



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Draft Determination

Application for revocation of AA1000458 and the substitution of  
authorisation AA1000503

lodged by

Metropolitan Waste and Resource Recovery Group

in respect of

joint procurement of organic waste processing services

Authorisation number: AA1000503

Date: 18 December 2020

Commissioners: Keogh

Rickard

Court

Ridgeway

## Summary

The ACCC proposes to re-authorise the Metropolitan Waste and Resource Recovery Group (MWRRG) and 13 metropolitan Melbourne councils to jointly procure organic waste processing services until 10 July 2032 (the Conduct).

MWRRG and a subset of the councils (comprising the South Eastern Organics Group) have been authorised since 18 June 2014 to engage in joint procurement. Mornington Peninsula Shire Council was added to the authorised group on 12 March 2020, and that authorisation was not due to expire until 2032.

The current application for re-authorisation seeks to add the Melbourne City, Port Phillip City, Whittlesea City, and Yarra City Councils (the Additional Councils) to the bargaining group until 2032.

The ACCC considers that the Conduct is likely to result in public benefits including improved economies of scale for suppliers, some transaction and administrative cost savings, and environmental and public health benefits.

However, the ACCC also considers that the Conduct is likely to result in significant public detriment by removing the need for a competitive tender process to supply organic waste processing services to the Additional Councils. The information available to the ACCC indicates that, over time, this is likely to result in poorer terms and conditions of organics processing contracts available to the Additional Councils.

In response to this issue, MWRRG has clarified that the Additional Councils intend to join the South Eastern Organics Group on a contingency basis (e.g. for use in the event that there is a shutdown of their primary, and geographically closer, facilities). The Additional Councils would access the South Eastern Organics Group arrangements on an “as needs” basis until a further competitive tender process can be conducted. For this reason, MWRRG is open to a limit on the maximum length of any contingency contracts.

Accordingly, the ACCC proposes to impose a condition of authorisation that limits the maximum length of any contingency contracts entered into by the Additional Councils through the South Eastern Organics Group to a period of three years. This proposed condition would prevent the Additional Councils from entering into long term contracts or allowing any short term contracts to be extended into the long term without intervening competitive open tenders.

Overall, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit, with the proposed condition of authorisation, would outweigh any likely detriment to the public from the Conduct.

The ACCC proposes to grant authorisation until 10 July 2032 (i.e. the same expiry date that applies to the current authorisation that was granted in March 2020).

The ACCC invites submissions in relation to this draft determination by 29 January 2021 before making its final decision. The ACCC particularly invites submissions on whether three years is an appropriate time limit on any contingency contracts entered into by the Additional Councils.

## 1. The application for revocation and substitution

- 1.1. On 21 April 2020, Metropolitan Waste and Resource Recovery Group (**MWRRG**), on behalf of itself and thirteen councils in metropolitan Melbourne (together, the **Applicants**) lodged an application to revoke authorisation AA1000458 and substitute authorisation AA1000503 for the one revoked (referred to as re-authorisation) with the ACCC.<sup>1</sup>
- 1.2. The ACCC can 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

- 1.3. MWRRG is a Victorian state government statutory body corporate, and is responsible for municipal solid waste management and planning. This management includes coordination of joint procurement processes for waste disposal services for the 31 local councils in metropolitan Melbourne.
- 1.4. 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, Mornington Peninsula Shire (the existing **South Eastern Organics Group**) in addition to the Melbourne City, Port Phillip City, Whittlesea City, and Yarra City councils (the **Additional Councils**) (together, the **Participating Councils**).

### Purpose of the application for re-authorisation

- 1.5. On 18 June 2014, the ACCC granted authorisations A91414 and A91415 to the South Eastern Organics Group to jointly procure organic waste processing services until 10 July 2032.
- 1.6. On 12 March 2020, the ACCC revoked authorisations A91414 and A91415 and substituted authorisation AA1000458 to include Mornington Peninsula Shire Council in the South Eastern Organics Group bargaining group until 10 July 2032.
- 1.7. The purpose of the current application for re-authorisation is to add the Additional Councils to the bargaining group.
- 1.8. The Applicants state that the Additional Councils' intention is to join the South Eastern Organics Group on a contingency basis (e.g. for use in the event that there is a shutdown of their primary, and geographically closer, facilities).

