



Draft Determination and interim authorisation

Application for authorisation AA1000604

lodged by

City of Hobart & Ors

in respect of

collective tendering for food and garden organics waste processing
services

Authorisation number: AA1000604

Date: 31 March 2022

Commissioners: Cass-Gottlieb

Keogh

Rickard

Brakey

Carver

Crone

Ridgeway

Summary

The ACCC proposes to grant authorisation to enable the City of Hobart Council, Glenorchy City Council and Kingborough City Council to collectively tender and contract for food organics and garden organics (**Organics**) processing services.

The ACCC proposes to grant authorisation for 4 years and 6 months. This is the period requested by the councils and includes 6 months to run the tender process with an initial 2-year contract and options to extend.

The ACCC considers the collective tender arrangement is likely to result in public benefits in the form of environmental benefits, increased efficiencies, increased competition, and transaction cost savings. The ACCC considers that the collective tender arrangement is likely to result in minimal public detriment.

The ACCC has also granted interim authorisation to enable the councils to conduct the tender process. Interim authorisation was not sought, and has not been granted, for the councils to enter into any contracts arising from the tender process.

The ACCC invites submissions in relation to this draft determination, by 15 April 2022, before making its final decision.

1. The application for authorisation

- 1.1. On 17 February 2022, the City of Hobart Council, Glenorchy City Council and Kingborough City Council (the **Participating Councils**) lodged application for authorisation AA1000604 with the Australian Competition and Consumer Commission (the **ACCC**). The Participating Councils are seeking authorisation to collectively tender and contract for food organics and garden organics (**Organics**) processing services, including acceptance, sorting and disposal.
- 1.2. This application for authorisation AA1000604 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 Participating Councils also requested interim authorisation to enable them to progress the tender process, but not to enter into contracts arising from the tender process, while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in section 6.

The Proposed Conduct

- 1.4. The Participating Councils are seeking authorisation to engage in a collaborative tender process in respect of the **Relevant Services** (defined below at paragraph 1.5) and to jointly negotiate contracts with the preferred tenderer. Each Participating Council will enter into individual procurement contracts with the successful tenderer on substantially the same terms. Each Participating Council will individually administer and manage the resulting contracts.

1.5. The Relevant Services comprise:

- a) the acceptance of Relevant Materials (defined below at paragraph 1.6) at the provider's receiving facility
- b) decontaminating and sorting of the Relevant Materials
- c) processing of the Relevant Materials
- d) storing Relevant Materials in a manner which does not breach applicable environmental laws and does not create a nuisance
- e) producing an end product from the Relevant Materials (eg compost, mulches, organics fertilisers, landscape soils, potting mixes, top dressing and broadacre fertiliser), in ways which do not breach applicable environmental laws and do not create a nuisance, and which achieve the best possible waste management outcome
- f) disposing of and selling the end products produced from Organics waste
- g) maintaining detailed and accurate records of quantities of Relevant Materials delivered to the provider's facility, and
- h) complying with general reporting obligations, including but not limited to, reporting on volumes received, sales reports, contaminants identified, market information and intelligence, and details of incidents that may impact on the provider's social and regulatory licences to operate.

1.6. The **Relevant Materials** include, but are not limited to:

- a) food scraps and leftovers
- b) dairy products
- c) meat, bones and egg shells
- d) cooked food
- e) coffee grounds and tea leaves
- f) paper towel and tissues
- g) soiled paper and cardboard
- h) grass clippings
- i) weeds, and
- j) small branches.

1.7. Together, paragraphs 1.4 to 1.6 form the **Proposed Conduct**.

2. Background

2.1. Each of the three Participating Councils are located in southern Tasmania. The Participating Councils provided the following map highlighting their local government areas:

Location of City of Hobart Council, Glenorchy City Council and Kingborough City Council



- 2.2. The Participating Councils submit that the introduction of Organics processing is relatively new to Tasmania and still unavailable in some areas. In southern Tasmania, B G & J M Barwick Pty Ltd (**Barwicks**) operates a sorting facility at Bridgewater to weigh, decontaminate and shred Organics waste. Once contaminants are removed the waste is transported to the Pure Living Soils² composting facility in central Tasmania to be processed.
- 2.3. At present, each of the Participating Councils has a separate contract with Veolia Environmental Services (Australia) Pty Ltd to collect and drop off Organics waste. These contracts will continue as collection services are not part of the proposed collaborative tender process.
- 2.4. Currently each Participating Council also has separate short-term contracts in place with Pure Living Soils for the sorting and processing of Organics waste.
- 2.5. The City of Hobart also owns and operates a composting facility within the McRobies Gully Waste Management Centre, which is used for public drop off and commercial garden and organic waste. The Participating Councils submit that this facility has limited capacity to accept additional material due to limited space but at this stage will continue to service public drop off and commercial garden organic waste for composting.

¹ *Application for Authorisation* 17 February 2022, p. 31.

² Pure Living Soils is a joint venture between Barwicks and Pure Foods Pty Ltd. *Application for Authorisation* 17 February 2022, p. 8.

