



Draft Determination and interim authorisation

Application for authorisation AA1000597

lodged by

Gippsland Waste and Resource Recovery Group

in respect of collaborative procurement of domestic waste collection and
transport services

Authorisation number: AA1000597

Date: 16 February 2022

Commissioners: Keogh
Rickard
Brakey

Summary

The ACCC proposes to grant authorisation to enable the Gippsland Waste and Resource Recovery Group (GWRRG) and 6 councils located in Gippsland, Victoria, to jointly tender and procure domestic waste collection and transport services. Waste service suppliers will be able to tender to supply all councils, or individual and/or clusters of councils. The councils are likely to sign individual contracts with the successful tenderer/s but they may engage in joint management activities in relation to the contracts with the service supplier/s.

The 6 councils are: Bass Coast Shire Council, Baw Baw Shire Council, East Gippsland Shire Council, Latrobe City Council, South Gippsland Shire Council and Wellington Shire Council (the Participating Councils).

The ACCC considers the joint tendering, procurement and management of domestic waste collection and transport services is likely to result in public benefits in the form of environmental benefits, providing greater long term certainty for councils and potential waste service suppliers; increased competition for service contracts with more joint tender participants than would be the case if councils sought tenders on an individual basis; and transaction cost savings.

The ACCC considers that the joint tendering, procurement and contract management is likely to result in limited public detriment. Councils will independently decide whether it is in their best interests to procure domestic waste collection and transport services through the joint tender process, or through individual negotiations with a supplier. Potential service providers will continue to have opportunities to compete to supply some or all of the Participating Councils.

Overall, the ACCC is satisfied that the proposed conduct is likely to result in a public benefit that would outweigh the minimal likely public detriment.

In recognition of the long term contracts the Participating Councils expect to enter following the tender process, the ACCC proposes to grant authorisation for 11 years.

The ACCC has also granted interim authorisation to enable the GWRRG and Participating Councils to commence the tender process while the ACCC is considering the substantive application. Interim authorisation does not extend to the Participating Councils selecting or entering into contracts domestic waste collection and transport services suppliers.

The ACCC invites submissions in relation to this draft determination by 2 March 2022 before making its final decision.

1. The application for authorisation

- 1.1. On 15 December 2021, the Gippsland Waste and Resource Recovery Group (GWRRG, the **Applicant**), on behalf of itself and 6 councils located in Gippsland, Victoria, lodged application for authorisation AA1000597 with the Australian Competition and Consumer Commission (the **ACCC**). The GWRRG is seeking authorisation for 10 years to jointly tender, and for the 6 Participating Councils to potentially jointly procure domestic waste collection and transport services. The Participating Councils are likely to individually enter into contracts with the successful supplier(s) but are also seeking authorisation for the ongoing joint management of the contracts.

- 1.2. This application for authorisation AA1000597 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. The GWRRG also requested interim authorisation to enable it, and the Participating Councils, to progress the tender process, including identifying appropriate suppliers and commencing the process of preparing contractual documentation, while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in section 6.

Participants in the Proposed Conduct

- 1.4. The GWRRG is a regional waste and resource recovery body,¹ and is responsible for planning, coordinating and facilitating the delivery of waste management and resource recovery across the Gippsland region. This management includes efficient procurement of waste and resource recovery infrastructure and services through collective procurement.
- 1.5. The councils that form part of this Application are Bass Coast Shire Council, Baw Baw Shire Council, East Gippsland Shire Council, Latrobe City Council, South Gippsland Shire Council and Wellington Shire Council (the **Participating Councils**).
- 1.6. The GWRRG has also sought authorisation to extend to any new waste authority or 'successor entity' of the GWRRG.²

The Proposed Conduct

- 1.7. Authorisation is sought for:
 - the GWRRG, on behalf of the Participating Councils, to conduct a collaborative competitive tender process for the provision of domestic waste collection and transport services, to evaluate the response in collaboration with the Participating Councils and to negotiate a contractual framework on behalf of the Participating Councils
 - the Participating Councils to enter into contract(s) with the successful supplier(s)
 - ongoing administration and management of the resultant contract(s) to be undertaken by the Participating Councils.

(the **Proposed Conduct**)

¹ Established under section 382 Environmental Protection Act 2017 (Vic) (the **EP Act**)

² In 2020, the Victorian Government announced a proposal to introduce a new waste authority that is intended to perform the functions of the seven existing Waste and Resource Recovery Groups throughout Victoria.

