the above issues, MWRRG submits that:
- councils cannot extend the existing contracts for recycling sorting services, as they are obliged to have contestable pricing before procuring services
 - the changes in government policy and the reforms that are occurring in the recycling waste industry (mentioned in paragraph 1.9 above) mean that long term contracts are no longer appropriate
 - the existing incumbent suppliers have significant market power, and potential new suppliers are well resourced
 - the proposed tender is designed to attract new entrants and innovative sorting methods, and the aggregated volumes of recyclable waste are sufficient to support new entry²³
 - a CGF mechanism (if used) will only apply to Participating Councils,²⁴ and not affect suppliers of recycling sorting services. Any fees charged by MWRRG for managing the CGF will be minimal
 - the proposed period for the tender and contract negotiation process is appropriate for the scale and complexity of the procurement
 - the suggestions of improper conduct by MWRRG are rejected – MWRRG is a public sector entity, and has used independent probity advisors and legal advisers in previous procurement processes for other waste services, and

²² Cleanaway considers that councils will incur more costs because: (1) MWRRG may impose a fee for administering the CGF; and (2) the CGF will remove the benefit councils might otherwise receive to manage the level of contamination in their commingled recycling.

²³ MWRRG submits that the combined volumes of recyclable waste available from the Participating Councils (410,000 tonnes per annum) is sufficient to support new entry. It submits that 20,000-50,000 tonnes per annum may provide sufficient scope for a new specialised / more advanced type of sorting facility to be constructed, and even a more traditional MRF would only require volumes of 50,000-100,000 tonnes per annum to be feasible.

²⁴ In response to Cleanaway, MWRRG also submit that the CGF will not affect councils' current incentive to keep their recycle waste at a lower contamination level – this is because the CGF will apply to the fees for sorting, rather than the fees for decontamination.

- the proposed restructuring to a new Victorian Waste Authority is a normal transition process for government agencies. The new authority will be expected to continue the arrangements established by MWRRG.

3.8. Public submissions received are available on the ACCC's [public register](#).

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. Section 91C(7) provides that the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless it is satisfied that it would not be prevented under subsection 90(7) from granting the substituted authorisation as if it were a new authorisation. Subsection 90(7) of the Act provides that 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**).
- 4.2. MWRRG 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.
- 4.3. In making its assessment of the Proposed Conduct, the ACCC has taken into account the application and all submissions received and considers:
- the relevant areas of competition that may be affected by the authorisation to be the supply and acquisition of sorting services for municipal recyclable waste in metropolitan Melbourne and regional Victoria,²⁵ and
 - that absent the Proposed Conduct, it is likely that each of the Participating Councils will individually procure recycling sorting services.

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.*²⁶

- 4.5. MWRRG submits that the public benefits identified in authorisation AA1000451 will also apply to the updated Proposed Conduct.
- 4.6. The ACCC considers that the Proposed Conduct is likely to result in the following public benefits:
- transaction cost savings

²⁵ However, the ACCC considers that it is not necessary to precisely define the relevant markets for the purpose of considering the application for re-authorisation.

²⁶ 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.

- increased efficiencies
- increased competition, and
- environmental benefits

Transaction cost savings

- 4.7. The ACCC accepts that the Proposed Conduct is likely to provide transaction cost savings, including by reducing or eliminating the duplication of administrative, legal and evaluation costs associated with each Participating Council conducting separate tenders.
- 4.8. The ACCC also considers the Proposed Conduct is likely to deliver transaction cost savings to potential suppliers of sorting services, including by reducing or eliminating the administrative burden of dealing with the procurement processes of multiple Participating Councils.

Increased efficiencies

- 4.9. The ACCC considers that the aggregation of the Participating Councils' recyclable waste volumes is likely to provide potential suppliers of recycling sorting services the opportunity to achieve a more efficient scale of operation in the delivery of recycling sorting services, which may facilitate lower average costs for each Participating Council.

Increased competition

- 4.10. The ACCC considers that the Proposed Conduct is likely to increase competition between suppliers to supply recycling sorting services to the Participating Councils.
- 4.11. While the Proposed Conduct will entail less supply certainty and shorter contract terms for suppliers compared to the arrangement in authorisation AA1000451²⁷, the combined volume of recyclable waste from the Participating Councils is still significant and expected to grow in the future.²⁸ Moreover, particularly for new suppliers, the joint procurement is likely to facilitate more efficient access to larger volume of recyclable waste than would be available if councils procured the services individually. As MWRRG submits, the joint procurement is designed to attract new suppliers to enter the market and guard against any inherent advantage of the large suppliers. To that end, the Proposed Conduct will encourage new suppliers to offer innovative approaches and existing suppliers to improve their facilities to meet the Participating Councils' needs for more effective / higher quality sorting services. The ACCC therefore considers that the Proposed Conduct is likely to provide an incentive for new suppliers and existing suppliers to participate in the procurement process and compete more vigorously to supply sorting services to the Participating Councils.