- 2.6. The following table illustrates the volume of Organics waste that the Participating Councils expect to collect each year over five years:

Table of expected Organics volumes

Participating Council	Annual tonnages				
	2021/22	2022/23	2023/24	2024/25	2025/26
Hobart	4,400	4,600	4,800	5,000	5,300
Glenorchy	5,000	5,250	5,500	5,750	6,050
Kingborough	2,300	2,400	2,500	2,600	2,700

3

- 2.7. The Participating Councils also submit that the Tasmanian Government has released a Draft Waste Action Plan which is intended to encourage the diversion of waste from landfill. This includes the proposed introduction of a \$20/tonne waste levy via the *Draft Waste and Resource Recovery Bill 2021 (Tas)* currently before the Tasmanian parliament. The levy would be charged on all materials delivered to waste management centres and landfills to provide an incentive to divert waste from landfill. Under the draft plan the Tasmanian Government aims to reduce the volume of organic waste sent to landfill in Tasmania by 25% by 2025 and 50% by 2030.
- 2.8. The Participating Councils submit that at present they deliver very minimal amounts of contaminated Organics material to landfill. However, the Participating Councils submit that an expected increase in population would be likely to see increasing volumes of non-contaminated Organics delivered to landfill each year unless alternative solutions are developed. The Participating Councils submit that there is currently no processing facility in southern Tasmania large enough to accept the predicted amounts of Organics waste and the facilities in northern Tasmania require prohibitive transport costs. Accordingly, equivalent or better facilities need to be constructed in a more accessible location. The Participating Councils submit that the Proposed Conduct provides them with the critical mass to encourage the necessary investment in a new processing facility.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including suppliers of Organics processing services in Australia, surrounding Tasmanian local councils, industry associations, and relevant Tasmanian and federal government bodies.⁴
- 3.3. The ACCC received one submission from BioPak Pty Limited in relation to the application and a submission in response from the Participating Councils. BioPak, a producer of compostable packaging solutions for the foodservice industry, is supportive of the application for authorisation but advocated for the Organics processing tender and contracts to be extended to also include compostable packaging material.

³ The estimated volumes are based on an estimated increase of 4-5% per annum due to increased population and participants. *Application for Authorisation* 17 February 2022, p. 32.

⁴ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 3.4. Public submissions by the Participating Councils and interested parties 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 Participating Councils have 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 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 relevant areas of competition likely to be affected by the Proposed Conduct, particularly competition to acquire and supply Organics processing services in southern Tasmania, 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 the Participating Councils would individually procure and administer their respective contracts for the processing and disposal of Organics.

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.⁵

- 4.5. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:
- environmental benefits
 - increased efficiency from economies of scale
 - increased competition, and
 - transaction cost savings.

5 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.

Environmental benefits

- 4.6. The Participating Councils submit that the Proposed Conduct will divert some or all Organics waste from their municipal areas away from landfill, reducing pressure on landfill sites. It will also encourage the development of improved composting methods and facilities and increase the supply of composted end products. The reduced organic matter decomposing anaerobically in landfill will also reduce the generation and emission of more potent greenhouse gases, in particular methane.
- 4.7. The ACCC notes the Participating Councils' submission that while they currently deliver very minimal amounts of contaminated Organics material to landfill there is currently no processing facility in southern Tasmania large enough to meet their expected future needs. The ACCC considers that the Proposed Conduct is likely to support a new and, potentially more innovative, processing facility, resulting in environmental benefits, including helping to avoid the use of landfill.
- 4.8. BioPak submits that the inclusion of certified compostable packaging used for food service into the Participating Councils' tender requirements will provide an end-of-life solution for these products that are meant to replace polluting plastic alternatives and will ensure that clean (not soiled with food waste) plastics waste streams are not contaminated.
- 4.9. The ACCC notes that the list of Relevant Materials proposed to be covered by the Proposed Conduct as listed at paragraph 1.7 is not exhaustive. Therefore, it is open to the Participating Councils to include combustible food service packaging in the tender arrangements.

Increased efficiency from economies of scale

- 4.10. The Participating Councils submit that the aggregation of a larger volume of organic waste as part of the Proposed Conduct is likely to enable the successful tenderer to achieve operating efficiencies and economies of scale in delivering the Relevant Services. In addition, the length of the proposed contracts are intended to provide certainty to underpin the investment in new and/or upgraded facilities to service the aggregated needs of the Participating Councils and thereby achieve those economies of scale.
- 4.11. In this respect, the Participating Councils submit that there is an unusually large number of councils in Tasmania relative to other states, with each council being relatively small in terms of population and land area, meaning servicing each council's needs is substantially more difficult.
- 4.12. The ACCC considers that the aggregation of waste volumes through joint procurement under the Proposed Conduct is likely to result in public benefits by facilitating service providers' realisation of operational efficiencies and lower costs and/or supporting investment in upgraded or new facilities and technologies. This in turn is likely to lower costs for Participating Councils.
- 4.13. This is particularly relevant for waste service providers that operate in regional locations such as Tasmania where individual councils may be less able to offer sufficient waste volumes individually to support high quality service provision or investment.