- 1.8. The Participating Councils and the GWRRG have formed a collaborative alliance through a Memorandum of Understanding to jointly investigate and explore the procurement of the services and engagement with prospective service providers. The proposed joint activities include the following:
- development of a request for tender and advertising the services
 - evaluation of proposals submitted by prospective service providers, and the preparation of recommendations to assist in evaluating proposals received
 - evaluation of, and contribution to, the costs of conducting the joint procurement
 - joint negotiations, including joint arrangements between the Participating Councils
 - forming groups or committees between the Participating Councils for the ongoing management of agreements with respect to the services.
- 1.9. To facilitate the joint activities, a group of representatives from each of the Participating Councils, as well as the GWRRG, will be established (the Working Group). The Working Group will prepare a Request for Tender with input from the Participating Councils, and will be responsible for receiving and evaluating proposals submitted by service providers in response to the Request for Tender. The Working Group will prepare a joint report containing their recommendations regarding preferred bidders which will be used by the Participating Councils in determining each Council's decision to proceed to formal contract with the service provider(s).
- 1.10. Once the proposals received under the Request for Tender are evaluated, and the joint report (including any relevant recommendations) has been submitted to the relevant Participating Councils, should the Councils wish to proceed to a formal contract, the GWRRG may assume the role of contract negotiator in collaboration with the relevant Council representative.
- 1.11. Participation in the Proposed Conduct will be voluntary for each Participating Council. A Council that does not opt-in to the Proposed Conduct may choose to proceed independently and continue to individually procure its own waste and resource recovery services.
- 1.12. Participating Councils that opt-in to the Proposed Conduct will not be required to accept the proposals recommended by the Working Group in the joint report, or to enter into any arrangements with service providers that submit tenders in the joint process. Such Councils will also be free to withdraw from the Proposed Conduct at any time following consideration of the joint report.
- 1.13. It is proposed that waste service providers in the bidding process may bid for:
- the provision of services to each Participating Council, and
 - the provision of services to a cluster of the Participating Councils (more than two) determined by geographic proximity, volume or any other relevant factors.
- 1.14. If tender proposals are received for the provision of services to multiple Participating Councils, those Councils may choose to jointly evaluate those proposals, with the assistance of the GWRRG, and to jointly negotiate with the relevant service providers with a view to entering joint arrangements between them for the services.
- 1.15. Following the joint tender process, it is proposed that each Participating Council, having opted in to the Proposed Conduct, will enter into an arrangement with the

successful service provider(s). Those Participating Councils will be responsible for managing arrangements with the contracted service providers on an ongoing basis. The GWRRG will not play a role in the ongoing administration or management of the contracts on behalf of the Participating Councils. However, the GWRRG may assist in facilitating contract management meetings to ensure best outcomes for the services procured.

Length of authorisation sought

1.16. The period of authorisation sought includes:

- 12 months to complete the initial joint procurement process (including the request for tender process, selection of invitees to proceed to tender and Council approval to proceed) (Initial Procurement), and
- 10 years from the conclusion of the Initial Procurement process for the acquisition of the services.

1.17. The rationale for the requested period is to promote competitive tender bids that allow service providers to realise a return on any capital investments undertaken. The GWRRG and the Participating Councils expect that service providers will make capital investments in processing infrastructure and may upgrade existing waste and resource recovery facilities and/or construct new facilities.

Rationale for the Proposed Conduct

1.18. The GWRRG submits that due to the expected increase in population in the Gippsland area by 2031, and the corresponding increase in municipal waste collected, additional waste material will be end up being sent to landfill each year unless an alternative solution is found. The collaborative procurement of the services will ensure that a sufficient quantity of waste is aggregated, especially in the effective collection and transportation methods, to ensure improved affordability and environmental outcomes.

1.19. The GWRRG submits that collaborative procurement has been the primary mechanism used (within Victoria and interstate) as a means of encouraging innovation in processing to move away from landfill. The GWRRG has been tasked with leading, on behalf of the councils, the investigation, development and implementation of waste and resource recovery infrastructure within the Gippsland region.

2. Background

2.1. The Participating Councils constitute all the local government authorities located in Gippsland, Victoria. Their roles and functions are governed by the Local Government Act 1989 (Vic). The Participating 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.

2.2. A map of the Gippsland area showing the location of the Participating Councils is below.

Figure 1: Map Gippsland Councils³



Government initiatives

2.3. The Victorian Government has established a co-ordinated state-wide strategy of tackling the increasing waste quantities and the need to decrease reliance on landfill, the State-wide Waste and Resource Recovery Infrastructure Plan (the State-wide Plan). The purpose of the State-wide Plan is to develop an approach to waste and resource recovery infrastructure that amongst other things:

- manages the expected mix of volumes of waste
- protects the community and environment
- supports a viable resource recovery industry
- reduces the amount of valuable materials going to landfill, and
- minimises long term costs to households, the industry and government.

2.4. In accordance with these obligations, the GWRRG established the Gippsland Waste and Resource Recovery Implementation Plan (the Gippsland Plan) which identifies the needs, challenges and opportunities for waste and resource recovery services over the next 10 years.