### The Conduct

- 1.9. The Applicants seek re-authorisation for the Participating Councils to:
  - jointly procure organic waste processing services, and
  - make certain joint decisions regarding the administration of ongoing contracts for organic waste management services.(the **Conduct**).

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

- 1.10. The Applicants state they are not seeking any material change to the conduct previously authorised, beyond adding the Additional Councils to the bargaining group.
- 1.11. The Applicants are also not seeking any changes to the term of authorisation, with re-authorisation sought until 10 July 2032 (the date the existing authorisation is due to expire).

### **The contingency arrangements**

- 1.12. As noted above, the Additional Councils are seeking the option to enter into contingency arrangements only if it is necessary. If authorisation were granted, the Additional Councils would not immediately enter into long term contracts (e.g. to 2032) with service providers to the South Eastern Organics Group. Rather, the Additional Councils would access the South Eastern Organics Group contract on an 'as needs' basis. If their existing service provider is able to continue over the long term, then the current arrangements with that service provider would continue as is.
- 1.13. In this context, MWRRG states it is open to a potential condition of authorisation that limits the maximum length of any contingency contracts entered into by the Additional Councils through the South Eastern Organics Group to a period of three years. The Applicants also state that if such a condition is imposed they would like to explore a mechanism that would allow MWRRG and the Additional Councils to obtain an extension of time if necessary.

### **Features of the Conduct**

- 1.14. The Conduct relates to procuring processing services for 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).
- 1.15. 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,
  - 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), and
  - the methods by which the councils procure organic waste services and manage ongoing contracts with service providers will not change.
- 1.16. Participation in the arrangements is voluntary for each council up until the point at which it enters any contractual arrangements with an organics processor. 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.
- 1.17. The participation of each of the Additional Councils will be implemented via a bi-lateral deed between each of the Additional Councils and each service provider. Each of the Additional Councils will also sign an agreement with MWRRG which will

facilitate the joint arrangements between each of the Participating Councils and MWRRG.

- 1.18. 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.<sup>2</sup> It is intended that this representative group will also be expanded to include the Additional Councils.

## 2. Background

### Outline of organics waste processing

- 2.1. 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) (broadly referred to as organics processing).

- 2.2. The Conduct for which authorisation is sought relates to organic processing.

### Organics processors operating in metropolitan Melbourne

- 2.3. Cleanaway Waste Management Limited (**Cleanaway**) operates across Australia. It supplies organics processing services in Melbourne from its facility located in Dandenong South. This facility sorts, decontaminates, and shreds more than 100,000 tonnes of organics waste every year. It also houses a food depackaging unit.<sup>3</sup>
- 2.4. The Sacyr Group (**Sacyr**) is a diversified multinational corporate group. It supplies organics waste processing services in Melbourne from its facility located in Dandenong South. This facility can sort, decontaminate, and compost up to 120,000 tonnes of organics waste every year.
- 2.5. The Veolia Group (**Veolia**) is a diversified multinational corporate group. It supplies organics waste processing services in Melbourne from its facility at Bulla capable of processing 85,000 tonnes of organic waste a year. Another Veolia facility at Werribee is being used as a green waste transfer station to process a further 35,000 tonnes of organic waste per year.
- 2.6. SUEZ is a French-based multinational group. It supplies organics waste processing services in Melbourne from its facility in Epping which is capable of processing up to 65,000 tonnes of organic waste a year. The SUEZ Group is currently the subject of a proposed takeover by the Veolia Group, which has not as yet been accepted by SUEZ or considered by the ACCC in relation to its Australian operations.

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<sup>2</sup> See Application – Melbourne Waste and Resource Recovery Group 18 November 2019 pp 9-10.

