



Draft Determination and interim authorisation

Application for Authorisation
lodged by
Gippsland Waste and Resource Recovery Group
in respect of
joint procurement of organic waste processing services
Authorisation number: AA1000543

25 February 2020

Commissioners:

Keogh

Rickard

Brakey

Court

Summary

The ACCC proposes to grant authorisation to enable the Gippsland Waste and Resource Recovery Group (GWRRG) and six councils located in Gippsland Victoria, to jointly investigate and procure organic waste processing services. The councils will sign individual contracts with the successful tenderer/s but are also seeking authorisation to jointly manage their contracts with the supplier(s) as they may engage in some joint management activities. Suppliers will be able to tender to supply each council and/or groups of councils.

The six 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 ACCC considers the joint tendering is likely to result in public benefits in the form of transaction costs savings, increased efficiencies, environmental benefits and increased competition for the supply of organic waste processing services to the councils.

The ACCC considers that the joint tendering conduct is likely to result in limited public detriment. Each council will independently decide which supply option, either from the options available through the joint tender process, or through separately contracting with a supplier, best suits their needs. Accordingly, all potential suppliers, whether or not they are capable of supplying all six councils, will continue to have opportunities to compete to supply the councils. This approach is likely to stimulate greater competition for the proposed contracts, by leading to more tender participants than would otherwise be the case and by incentivising potential tenderers (both existing and new entrants) to compete more vigorously to supply the councils.

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

The ACCC proposes to grant authorisation until 1 July 2042.

The ACCC has also granted interim authorisation to enable the Applicants to commence the tender process while the ACCC is considering the substantive application. Interim authorisation does not extend to the councils selecting or enter into contracts with suppliers

The ACCC invites submissions in relation to this draft determination by 18 March 2021.

1. The application for authorisation

- 1.1. On 15 January 2021, the Gippsland Waste and Resource Recovery Group (**GWRRG**), on behalf of itself and six councils located in Gippsland, Victoria (together, the **Applicants**), lodged application for authorisation AA1000543 with the Australian Competition and Consumer Commission (the **ACCC**)¹. The Applicants are seeking authorisation to jointly investigate, and for the councils to jointly procure, the provision of organic waste processing services. The councils will sign individual contracts with the successful tenderer/s but are also seeking authorisation to cover the potential for their ongoing joint management of the contracts.

¹ This application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth).

- 1.2. Authorisation 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.
- 1.3. The Applicants have also requested interim authorisation to enable them 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. Interim authorisation is not sought to release a formal request for tender or enter into contracts with a supplier. The request for interim authorisation is discussed further in section 6.

The Applicants

- 1.4. GWRRG is a Victorian statutory body corporate,² and is responsible for municipal solid waste management and planning. This management includes coordination of joint procurement processes for waste disposal services for local councils in Gippsland.
- 1.5. The councils that form part of this Application (the **Participating 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 Proposed Conduct

- 1.6. The Applicants seek authorisation for:
 - GWRRG, on behalf of the Participating Councils, to conduct a collaborative competitive tender process for organic waste processing services, to evaluate the responses in collaboration with the Participating Councils and to negotiate the contractual framework on behalf of the Participating Councils
 - the Participating Councils to enter into contract(s) with the successful supplier(s), and
 - ongoing administration and management of the resultant contract(s) to be undertaken by the Participating Councils.

(the **Proposed Conduct**)

- 1.7. The Participating Councils submit that they require access to larger capacity and more complex organics processing services to meet the increasing demand for organics processing services from ratepayers (particularly food and green waste). The Applicants expect that the joint tender will encourage service providers to make the necessary capital investments in the form of processing infrastructure, leading to upgrades of existing resource recovery facilities and/or construction of new facilities.
- 1.8. To facilitate the joint procurement, a group of representatives from each of the Participating Councils, as well as GWRRG, will be established (the **Panel**). The Panel will be responsible for receiving and evaluating proposals submitted by service providers in response to the invitation to tender. The Panel will prepare a joint report containing their recommendations regarding preferred bidders which will be used by the Councils in determining each Council's decision to proceed to formal contract with the service provider(s).
- 1.9. Once the proposals received under the invitation to tender are evaluated, and the joint report (including any relevant recommendations) has been submitted to the

² Established under section 50 *Environmental Protection Act 1970* (Vic).