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 Gippsland Resource Recovery Group Website: <https://www.resourcerecoverygipps.vic.gov.au/about/who-we-are/>

- 3.2. The ACCC invited submissions from a range of potentially interested parties including waste management firms, industry associations and government bodies. The ACCC received one submission from JJ's Waste & Recycling (**JJ's Waste**), a provider of waste management collection services in Victoria. JJ's Waste raised concerns about the potential for the Proposed Conduct to exclude local companies from participating, lead to inefficiencies in the delivery of services, a lack of innovation and reduced competitiveness.
- 3.3. The GWRRG, in response to JJ's Waste concerns, submits a 10-year term may assist to encourage investment in equipment and in dealing with rising waste volumes which requires greater innovation and commitment of new technologies. Further, the tender will be open to all parties, and allows for bidders to bid for some or all of the councils' needs, as such maintaining competition. Lastly, managing a fleet across greater volumes of waste should allow for efficiencies if waste is required to be transported longer distances from the collection point to respective processing locations.
- 3.4. Public submissions by the GWRRG and JJ's Waste are on the [Public Register](#) for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The GWRRG has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 4.3. In making its assessment of the Proposed Conduct, the ACCC has considered:
 - the relevant areas of competition likely to be affected by the Proposed Conduct, particularly competition to supply and acquire domestic waste collection and transport services in Gippsland, and
 - the likely future without the Proposed Conduct that is the subject of the authorisation. In particular, the ACCC considers that it is likely that each of the Participating Councils would individually procure and administer their respective contracts for the acquisition of domestic waste collection and transport services. The ACCC considers that without the aggregation of waste of the individual Participating Councils, it is likely that the development and implementation of new waste and resource recovery infrastructure may not proceed, or would occur more slowly.

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.*⁴

4.5. The ACCC considers that the Proposed Conduct is likely to result in the following

- increased efficiencies
- increased competition
- environmental benefits, and
- transaction cost savings

Increased efficiencies

4.6. The ACCC considers that the aggregation of the Participating Councils' waste volumes is likely to provide potential suppliers of collection and transport services the opportunity to achieve a more efficient scale of operation in the delivery of collection and transportation services, which is likely to facilitate lower average costs for each Participating Council.

Increased competition to supply domestic waste collection and transport services in Gippsland

4.7. GWRRG submits that authorisation will enhance competition as the combination of volumes and services by the Participating Councils will incentivise additional service providers to bid and compete to provide the services. JJ's Waste states that a reduction in the total number of contracts available and a variation in start dates and contract terms will lead to a reduced number of skilled, experienced service providers over time leading to reduced competition and increased costs.

4.8. The ACCC considers aggregation of a larger volume of domestic waste collection, availability of transportation services and the duration of the proposed contracts, are likely to provide greater long-term certainty for potential suppliers of the services. This is likely to attract additional suppliers, increasing competition in the tender process.

4.9. The aggregation of a larger volume of domestic waste collection is also likely to enable service providers to achieve greater operating efficiencies and economies of scale in delivering the services, which will facilitate lower average costs for the Participating Councils.

Environmental benefits

4.10. The GWRRG submits that aggregating waste collection across the Participating Councils avoids the underutilisation of the fleet of vehicles and may result in less fossil fuels produced. Additionally, if coordination is successfully implemented, it may reduce the amount of valuable materials going to landfill. JJ's Waste states that larger trucks are not more fuel efficient and may not be able to navigate all streets requiring bin collections, thereby requiring a fleet with smaller vehicles anyway.

4.11. The ACCC considers to the extent that the Proposed Conduct results in more efficient, newer and/or improved collection may result in environmental benefits.

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

4.12. The ACCC acknowledges that the potential benefit claimed by GWRRG may be reduced in some areas for the reasons outlined by JJ's Waste, however, the ACCC considers the conduct is still likely to result in some environmental benefits.

Transaction cost savings

4.13. 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.

4.14. 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.

Public detriments

4.15. 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.⁵

4.16. The ACCC notes that the Participating Councils may compete, to some extent, in the acquisition of domestic waste collection and transportation services in the Gippsland region. Collectively tendering for these services may lessen competition in the supply of these services in Gippsland, particularly if tenderers were only able to bid for the total combined volumes, because this may exclude some current providers from tendering.

4.17. JJ's Waste submits the Proposed Conduct may only benefit major waste service providers due to the complexities of the tender process disadvantaging smaller providers. JJ's Waste submits that once a proposal is given exclusivity for a certain area of waste, it is only a matter of time before there is a gradual expansion into other areas of waste, including commercial and industrial. JJ's Waste is concerned that this would drive waste processing companies such as itself out of the market.