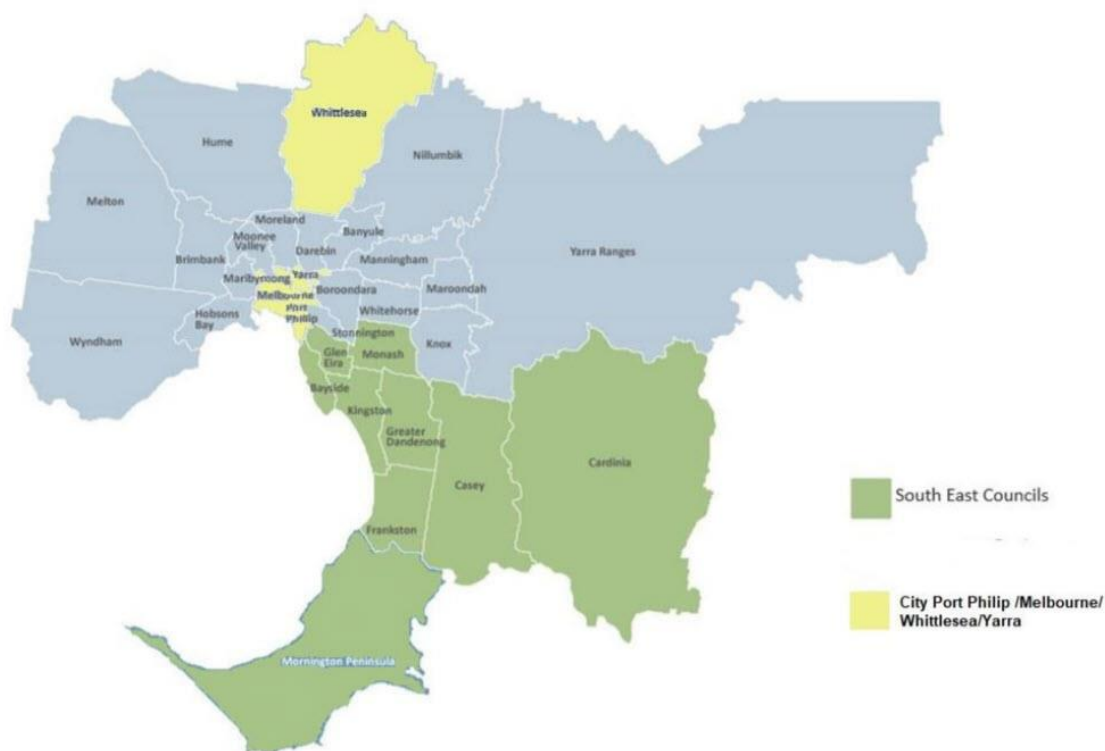
<sup>3</sup> Cleanaway Website <<https://www.cleanaway.com.au/sustainable-future-hub/#vic>>

- 2.7. Biomix Compost (**Biomix**) is a privately owned composting facility currently providing composting to Melbourne from its facility in Stanhope, near Bendigo in rural Victoria. It has historically processed large quantities of organics material under direct contracts with councils and various sub-contracts and correspondingly supplies a large quantity of the compost and related products sold in Victoria.
- 2.8. A number of smaller companies also supply or are seeking to supply organics processing services within Melbourne which include composting, shredding and/or transfer services to other sub-contracted processors.

## MWRRG and Melbourne councils' current involvement in the organics waste stream

- 2.9. The Existing Councils are local government authorities located primarily in south-east metropolitan Melbourne. The Additional Councils are located in central and north metropolitan Melbourne. Their roles and functions 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.
- 2.10. The total population of metropolitan Melbourne is estimated to be approximately 5.08 million as at 30 June 2019. The combined resident population of the eight Existing Councils participating in the existing South Eastern Organics Group is estimated to be approximately 1.57 million as at 30 June 2019. The population of the Additional Councils is approximately 626,289.<sup>4</sup>

**Figure 1: Map of Existing Councils (in green) in the South East Organics Group and Additional Councils (in yellow)**



<sup>4</sup> See <https://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/3218.0?OpenDocument>