- relevant Councils, should the Councils wish to proceed to formal contract, GWRRG may assume the role of contract negotiator in collaboration with the relevant Council representative.
- 1.10. The proposed joint arrangements will be voluntary for each of the Councils. 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.
 - 1.11. Councils that opt-in to the joint procurement arrangements will not be required to accept the proposals recommended by the Panel in the joint report, or to enter into any arrangements with service providers that submit bids in the joint process. Such Councils will also be free to withdraw from the joint procurement arrangements at any time following consideration of the joint report.
 - 1.12. It is proposed that 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.
 - 1.13. If 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 GWRRG, and to jointly negotiate with the relevant service providers with a view to entering joint arrangements between them for the services.
 - 1.14. Following the joint tender process, it is proposed that each Participating Council will enter into an arrangement with the successful service provider(s). Those Councils will be responsible for managing arrangements with contracted service providers on an ongoing basis. It is expected that such management will be undertaken by each Council independently, although the Councils may wish to co-ordinating their activities in managing contractual matters of common concern. GWRRG will not play a role in the ongoing administration or management of waste and resource recovery contracts on behalf of the participating Councils, however, it may assist in facilitating contract management meetings to ensure best outcomes for the services procured.
 - 1.15. Authorisation is sought:
 - until 1 July 2022 to complete the initial joint procurement process (including the invitation to tender process, selection of invitees to proceed to tender and Council approval to proceed) with South Gippsland Shire Council, Latrobe City Council, Wellington Shire Council and Baw Baw Shire Council (initial procurement), and
 - for twenty years post 1 July 2022 from the conclusion of the initial procurement for the provision of the services. The services are to be provided to the four Councils participating in the initial procurement, and in due course to the East Gippsland Shire Council and the Bass Coast Shire Council at such time as they negotiate and execute contracts to also become customers of the services provider(s).
 - 1.16. The term of Authorisation sought above is based on scheduling for completion of four of the Councils' current major waste contracts.
 - 1.17. The rationale for the time period proposed is to promote competitive tender submissions that allow service providers to realise a return on any capital investments undertaken. GWRRG and the Councils expect that service providers will

make capital investments in the form of processing infrastructure, and may upgrade existing resource recovery facilities and/or construct new facilities.

Rationale for the Proposed Conduct

- 1.18. The Applicants submit that collaborative procurement has been the primary mechanism used (including within Victoria and interstate) to move away from landfill as a means of encouraging innovation in processing. On its own, a single regional council is substantially reliant on landfill for waste disposal, as the volumes of waste generated are not great enough to encourage investment in more advanced solutions. However, when several councils aggregate kerbside waste volumes, economies of scale are improved, and avenues for innovation and capital investment are opened up, attracting greater interest from industry.
- 1.19. The Applicants submit that joint procurement arrangements are intended to encourage resource sharing and efficiencies, and to support the “overarching governance principles” for the Councils set out in section 9 of the Local Government Act 2020 (Vic) (LG Act).

2. Background

- 2.1. The Participating Councils constitute all the local government authorities located in Gippsland, Victoria, the roles and functions of which 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 Gippsland showing the location of the Participating Councils is below.

Figure 1: Map Gippsland Councils



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

- 2.3. The below table shows the estimated annual weight of organic waste that would be available from each of the Participating Councils.

Estimated weight of material in tonnes			
Council	Low Estimate	Medium Estimate	High Estimate
Bass Coast Shire Council	8,200	9,710	11,700
Baw Baw Shire Council	6,700	7,990	9,100
East Gippsland Shire Council	6,500	7,560	9,200
Latrobe City Council	10,600	12,500	15,100
South Gippsland Shire Council	3,900	4,560	5,400
Wellington Shire Council	5,700	6,780	8,100
Total	41,600	49,100	59,200

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties, including waste management companies, industry associations and government bodies.³ The ACCC received one submission in response to the application, from the Victorian Waste Management Association (the **VWMA**). In summary, the VWMA opposes the application for authorisation as it is of the view that market innovation and public good is maximised where:
- the number of market opportunities is maximised
 - the number of competitors who can bid for those market opportunities is maximised
 - the transparency and availability of tender documents is maximised
 - market opportunities occur frequently and evenly. That is, they are spread evenly over time, rather than aggregated into a single event, and
 - the size of the resultant activity is optimal with respect to asset and supervisory utilisation.
- 3.2. The authorisation application and any public submissions by the Applicants and interested parties will be on the [Public Register](#) for this matter.

³ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister

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 *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision with 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) 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 application and other relevant information available to the ACCC, including information available to the ACCC regarding similar previous matters
 - the period for which authorisation has been sought
 - the relevant areas of competition likely to be affected by the Proposed Conduct, particularly competition to supply and acquire processing services for organic waste 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 provision of organic waste processing 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 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."*⁴
- 4.5. The Applicants submit that the Proposed Conduct is likely to result in public benefits, including:
 - economic efficiencies arising from long-term certainty
 - greater competition
 - transaction cost savings (including improvement in contract management using GWRRG, standardisation of document and services and avoiding replication of negotiations)
 - environmental benefits.
- 4.6. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

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.