Environmental benefits

- 4.12. To the extent that the Proposed Conduct results in more efficient, newer and/or improved sorting approaches in respect of recyclable waste, the ACCC considers there are likely to be public benefits arising from: higher quality and greater variety of sorted recyclable materials, increase in recycling and the resource recovery rate, more

²⁷ Authorisation AA1000451 provides that MWRRG and the 30 metropolitan Melbourne councils may enter into 20-year contracts with suppliers for the supply of recycling sorting services.

²⁸ MWRRG submits that government policy initiatives, particularly the Victorian Circular Economy policy, provides an environment that should see the volumes of recyclable materials increase in future years.

diversion of recyclable waste from landfill and decrease in stockpiling of low-quality recyclables.

- 4.13. MWRRG submits that the Proposed Conduct will facilitate achievement of government objectives. To the extent that the Proposed Conduct aligns with relevant government strategies on environmental preservation and a more circular economy, the ACCC considers the achievement of government objectives may be supported by the Proposed Conduct.

Public detriments

- 4.14. 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.²⁹

- 4.15. MWRRG submits there will be limited public detriment resulting from the Proposed Conduct.
- 4.16. The Participating Councils may be considered to be each other's competitors in the acquisition of sorting services for municipal recyclable waste. By conducting their procurement jointly rather than individually, the Participating Councils are agreeing to no longer compete. The Proposed Conduct may therefore lessen competition in the acquisition of sorting services for municipal recyclable waste.
- 4.17. The ACCC has considered the concerns from Cleanaway and GSWT that the Participating Councils will have too much market power. The ACCC acknowledges that the Participating Councils account for large volume of municipal recyclable waste (including, the majority of municipal recyclable waste volume in metropolitan Melbourne). However, the ACCC notes that 4 metropolitan Councils and the majority of regional Victorian councils are not participants. Further, the ACCC considers that any detriment resulting from the Participating Councils' enhanced buying power is likely to be limited because:
- the tender process will be competitive and transparent, supporting the countervailing power of suppliers of recyclable waste sorting services
 - the majority of existing and potential sorting suppliers operate either nationally or internationally, and there will continue to be other future opportunities to supply sorting services in Australia and elsewhere, and
 - participation in the Proposed Conduct is voluntary for the Participating Councils and for potential suppliers.
- 4.18. The ACCC notes the concern from Cleanaway and SUEZ regarding the shorter contract term under the Proposed Conduct (i.e. up to 7 years, compared to the 20 year contract term approved in authorisation AA1000451). Absent the Proposed Conduct, individual councils are unlikely to enter into a long-term contract with suppliers, given the ongoing reforms that are occurring in the recycling industry in Victoria. The Proposed Conduct does not exclude any suppliers from bidding to supply sorting services to the Participating Councils.³⁰ The ACCC understands that the joint

²⁹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

³⁰ Nor does it preclude them from supplying sorting services to non-Participating councils or supplying other waste services to other customers.

procurement process is likely to facilitate rather than limit new entry by potential suppliers to provide sorting services (including innovative and more specialised sorting services) to the Participating Councils. The ACCC also notes MWRRG's submission that the aggregated recyclable waste volume of the Participating Councils is sufficient to support new construction or improvement of sorting facilities.

4.19. The ACCC has also considered the issues raised by Cleanaway and GWST regarding the proposed CGF mechanism. The ACCC considers that the CGF mechanism (if used) is not likely to result in a public detriment, because:

- If Participating Councils wish to avoid the impact of the CGF mechanism, they can choose to not participate in the Proposed Conduct. The ACCC understands that, for those councils that acquire sorting services from suppliers, the fees paid by the councils are expected to be smoothed over the full term of the panel arrangement (while in one period the fees may be higher than what they would otherwise be, in a subsequent period the fees may be lower for a council). The ACCC also notes MWRRG's submission that any fee for administering the CGF will be minimal.
- There is no evidence the CGF mechanism is likely to affect bidding by potential suppliers. At the time of tendering, suppliers will not know whether they will receive orders from the Participating Councils. The suppliers will also not know the prices of their competitors, because they will individually negotiate with MWRRG (or the 3 regional WRRGs). Suppliers will be able to offer any terms they wish in their tender submissions. Once the terms have been agreed with MWRRG (or the 3 regional WRRGs), the suppliers will receive the same terms (including pricing) regardless of whether the CGF mechanism is used.
- Based on information provided by MWRRG, the ACCC understands that the CGF mechanism will only apply in the services stage, following the conclusion of the tender stage. For instance, the mechanism may be applied if a Participating Council's order resulted in a supplier's full processing capacity to be reached, such that it is necessary for other Participating Councils to acquire services from other suppliers that have capacity but more expensive pricing.