**Table 1 – Annual organic waste volumes of Existing Councils (in green) and Additional Councils (in yellow) as estimated by MWRRG**

<b>Council / Shire</b>	<b>Organic waste (tonnes per annum)</b>
<b>Bayside City</b>	9827
<b>Cardinia Shire</b>	7611
<b>Casey City</b>	35,336
<b>Greater Dandenong City</b>	12,791
<b>Frankston City</b>	18,529
<b>Glen Eira City</b>	11,793
<b>Kingston City</b>	14,397
<b>Monash City</b>	21,959
<b>Mornington Peninsula Shire</b>	~25,000
<b>Melbourne City</b>	~5,000
<b>Port Phillip City</b>	~5,000
<b>Whittlesea City</b>	~15,000
<b>Yarra City</b>	~6,500
<b>Total</b>	<b>~188,743</b>

Source: Adapted from MWRRG, AA1000503 Application document, page 15-16 and Sustainability Victoria, Victorian Local Government Annual Waste Services Workbook 2017–18.

2.11. 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 Existing Councils collect approximately 43% of this material. The addition of the Additional Councils would raise the amount collected to approximately 52% of the municipal total.<sup>5</sup>

2.12. The majority of metropolitan Melbourne councils have joined one of the three collective tendering groups under the auspices of MWRRG:

- **North Western Organics Group – (green area in Figure 2 below)<sup>6</sup>**– involves 11 councils: Banyule, Brimbank, Darebin, Hobsons Bay, Hume, Maribyrnong, Melton, Moonee Valley, Moreland, Nillumbik and Wyndham.

Veolia has the contract to process organic waste collected from these council areas until 2029.

- **Eastern Organics Group – (blue area in Figure 2 below) authorised 2014** involves five councils: Knox City, Maroondah City, Yarra Ranges Shire, Manningham City and Whitehorse City.

Bio Gro Australia and Biomix have the contract to process organic waste collected from these council areas until 2032.

<sup>5</sup> 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.

<sup>6</sup> Metropolitan Waste Management Group (2014) *Annual Report* pg 28 [https://www.parliament.vic.gov.au/file\\_uploads/Metropolitan\\_Waste\\_Management\\_Group\\_Annual\\_Report\\_2014\\_G75TC\\_C0t.pdf](https://www.parliament.vic.gov.au/file_uploads/Metropolitan_Waste_Management_Group_Annual_Report_2014_G75TC_C0t.pdf)



- **South East Organics Group – (yellow area in Figure 2 below) first authorised in 2014, revocation and substitution in March 2020 to add Mornington Peninsula, subject of current authorisation application**

Currently involves nine councils: Bayside, Cardinia, Casey, Frankston, Glen Eira, Greater Dandenong, Kingston, Monash and Mornington Peninsular. The current application would add four councils: Melbourne City, Port Philip City, Whittlesea City, and Yarra City Councils.

Cleanaway, Veolia and Sacyr share the contracts to process organic waste collected from these council areas until 2032.

- 2.13. These three collective tendering groups account for around 85% of municipally collected organics waste which is processed in metropolitan Melbourne. If each of the Additional Councils join SEOG, this would rise to approximately 95%.
- 2.14. The following map illustrates the three collective tendering groups under the aegis of MWRRG. The council areas shown in brown indicate the remaining metropolitan Melbourne councils not currently in one of the three groups.

**Figure 2 - Melbourne metropolitan councils currently in a MWRRG facilitated, joint tendered organics processing group and organics processor locations**



note: brown shading covers the Additional Councils, as well as Boroondara and Stonnington Councils

## Future of MWRRG and Melbourne councils' involvement in the organics waste stream

- 2.15. Separately, the Victorian State Government has also committed to establishing a new Waste and Recycling Act and a waste authority. This is the result of reviews from several Victorian government agencies which were delivered in 2019 and instituted in response to perceived substantial dysfunctions in the waste and recycling industry.<sup>7</sup> The proposal is that 'the new waste authority will partner with local councils to