4.18. However, the GWRRG submits that any potential detriment would be outweighed by the benefit to the public. In particular, the GWRRG submits:

- The tender process will allow for suppliers to submit bids to supply smaller areas and single councils and therefore there will remain scope for smaller suppliers to secure work for a particular area, and to also ensure that larger suppliers must remain competitive in their pricing.
- The tender process will be competitive and conducted in accordance with best practice probity standards, including transparency and audit requirements. The GWRRG has engaged an independent probity auditor to oversee the joint procurement process, and who will report back to the Working Group.
- Selected suppliers will remain free to compete to supply services to councils in Victoria other than the Participating Councils. The Proposed Conduct affects a maximum of 6 local councils in Victoria out of a total of 79.

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

- Participation of each Participating Council is voluntary. Also, entry into contracts on terms negotiated under the joint tender will be voluntary for each of the Participating Councils at the end of the tender process.

4.19. The ACCC considers that the opportunity for suppliers to flexibly bid for single Councils or groups of Participating Councils will facilitate participation by smaller local waste services providers, as well as larger ones. Each Participating Council will have the ability to decide on which tenderer they contract with based on both commercial and non-commercial factors offered by each tenderer, and may consider factors like local expertise and job creation in this analysis.

4.20. Overall, the ACCC considers that the impact on competition is likely to be limited because potential suppliers will be free to tender to supply individual Participating Councils, or combinations of some or all of the Participating Councils. Each Council will independently decide which supply option best suits its needs, either from the options available through the joint tender process or through separately contracting with a supplier.

ACCC conclusion on public detriment

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

Length of authorisation

4.22. The Act allows the ACCC to grant authorisation for a limited period.⁶ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation sought. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.23. In this instance, the GWRRG seeks authorisation for 11 years. The GWRRG submits that, in addition to a 12 month period to run the tender process, authorisation is sought to cover the 10 year contract period required to allow service providers to realise a return on any capital investments undertaken with respect to the services.

4.24. The ACCC recognises that long term contracts are commonly required to support the level of investment necessary to upscale processing services and enhanced transportation, whilst providing certainty to the Participating Councils and relevant parties. Therefore, the ACCC considers the proposed term of authorisation is likely to be necessary for the Proposed Conduct to achieve this outcome and the associated public benefits.

4.25. The ACCC proposes to grant authorisation for 11 years.

5. Draft determination

The application

5.1. On 15 December 2021, the GWRRG lodged application AA1000597 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

⁶ Subsection 91(1)

- 5.2. GWRRG seeks authorisation for Proposed 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 Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000597 to enable the GWRRG to and the Participating Councils to conduct a joint tender process, procure and administer contracts for the provision of domestic waste collection and transport services as described in paragraph 1.7 and defined as the Proposed Conduct.
- 5.7. The ACCC proposes that authorisation apply to any successor entity of the Gippsland Waste and Resource Recovery Group.
- 5.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000597 for 11 years.
- 5.10. This draft determination is made on 16 February 2022.

6. Interim authorisation

- 6.1. At the time of lodging the application, the GWRRG requested interim authorisation to enable it to progress the tender process, including identifying appropriate service suppliers and commencing the process of preparing contractual documentation, while the ACCC is considering the substantive application.
- 6.2. The GWRRG submits that interim authorisation is necessary due to the time that is likely to be required to progress the overall tender process. The GWRRG considers it necessary to commence the procurement process as soon as possible in order to avoid any delays that may compromise the procurement being undertaken in a timely manner. The GWRRG submits that interim authorisation is important to ensure sufficient time to proceed to subsequent stages of the procurement and not disrupt the continuous provision of waste services to the Participating Councils' residents as existing supply arrangements expire.
- 6.3. The ACCC has decided to grant interim authorisation for the following reasons:

- there is a need for the GWWRG and Participating Councils to commence preparations for the joint tender process in order to minimise the risk of interruption of service, or having to enter into short term supply arrangements, if long term arrangements for domestic waste processing and transport services are not in place when the Participating Councils existing contracts expire
 - the relevant areas of competition are unlikely to be permanently altered if interim authorisation to commence preparations for the tender process but not release the formal request for tender or enter into contracts, is granted
 - based on the ACCC's assessment to date, the Proposed Conduct is likely to result in public benefits and is unlikely to result in significant public detriments.
- 6.4. Interim authorisation is granted to allow the GWRRG and the Participating Councils to progress the tender process, including identifying appropriate service suppliers and commencing the process of preparing contractual documentation and releasing a joint request for tender. Interim authorisation does not extend to the Councils selecting or entering into contracts with suppliers following any joint tender process.
- 6.5. Interim authorisation commences immediately and remains in place until it is revoked, or the date the ACCC's final determination comes into effect, or when the application for authorisation is withdrawn.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by **2 March 2022**. In addition, consistent with section 90A of the Act, GWRRG, the Participating Councils or an interested party may request that the ACCC hold a conference to discuss the draft determination.