- **Economic efficiencies arising from improved economies of scale for suppliers and greater long-term certainty for suppliers:**
 - The aggregation of a larger volume of organic waste is likely to enable service providers to achieve operating efficiencies and economies of scale in delivering processing services, which may facilitate lower average costs for each Participating Council.
 - In addition, the length of the contracts intended to be entered into is intended to provide long-term certainty to underpin the investment in new and/or upgrades facilities to service the aggregated needs of the Participating Councils and achieve these economies of scale.
- **Greater competition to supply organic waste processing services:** The intention of the Applicants is that the improved economies of scale and long term certainty for suppliers will lower the barriers to new entry and new investment by existing suppliers to upgrade facilities. The potential for contracts covering greater volumes of organic waste than any of the Participating Councils could offer individually is likely to provide greater incentives for suppliers to compete for the tenders which is likely to enhance competition to supply organics waste processing services to the Applicants.
- **Transaction cost savings:** The combined contracting process is likely to lead to efficiency savings for the Participating Councils (including the collective use of GWRRG's expertise, standardisation of documents and procedures, and avoiding replication of negotiations), relative to the scenario where each council engages separately with potential suppliers.
- **Environmental and health benefits:** The larger, more modern facilities likely to result from the Proposed Conduct will be able to deal with a larger volume of organic waste and a wider range of organics waste. This will divert increased amounts of waste from landfill with associated environmental benefits. It will also help to preserve landfill space for longer and produce environmentally useful by-products (compost and potentially energy).

Public detriments

4.7. 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

4.8. The Applicants state that there should be no public detriment associated with the Proposed Conduct, and any potential detriment would nevertheless be outweighed by the benefit to the public. In particular, they submit the following.

- 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 certain streams of work, 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.

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

Selected suppliers will not be in any way restricted from offering services to other councils.

- 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.
- 4.9. The Participating Councils may be considered to be each other's competitors for the acquisition of organic waste processing services in Gippsland. By joining together to conduct a joint tender, the Participating Councils are agreeing to no longer compete. The Proposed Conduct therefore will lessen competition in the acquisition of processing services for organic waste in Gippsland.
- 4.10. The ACCC recognises that the Participating Councils account for all municipal organics waste volumes in Gippsland. However, the structure of the tender process means that suppliers will be free to tender to supply individual Participating Councils, or combinations of Participating Councils, as well as or instead of tendering to supply the entire group. Each Council will independently decide which supply option, either from the options available through the joint tender process or through separately contracting with a supplier, best suits their needs. Accordingly, all potential suppliers, whether or not they are capable of supplying all six Participating Councils, will continue to have opportunities to compete to supply the Councils.
- 4.11. The ACCC considers that this approach is likely to stimulate greater competition for the proposed contracts, by leading to more tender participants than would otherwise be the case and by incentivising potential tenderers (both existing and new entrants) to compete more vigorously to supply the Participating Councils.
- 4.12. The structure of the tender process also means that a degree of competition between the Participating Councils to acquire processing services will be maintained.
- 4.13. With respect to the concerns raised by the VWMA, as noted, the structure of the tender process will provide opportunities for a range of suppliers to compete to supply the Participating Councils. The ACCC considers that the Participating Councils are likely to be well placed to assess what type of arrangements are likely to deliver them the best outcomes for their communities.
- 4.14. The ACCC also notes the Applicants submission that the tender process will be conducted in accordance with best practice probity standards, including transparency and audit requirements. No information has been provided that would raise concerns about the transparency of the process.

Balance of public benefit and detriment

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

Length of authorisation

- 4.16. The Act allows the ACCC to grant authorisation for a limited period of time.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. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

⁶ Subsection 91(1)

- 4.17. In this instance, the Applicants seek authorisation until 1 July 2042. Substantial investment in new entry and/or existing upgrading existing facilities will be required in order to satisfy the Applicants needs for greater capacity and complexity of organics processing services. The Applicants submit that the 21 year period is required to promote competitive tender submissions that allow service providers to realise a return on any capital investments undertaken with respect to the organics processing services.
- 4.18. The ACCC recognises that long term contracts are likely required to support the level of investment necessary to construct a large scale facility capable of delivering affordable large scale, complex organics processing services to the Participating Councils. Therefore, the ACCC considers the proposed term of authorisation, though longer than the ACCC typically grants for collective tendering of waste services by councils, is likely to be necessary for the Proposed Conduct to achieve this outcome and the associated public benefits.
- 4.19. The ACCC proposes to grant authorisation until 1 July 2042.

5. Draft determination

The application

- 5.1. On 15 January 2021, the Applicants lodged application AA1000543 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsection 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 that 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 AA1000543 to enable the Applicants to conduct a joint tender process to investigate, procure and administer contracts for the provision of organics waste processing services, as described in paragraph 1.7 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 or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000543 until 1 July 2042.

5.9. This draft determination is made on 25 February 2021.

6. Interim authorisation

- 6.1. At the time of lodging the application, the Applicants requested interim authorisation 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. Interim authorisation is not sought to release a formal request for tender or select or enter into contracts with suppliers.
- 6.2. The Applicants submit that interim authorisation is necessary due to the time that is likely to be required to progress the overall tender process. The Applicants consider 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 Applicants submit 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. In granting interim authorisation, the ACCC has taken into account:
- That there is a need for the 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 the processing of organic waste 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 its 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 will remain in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until the ACCC decides to revoke interim authorisation.

7. Next Steps

- 7.1. The ACCC now invites submissions in response to this draft determination by 18 March 2021. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.