<sup>7</sup> The Age (22 February 2019) *State government must act to fix recycling crisis, councils urge* <https://www.theage.com.au/politics/victoria/state-government-must-act-to-fix-recycling-crisis-councils-urge-20190222-p50zos.html>, Victorian Government (15 September 2020) <https://www.vic.gov.au/waste-act-and-authority-consultation>.



manage waste and recycling services. It will also ensure high-quality waste and recycling services for all Victorians'.<sup>8</sup>

- 2.16. In effect, it is proposed that the proposed new waste authority will subsume the functions of all seven of the Victorian Waste and Resource Recovery Groups, including MWRRG. It will also acquire the infrastructure planning function currently being performed by Sustainability Victoria.<sup>9</sup>

### 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 bodies.<sup>10</sup>
- 3.3. The ACCC received submissions from three processors, each of whom requested that they not be publicly identified, in relation to the application, conducted further market inquiries with councils and processors, and also received several submissions in response from the Applicants. Market inquiries were substantially delayed during the shutdown period during Melbourne's response to the Covid-19 outbreak.
- 3.4. Broadly, the three submissions oppose the application on the basis that:
- The Councils nominated are not well geographically linked to the South East cluster, limiting cost savings arising from potential transportation efficiencies.
  - There are new companies offering both transfer and processing opportunities since the South East Organics Tender was advertised. These companies would like to tender for the waste volumes of the Additional Councils.
  - There is nothing preventing any of the facilities which service the existing joint bargaining groups from also tendering in an open, competitive tendering process
  - There have been changes in Victorian Government policy for the Resource Recovery Sector.<sup>11</sup> The submissions state that there needs to be a stronger alignment between the contracts released by MWRRG and the new policy. Businesses which have been encouraged to enter the industry by the new policy, facilitation provided by government departments and grants are being shut out by MWRRG's amalgamation of Councils into existing contracts rather than releasing new tenders.
  - The continued amalgamation of Councils into existing joint arrangements is not in the best interest of the industry and is encouraging heavy handed behaviour by

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<sup>8</sup> State of Victoria (20 November 2020) *Waste Act and Authority* consultation page at vic.gov.au <https://www.vic.gov.au/waste-act-and-authority-consultation>.

<sup>9</sup> State of Victoria Department of Environment, Land, Water and Planning (2020) *Waste and recycling legislation and governance options paper* pg 6.

<sup>10</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>11</sup> Following the collapse of several waste and recycling companies, the Victorian Government has acted to increase the number of waste processors and provide financial support to the entry of new, smaller processors in an effort to increase diversification of providers.

MWRRG, which is concerning given the high proportion of municipal collected organics waste which MWRRG controls.

3.5. In summary, the Applicants responded that:

- The Additional Councils are seeking to join the South East Organics Group on a contingency basis for up to three years (in the event that there is a shutdown of their primary, and geographically closer, facilities).
- There are good reasons why councils may choose not to participate in joint tendering initially and it is not possible for MWRRG to compel them to participate. In MWRRG's view this should not preclude a council joining a joint tendering group at a later time if the council considers that doing so would be in its interests.
- Businesses will have the opportunity to participate in future tenders. MWRRG is currently developing the Metropolitan Organics Procurement Strategy (Strategy), to be completed over the next 12 months. MWRRG envisages that the Strategy may result in further opportunities for the joint procurement of organic waste services across metropolitan Melbourne and greater Victoria that will be open to all businesses (i.e., in the same manner as all previous tenders).

3.6. Public submissions by the Applicants and interested parties are on the Public Register for this matter.

## 4. ACCC 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 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. Consistent with subsection 90(7)<sup>12</sup> 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).

### Relevant areas of competition

4.3. In making its assessment of the Conduct, the ACCC considers that the relevant areas of competition are likely to be the supply and acquisition of processing services for organic waste in metropolitan Melbourne.

### Future with and without the Conduct

4.4. In applying the authorisation test, the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future in which the conduct does not occur.

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<sup>12</sup> See subsection 91C(7).