4.20. GSWT has also raised concerns regarding MWRRG's capability to manage other collaborative tender processes that have been undertaken following ACCC authorisation.³¹ The ACCC does not consider there is evidence to suggest that MWRRG lacks capacity to properly manage those tender processes on behalf of the relevant councils. The ACCC also notes that MWRRG has consulted with independent probity advisors and legal advisors during those tenders, which minimises the risk of poor outcomes occurring.

4.21. Overall, the ACCC considers that the Proposed Conduct is not likely to result in a public detriment.

Balance of public benefit and detriment

4.22. 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.

³¹ Authorisation AA1000448 (advanced waste processing services) and authorisation AA1000449 (landfill services).

Length of authorisation

- 4.23. The Act allows the ACCC to grant authorisation for a limited period of time.³² 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.
- 4.24. In this instance, MWRRG seeks re-authorisation for the same period as that granted under the existing authorisation (a period of 21 years ending on 7 March 2041³³), or alternatively a shorter period (8 months for the tender process, and up to 7 years³⁴ for giving effect to the contracts) if the ACCC considers this to be more appropriate.
- 4.25. Cleanaway and Suez submit that MWRRG's proposed contract term is too short to justify investment by service providers.
- 4.26. Based on the information provided by MWRRG (see paragraph 1.9 above), the ACCC understands that substantial reforms³⁵ in the recycling waste industry are being implemented over the next 5 to 6 years, and there is some uncertainty about the impact of these reforms. The ACCC notes MWRRG's submission that given this uncertainty, shorter term contracts for the supply of recycling sorting services would be more appropriate for both the councils and the suppliers; however, longer term contracts could be considered in the last 1 or 2 years of the panel arrangement (once the impacts of the reforms become clearer). The shorter contract term will enable Participating Councils to obtain services effectively, and suppliers to access waste volumes efficiently, while each side assesses the practical impact of the changes in the market.³⁶
- 4.27. The ACCC's preliminary view is that the uncertainty created by ongoing reforms in the industry mean that it is appropriate to grant authorisation for the shorter of the two periods proposed by MWRRG. That is, the ACCC proposes to grant authorisation for 7 years and 8 months which encompasses 8 months to complete the tender process and negotiation/execution of contract(s), and 7 years to give effect to the contract(s) for the supply of recycling sorting services (including the ongoing administration of the contract(s)).

5. Draft determination

The application

- 5.1. On 11 October 2021, MWRRG lodged an application to revoke authorisation AA1000451 and substitute authorisation AA1000581 for the ones revoked (referred to as re-authorisation). This application for re-authorisation was made under subsection 91C(1) of the Act.

³² Subsection 91(1) of the Act.

³³ This period comprises 12 months to conduct the tender process and negotiate and enter into contracts, and 20 years to give effect to the contracts.

³⁴ MWRRG submits the proposed term for the panel is an initial period of 3 years, with the option for MWRRG (in consultation with the 3 regional WRRGs) to extend it for 2 additional periods of 2 years each.

³⁵ As stated in footnote 9 above, the Victorian Government has released its Recycling Victoria Circular Economy Policy. The policy requires segregation of glass collection by 2027, diversion of 80% of waste from landfill by 2030 and introduction of a Container Deposit Scheme by 2023, among other things.

³⁶ MWRRG also submits that entering into a longer term contract now may result in poorer outcomes for all parties, including potential new suppliers; however the circumstances for entering into longer term contracts may be more favourable as the proposed panel for suppliers is in its last year or two (see MWRRG response to ACCC's question, 15 December 2021).

- 5.2. MWRRG seeks authorisation for Proposed Conduct as defined at paragraph 1.6. 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 subsection 90(7) 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 considers 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 revoke authorisation AA1000451 and grant authorisation AA1000581 in substitution to enable MWRRG and the 3 regional WRRGs (and any successor appointed for MWRRG and the 3 regional WRRGs) and 35 Participating Councils (referred to in paragraph 1.5) to conduct a collaborative tender process to procure sorting services for commingled household recyclable waste, as described in paragraph 1.6 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 Act and 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 AA1000581 for 7 years and 8 months.
- 5.9. On 10 November 2021, the ACCC granted interim authorisation to enable MWRRG, the Participating Councils and the 3 regional WRRGs to commence the tender and contract negotiation stage of the Proposed Conduct (but not execute any binding contracts) while the ACCC considers the substantive application. Interim authorisation remains in place until the date of the ACCC's final determination comes into effect or until interim authorisation is revoked.
- 5.10. This draft determination is made on 16 December 2021.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 21 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.