



Determination

Application for authorisation AA1000566

lodged by

Gippsland Waste and Resource Recovery Group

in respect of collaborative procurement of glass and mixed recycling processing

Authorisation number: AA1000566

20 October 2021

Commissioners:

Keogh

Rickard

Brakey

Ridgeway

Summary

The ACCC has decided to grant authorisation to enable the Gippsland Waste and Resource Recovery Group (GWRRG) and 6 councils located in Gippsland, Victoria, to jointly tender, procure and manage glass and mixed recycling processing services. Waste service suppliers will be able to tender to supply each council and/or groups of councils. The councils are likely to sign individual contracts with the successful tenderer/s but they may also 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 recycling processing 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 glass and mixed recycling processing services through the joint tender process, or through individual negotiations with a supplier. All 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 has decided to grant authorisation until 30 December 2037.

1. The application for authorisation

- 1.1. On 23 August 2021, the Gippsland Waste and Resource Recovery Group (**GWRRG**), on behalf of itself and 6 councils located in Gippsland, Victoria lodged application for authorisation AA1000566 with the Australian Competition and Consumer Commission (the **ACCC**).¹ GWRRG is seeking authorisation for approximately 16 years, to jointly tender, and for the 6 Participating Councils to jointly procure processing services for glass and mixed recyclables. The Participating Councils are most likely to sign individual contracts with the successful tenderer/s but are also seeking authorisation to cover the potential for them to engage in ongoing joint management of the contracts.
- 1.2. 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. On 23 September 2021, interim authorisation was granted under subsection 91(2) of the Act. On 6 October 2021, the ACCC revoked this interim authorisation and granted

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

a new interim authorisation allowing GWRRG and the Participating Councils to release a formal joint request for tender.² Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Participants in the Proposed Conduct

- 1.4. GWRRG is a Victorian statutory body corporate,³ and is responsible for planning, co-ordinating 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. GWRRG has also sought authorisation to extend to any new waste authority or 'successor entity' of GWRRG.⁴

The Proposed Conduct

- 1.7. Authorisation is sought for:
 - GWRRG, on behalf of the Participating Councils, to conduct a collaborative competitive tender process for glass and mixed recycling 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), (a flexible approach will be taken as to how the Participating Councils will contract, but it is most likely that the Participating Councils will contract separately with successful tenderers), and
 - ongoing administration and management of the resultant contract(s) to be undertaken by the Participating Councils.

(the **Proposed Conduct**)

- 1.8. Recyclable waste includes domestic post-consumer plastic, paper and cardboard, steel, aluminium and glass materials that are collected through kerbside and other domestic collection services. This waste is either sent to landfill or reprocessed at a reprocessing facility known as a Material Recovery Facility. Following reprocessing, individual material streams are made available as commodities for re-manufacture or as additives to products.
- 1.9. The Participating Councils and GWRRG have formed a collaborative alliance through a Memorandum of Understanding to jointly investigate and explore the procurement of recycling processing services with prospective service providers. The proposed joint activities include the following:

² See ACCC decision of 6 October 2021, available on the ACCC's [public register](#).

³ Established under section 50 *Environmental Protection Act 1970* (Vic).

⁴ 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.

- Development of a request for tender and advertising the recycling processing 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 recycling processing services.

- 1.10. To facilitate the joint activities, a group of representatives from each of the Participating Councils, as well as 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).
- 1.11. 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, GWRRG may assume the role of contract negotiator in collaboration with the relevant Council representative.
- 1.12. Participation in the proposed joint arrangements 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.
- 1.13. Participating Councils that opt-in to the joint procurement arrangements 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 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.
- 1.14. 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.
- 1.15. 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.
- 1.16. Following the joint tender process, it is proposed that each Participating Council, having opted in to the joint procurement arrangement, will enter into an arrangement with the successful service provider(s). Those Participating Councils will be

responsible for managing arrangements with contracted service providers on an ongoing basis. GWRRG will not play a role in the ongoing administration or management of recycling processing contracts on behalf of the Participating Councils. However, it may assist in facilitating contract management meetings to ensure best outcomes for the services procured.

Length of authorisation sought

1.17. Authorisation is sought:

- for 10 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
- for 15 years from the conclusion of the Initial Procurement process for the provision of the services, based on the term currently expected for the proposed contracts.