4.5. In the likely future with the Conduct:

- The Participating Councils will have the ability 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 Additional Councils intend to join the South Eastern Organics Group on a contingency basis and therefore would access the South Eastern Organics Group arrangements on an “as needs” basis. In order to confirm this contingency basis, the Additional Councils are open to a condition of authorisation that limits the maximum length of any contingency contracts entered into by the Additional Councils through the South Eastern Organics Group to a period of three years.

4.6. In the likely future without the Conduct, the ACCC considers that:

- The Additional Councils would continue with their existing individual organics waste management arrangements until the end of their contract periods and then periodically seek to tender and negotiate for new arrangements (either with their existing processor or a new one).
- It is possible that the existing members of the South Eastern Organics Group could individually procure their organics waste management services. However, as matter of fact, these councils have already conducted a joint tender and currently make joint decisions regarding the administration of ongoing contracts for organic waste management services pursuant to authorisations A91414 and A91415. Therefore, absent a joint arrangement involving *all* of the Participating Councils, there is likely to be continued collaboration between the existing members of the South Eastern Organics Group pursuant to their current authorisation.

## Public benefits

4.7. 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.*<sup>13</sup>

4.8. The ACCC has considered whether the Conduct is likely to result in the following public benefits:

- improved economies of scale for suppliers,
- transaction cost savings, and
- environmental and health benefits.

### Improved economies of scale for suppliers

4.9. The Applicants submit that the aggregation of a larger volume of organic waste is likely to enable service providers to achieve greater operating efficiencies and

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<sup>13</sup> 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 delivering processing services, which will facilitate lower average costs for all of the Participating Councils.

- 4.10. The ACCC notes that these efficiencies relating to economies of scale can be achieved if the processing costs per tonne of organic material decrease the higher the volume processed. Market inquiries indicate this is the case, with the minimum efficient scale for new entry to be approximately 50,000 tonnes.
- 4.11. The ACCC considers that the successful South Eastern Organics Group tender outcome demonstrates that the Existing Councils supply the necessary volumes to provide the South Eastern Organics Group processors with sufficient economies of scale. The ACCC considers that this is a clear public benefit of the Conduct.
- 4.12. If the Additional Councils join the South Eastern Organics Group, even on a short-term contingency basis, this will increase the volumes processed by the South Eastern Organics Group processors. This may allow further efficiencies to be realised over a greater volume of organic waste, facilitating lower average costs for the processing of the organic waste produced by the councils in the South Eastern Organics Group. However, the addition of the volumes of the Additional Councils would also increase the scale of other processors outside the South Eastern Organics Group, with corresponding efficiency benefits and reduction of costs.
- 4.13. Therefore, on the information available to the ACCC, it is unclear that joining the South Eastern Organics Group would be the most efficient disposition of the organic waste volumes of the Additional Councils. Accordingly, it is unclear that including the Additional Councils' volumes within the South Eastern Organics Group will lead to an incremental increase in the public benefit from economies of scale.
- 4.14. In summary, the ACCC considers that the Conduct is likely to lead to improved economies of scale for suppliers of organics processing to the South Eastern Organics Group but considers that the majority of this benefit stems from the Existing Councils.

### **Transaction and administrative cost savings from joint contracting**

- 4.15. The Applicants submit that the combined contracting process leads to efficiency related cost savings (including from 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 the Participating Councils engage separately with potential suppliers.
- 4.16. The Applicants also submit that one of the reasons for the application is to give the Additional Councils the ability to join the South Eastern Organics Group and reduce the magnitude of the effects of any business failure by an existing waste processor. The Additional Councils would benefit from avoiding the need to run a tender for contingency organic processing services to manage this risk and from the above ongoing administrative cost savings for the duration they join the South Eastern Organics Group.
- 4.17. In response to market inquiries, a significant number of market participants questioned whether the collective administration of organics processing contracts and MWRRG's involvement does in fact lead to administrative cost savings on an ongoing basis. Some parties have submitted that MWRRG's contract management has not reduced the contract administration requirements for either councils or processors that participate in its joint tender groups and merely appears to have added an additional layer of oversight and reporting.