Increased competition

- 4.14. The Participating Councils submit that the Proposed Conduct will encourage new suppliers to compete for the Organics volumes offered by the Participating Councils and encourage all prospective tenderers to offer more attractive service offerings and competitive tenders.
- 4.15. The ACCC considers the Proposed Conduct is likely to increase competition by offering prospective tenderers a more certain and substantial volume of Organics for processing.

Transaction cost savings

- 4.16. The Participating Councils submit that transaction cost savings are likely to arise from the Proposed Conduct including through:
- a reduction or elimination of duplicated administrative, legal and evaluation costs which would arise if each Participating Council had to conduct its own separate tender processes and contract negotiation, and
 - a reduction in the administrative burden for the tenderers in dealing with the procurement processes of multiple municipalities.
- 4.17. The ACCC considers that the Proposed Conduct is likely to provide transaction cost savings by reducing the administrative, legal and evaluation costs for each Council compared to conducting separate tenders.
- 4.18. The ACCC also considers the Proposed Conduct is likely to deliver transaction cost savings to the potential tenderers by reducing the administrative cost of dealing with separate procurement processes of multiple councils.

Public detriments

- 4.19. 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.⁶*
- 4.20. The Participating Councils submit that the Proposed Conduct will not lessen competition since only three of the 12 councils located in southern Tasmania are involved. Service providers will be free to compete for contracts to supply other southern Tasmanian councils and for contracts to supply services to the Participating Councils in relation to other waste streams.
- 4.21. The ACCC notes that the Participating Councils may compete in the acquisition of Organics processing services. By conducting their procurement jointly rather than individually, the Participating Councils are agreeing to no longer compete.
- 4.22. The ACCC considers that public detriment may arise as a result of a joint procurement process that comprises a substantial portion of the market as it reduces the opportunity for processors to provide the relevant services.

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

- 4.23. However, the ACCC considers that the Proposed Conduct is likely to result in minimal public detriment. Service providers who do not win the contract will continue to be able to supply other southern Tasmania councils with Organics processing services and to supply the Participating Councils with processing services for other waste streams.
- 4.24. Further, as discussed at paragraph 4.13, the ACCC considers that the increased volumes available is likely to encourage more potential suppliers to participate in the tender process. The detriment from a loss of competition for the provision of recyclable processing services is likely to be mitigated by an increase in competition by processors tendering to win the contract with the Participating Councils.

Balance of public benefit and detriment

- 4.25. 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

- 4.26. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.27. The Participating Councils seek authorisation for 4 years and 6 months. This is intended to cover 6 months to undertake the tender process, an initial 2-year contract and the option for 2 extensions of 1 year each to the contract.
- 4.28. The ACCC proposes to grant authorisation to the Participating Councils for 4 years and 6 months.

5. Draft determination

The application

- 5.1. On 17 February 2022, the Participating Councils lodged application AA1000604 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 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

⁷ Subsection 91(1)

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 AA1000604 to enable the Participating Councils to collectively tender and contract for Organics services, including acceptance, sorting and disposal as described in paragraphs 1.4 to 1.6 and defined as the Proposed Conduct.

5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act, including concerted practices under section 45(1)(c) of the Act that may arise from information sharing as part of the collective tender process.

5.8. The ACCC proposes to grant authorisation AA1000604 for 4 years and 6 months.

5.9. This draft determination is made on 31 March 2022.

6. Interim authorisation

6.1. At the time of lodging the application, the Participating Councils requested interim authorisation so that they could progress the tender process while the ACCC is considering the substantive application. In particular, the Participating Councils have sought interim authorisation with a view to identifying the preferred tenderer, commencing the negotiation process with the preferred tenderer and preparing the ensuing contractual documents.

6.2. The Participating Councils submit that the request for interim authorisation has been made in order to expedite the overall tender process. The Organics needs of each of the Participating Councils are currently addressed by interim, short-term arrangements following the expiry of contracts in 2021 and early 2022. The Participating Councils submit that expediting the selection and negotiation process under an interim authorisation will reduce the need for, and scope of, transitional arrangements.

6.3. In addition, the Participating Councils submit that expediting the tender process will minimise their costs in relation to the new \$20/tonne waste levy for all materials delivered to waste management centres and landfills to be introduced by the Tasmanian Government with effect from 1 July 2022.

6.4. The ACCC has decided to grant interim authorisation as:

- granting interim authorisation is:
 - unlikely to change the market or lead to any harm to any market participants
 - will assist the Participating Councils to transition from their current short term interim arrangements for the processing of Organics waste more quickly and potentially avoid or reduce the waste levy which would otherwise be charged from July 1 2022, and
- the ACCC's assessment to date is that the Proposed Conduct is likely to result in public benefits and minimal public detriment.

- 6.5. Accordingly, the ACCC grants interim authorisation to enable to Participating Councils to conduct the tender process, including identifying the preferred tenderer, commencing the negotiation process with the preferred tenderer and preparing the ensuing contractual documents. Interim authorisation is not sought, and is not granted, for entry into any contract arising from the tender process.
- 6.6. 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 15 April 2022. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.