1.18. The rationale for the requested time period is to promote competitive tender bids that allow service providers to realise a return on any capital investments undertaken. 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

1.19. The current capacity for recycling processing in the Gippsland Region is limited. There are only two locally based facilities, which are capable of processing less than half of the material generated in the region. This has led to a small number of large operators located in Melbourne receiving the majority of the recyclable material generated in the Gippsland region.

1.20. GWRRG submits that during the past two and a half years Councils have been subjected to rising costs and in some cases faced with redirecting recyclable materials to landfill due to a lack of capacity to manage the volume and breadth of materials from kerbside collection.

1.21. GWRRG submits that due to the expected increase in population in Gippsland by 2031, and the corresponding increase in municipal waste collected, additional recyclable 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 recyclable waste is aggregated to support increased investment required from the private sector.

1.22. GWRRG submits 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 recyclable material generated are not great enough to encourage investment in more advanced solutions. However, when several councils aggregate kerbside collection volumes, economies of scale are improved, and avenues for innovation and capital investment are opened up, attracting greater interest from industry.

1.23. GWRRG submits that the 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. 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 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/>

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 Statewide Waste and Resource Recovery Infrastructure Plan (the **Statewide Plan**). The purpose of the Statewide Plan is to develop a statewide 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. The National Waste Policy was established in light of the challenges in the waste sector and focuses on waste avoidance, including by encouraging material recovery and diversion of waste from landfill.
- 2.5. In accordance with these obligations, 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.
- 3.2. The ACCC invited submissions in response to the application from current suppliers of recycling processing services to the Participating Councils. The ACCC received one submission from Tambo Waste, the current supplier of recycling processing services to East Gippsland and Wellington Shire Councils. Tambo Waste raised concerns about the potential for the Proposed Conduct to exclude smaller local companies from participation in local materials recovery, potentially increasing the market share concentration of major waste service providers (see paragraph 4.8 below).
- 3.3. GWRRG, in response to Tambo Waste's concerns, submitted that the aggregation of glass and mixed recycling volumes are needed to incentivise an investment in increased local processing capacity. GWRRG further submits that the aim of promoting viable local businesses is supported by the tender requirements relating to local investment, jobs and opportunities for marginalised sections of the community.
- 3.4. Public submissions by GWRRG and Tambo Waste are available on the Public Register for this matter.
- 3.5. On 23 September 2021, the ACCC issued a draft determination proposing to grant authorisation until 30 December 2037. The ACCC consulted more widely with a range of potentially interested parties including waste management companies, industry associations and government bodies on the draft determination. No submissions were received in response to the draft determination and a pre-decision conference was not requested.

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. 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 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 supply and acquire glass and mixed recycling processing 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 glass and mixed recycling processing services. The ACCC considers that without the aggregation of waste of the individual Participating Councils, it is likely that investment in new recycling processing facilities will not proceed, or will 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 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.*⁵

- 4.5. GWRRG submits that the Proposed Conduct is likely to result in public benefits, including:
- environmental benefits, including a reduction in recyclable waste sent to landfill, reduction in greenhouse gases and reducing the dependence on landfills in Gippsland
 - long-term certainty with respect to the management of recycling processing services
 - transaction cost savings for the costs associated with the tender process, negotiating contracts, and service delivery of the services (including using the expertise of GWRRG for waste management and procurement)
 - increase in competition, as the aggregated volumes of the Participating Councils will incentivise additional providers to bid and compete to provide the services
 - achievement of the government objectives outlined in paragraphs 2.3 to 2.5. Further, a reduction of greenhouse emissions towards the Victorian Government's Emission Reduction Target, and
 - improved service delivery and innovation, including increased investment in new recyclable processing technology and facilities, increasing local employment opportunities.

- 4.6. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- **Environmental benefits**

Currently, there is limited capacity for recyclable processing in the Gippsland region, with local facilities capable of processing less than half of the material generated in the region. Recyclable material from the region is transported for processing at larger facilities in Melbourne, or sent unnecessarily to landfill.

The Proposed Conduct is likely to facilitate investment in new or upgraded facilities for recyclable processing, which will facilitate an increase in the processing capacity for recyclables in the Gippsland region.