- 4.18. The ACCC notes that the terms of contracts established via the South Eastern Organics Group arrangements reflect the agreement reached by the Existing Councils and the Additional Councils did not, and will not, have input into that process.
- 4.19. Overall, the ACCC considers that the Conduct is likely to result in public benefit through transaction and administrative cost savings although, given the above considerations, these are likely to be relatively small both for the Existing and the Additional Councils.

### **Environmental and health benefits**

- 4.20. The Applicants submit that pursuant to the previous 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.
- 4.21. The Applicants also submit that the Additional Councils wish to join the South Eastern Organics Group on a contingency basis to reduce the risk of the environmental effects of any business failure by their current processors.
- 4.22. The ACCC considers that public benefits in the form of environmental and public health benefits are likely to arise from the Existing Councils continuing to support the operations of the South Eastern Organics Group processors with their organic waste volumes by participating in the Conduct.
- 4.23. The South Eastern Organics Group processors are not dependent on participation in the Conduct by the Additional Councils in order to support their operations and the resulting health and environmental benefits. In addition, other modern facilities now exist in the region which, in the absence of the Conduct, could also supply these environmental and health services to the Additional Councils. There is also nothing to prevent the South Eastern Organics Group processors from tendering if the Additional Councils conducted their own joint or separate tender processes.
- 4.24. However, the ACCC accepts that any sudden business failure by an organics processor servicing the Additional Councils is likely to lead to a period of disruption during which collected organics waste may need to be sent to landfill, to the detriment of the environment. Depending on capacity in the region, this period of disruption has the potential to be quite lengthy. Therefore, to the extent that the Additional Councils are able to quickly change processor through engaging in the Conduct in the event of an unexpected business failure, the ACCC considers that this is likely to lead to public benefits in the form of environmental benefits.
- 4.25. Accordingly, the ACCC considers that the Conduct is likely to result in public benefit in the form of:
- environmental and public health benefits through the Existing Councils' support for the operations of the South Eastern Organics Group processors, and
  - environmental benefits from the avoidance of the need to send some organic waste to landfill should the Additional Councils' existing organic processing arrangements fail.

## **ACCC conclusion on public benefit**

4.26. The ACCC considers that the Conduct is likely to result in the following public benefits:

- improved economies of scale for suppliers,
- some transaction and administrative cost savings, and
- environmental and public health benefits.

## **Public detriments**

4.27. The Act does not define what constitutes a public detriment. The ACCC applies the broad approach adopted by the Tribunal, which has defined public detriment 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.*<sup>14</sup>

4.28. The Applicants submit that the substituted authorisation will not result in any discernible public detriments. Authorisations A91414 and A91415 were in place for over five years and, during that period, no material public detriments were identified in relation to the relevant conduct.

4.29. Having regard to the submissions of the Applicants and interested parties and information obtained from market inquiries, the ACCC has considered whether the Conduct is likely to result in a loss of competition for the organics waste processing contracts of the Additional Councils.

4.30. The ACCC considers that these possible long term impacts on the market are not directly relevant to this assessment in light of MWRRG's clarifying submission that the Additional Councils intend to join the South Eastern Organics Group on a contingency basis and would be open to a limit on the maximum length of any contingency contracts.

## **Loss of competition for the organics waste processing contracts of the Additional Councils**

4.31. In granting authorisations A91414 and A91415, the ACCC noted that while the processing of organic waste for the South Eastern Organics Group would not be contestable for the duration of the relevant contract period, the tender process ensured there would be competition 'for the market' (e.g. competition to win the contract).

4.32. On its face, the Conduct in the current application for re-authorisation would allow the Additional Councils to enter into organic waste processing contracts without conducting a competitive tender process. MWRRG has not amended the Conduct definition to include a competitive tender aspect.

4.33. Market inquiries indicate that any open tenders conducted by the Additional Councils are likely to be highly competitive with a number of organics processors strongly motivated to submit attractive bids. In contrast, market inquiries indicate that:

- there is likely to be little, if any, competition for the volumes of the Additional Councils if they enter contracts through the South Eastern Organics Group

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

- some councils are currently able to access more favourable terms and conditions outside the MWRRG joint tendering groups than inside, to the extent that they did not participate in the original joint tendering
- there is a history of metropolitan Melbourne councils entering into short-term organics processing contracts in response to sudden facility closures on unfavourable terms (from a long term perspective) and then allowing those contracts to roll over for an extended period of time.

4.34. In these circumstances, the ACCC considers that the Conduct is likely to result in significant public detriment by removing the need for a competitive tender process to supply organic waste processing services to the Additional Councils. The information available to the ACCC indicates that over time this is likely to result in poorer terms and conditions of organics processing contracts available to the Additional Councils.

4.35. In response to this issue, the Applicants have clarified that the contingency arrangements outlined above (at paragraph 1.12) mean the Additional Councils would access the South Eastern Organics Group arrangements on an “as needs” basis until a further competitive tender process can be conducted. Under that subsequent competitive tender process, service providers would have the opportunity to tender for the entirety of the Additional Councils’ organic waste volumes (or, if not under that tender, then any independent tender run by an individual council should they choose to do so). For that reason, MWRRG is open to a condition of authorisation that limits the maximum length of any contingency contracts entered into by the Additional Councils through the South Eastern Organics Group.

4.36. Accordingly, the ACCC proposes to impose a condition of authorisation that limits the maximum length of any contingency contracts entered into by the Additional Councils through the South Eastern Organics Group to a period of three years. The ACCC considers that a time limit on the Additional Councils’ use of contracts negotiated through the South Eastern Organics Group prevents the Additional Councils from entering into long term contracts or allowing any short term contracts to be extended into the long term without intervening competitive open tenders.

4.37. The ACCC invites comments from the Applicants and interested parties as to whether three years is an appropriate time limit on any contingency contracts entered into by the Additional Councils.

## Balance of public benefit and detriment

4.38. For the reasons outlined in this draft determination, the ACCC is satisfied that, subject to the proposed condition of authorisation, 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.

## Length of authorisation

4.39. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>15</sup> 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.

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<sup>15</sup> Subsection 91(1)



- 4.40. In this instance, the Applicants seek re-authorisation until 10 July 2032.
- 4.41. Some interested parties that oppose the authorisation indicated that a time limit on the Conduct would reduce their concerns.
- 4.42. The ACCC considers it appropriate to grant authorisation until 10 July 2032 for all of the Participating Councils, subject to the proposed condition limiting the maximum length of any contingency contracts entered into by the Additional Councils through the South Eastern Organics Group to a period of three years.
- 4.43. For the avoidance of doubt, the proposed grant of authorisation would not place any time limits on the participation of the Existing Councils in the Conduct up until the expiry of the authorisation on 10 July 2032.

## 5. Draft determination

### The application

- 5.1. On 21 April 2020 the Applicants lodged an application to revoke authorisation AA1000458 and substitute authorisation AA1000503 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000503 was made under subsection 91C(1) of the Act.
- 5.2. The Applicants seek authorisation for 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 Proposed Conduct, subject to the proposed condition of authorisation below, 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 the re-authorisation sought.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisation AA1000458 and grant authorisation AA1000503 in substitution to enable the Applicants to collectively procure organic waste processing services and to make joint decisions regarding the allocation of waste material as described in paragraph 1.6 and defined as the Conduct.
- 5.7. Authorisation is proposed to be granted subject to a condition that the maximum length of any contingency contracts entered into by the Additional Councils through the South Eastern Organics Group must not exceed a period of three years.

- 5.8. 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.
- 5.9. The ACCC proposes to grant authorisation AA1000503 until 10 July 2032.
- 5.10. The proposed authorisation is in respect of the arrangement as it stands at the time authorisation is granted. Any changes to the arrangement during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.11. This draft determination is made on 18 December 2020.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 29 January 2021. 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.