An increase in processing capacity will reduce recyclable material being redirected to landfill and is likely to result in associated environmental benefits,

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.

including a reduction in greenhouses gases, contaminated water, traffic congestion and vermin.

Increased capacity for local processing is also likely to cause environmental benefits by limiting the volume of waste which needs to be transported elsewhere for processing.

- **Greater long term certainty for Participating Councils and suppliers, and increased competition**

The aggregation of a larger volume of glass and mixed recyclables, and the duration of the proposed contracts, are likely to provide long term certainty for potential suppliers of the services which will increase competition in the tender process. The greater certainty is also likely to lead to greater incentives for potential suppliers to invest in new or upgraded facilities to secure the recycling processing contracts.

The aggregation of a larger volume of glass and mixed recyclables 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 all of the Participating Councils.

- **Transaction cost savings**

The collective tender, contracting and ongoing management 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), compared to each council running their own process. Service providers will also be able to participate in a single tender process rather than respond to individual tenders by each Council.

The extent of the transaction cost savings will depend on whether the Participating Councils choose to join the collective procurement and management of the service agreements, or whether they proceed independently and continue to individually procure their own waste and resource recovery services, following consideration of the Working Group's joint report. Nonetheless, the ACCC considers there will be efficiency savings for the Participating Councils and service providers under the Proposed Conduct relative to the situation where there are multiple individual tender and procurement processes.

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.*⁶

4.8. The ACCC notes that the Participating Councils may compete, to some extent, in the acquisition of recycling processing services in the Gippsland region where there is a limited supply of services. Collectively tendering for these services may lessen competition in the supply of processing services for glass and mixed recyclables in

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

Gippsland, particularly if tenderers were required to bid for the total combined volumes, because this may exclude some current recycling processing providers from tendering.

- 4.9. This is the concern of Tambo Waste. Tambo Waste submits that the Proposed Conduct will only benefit major waste service providers, who could potentially be appointed as the sole provider of services across all Participating Councils. Tambo Waste submits that the joint tendering has the potential to exclude smaller companies, like itself, from participation and involvement in local materials recovery. Tambo Waste submits that this may have the effect of reducing the jobs available in regional Victoria and providing fewer opportunities for regional Victorian businesses.
- 4.10. However, GWRRG submits 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, GWRRG submits the following:
- Investments in increased processing capacity, which will facilitate less recyclable waste being sent to landfill, are unlikely to proceed without some aggregation of waste. It is expected that the aggregation will provide a better basis for supporting investment in local facilities.
 - 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. It is also open to local providers to partner with other suppliers if they wish to tender for a larger volume of work.
 - The tender process will be competitive and conducted in accordance with best practice probity standards, including transparency and audit requirements. 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 for services from 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.
 - 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.
- 4.11. 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 providers, as well as large waste service providers. 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.
- 4.12. 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.

Balance of public benefit and detriment

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

Length of authorisation

4.14. 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.

4.15. In this instance, the GWRRG seeks authorisation for approximately 16 years. GWRRG submits that in addition to a 10 month period to run the tender process, authorisation is needed to cover the 15 year contract period required to allow service providers to realise a return on any capital investments undertaken with respect to the recyclable processing services.

4.16. The ACCC recognises that long term contracts are commonly required to support the level of investment necessary to construct a large scale facility capable of delivering affordable recycling processing services to the Participating Councils. 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.

4.17. The ACCC has decided to grant authorisation until 30 December 2037.

5. Determination

The application

5.1. On 23 August 2021, GWRRG lodged application AA1000566 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

The authorisation test

5.2. 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.

5.3. For the reasons outlined in this 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.

5.4. Accordingly, the ACCC has decided to grant authorisation.

Conduct authorised

5.5. The ACCC has decided to grant authorisation AA1000566 to enable the GWRRG and the Participating Councils to conduct a joint tender process, procure and administer

⁷ Subsection 91(1)

contracts for the provision of glass and mixed recycling processing services as described in paragraph 1.7 and defined as the Proposed Conduct.

- 5.6. The ACCC proposes that authorisation apply to any successor entity of the Gippsland Waste and Resource Recovery Group.
- 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 has decided to grant authorisation AA1000566 until 30 December 2037.

6. Date authorisation comes into effect

- 6.1. This determination is made on 20 October 2021. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 11 November 2021.