



Draft Determination

Application for Authorisation
lodged by
Metropolitan Waste and Resource Recovery Group
in respect of
joint procurement of advanced waste processing services
Authorisation number: AA1000448

20 November 2019

Commissioners: Keogh
Rickard
Court
Ridgeway

Summary

The ACCC proposes to grant authorisation to enable the Metropolitan Waste and Resource Recovery Group (MWRRG) and 16 councils located in south-eastern metropolitan Melbourne to conduct a collaborative tender process for the procurement of advanced waste processing (AWP) services, which may facilitate the construction of one or more AWP facilities. AWP involves processes to recover alternative resources (such as electricity or fuel) from municipal residual waste (i.e. waste that is not capable of being recycled and is typically destined for landfill).

The ACCC considers the Proposed Conduct is likely to result in public benefits in the form of transaction costs savings, increased efficiencies, environmental benefits and increased competition.

The ACCC considers that the Proposed Conduct is likely to result in limited public detriment due to a number of mitigating factors including: the tender process will be competitive and transparent; the majority of potential AWP suppliers operate either nationally or internationally; and there will continue to be other future opportunities to supply AWP services in Australia and elsewhere.

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 for 30 months to conduct the tender process, negotiate contracts and execute contracts, and 30 years to give effect to the contract/s for the supply of AWP services (including the ongoing administration of the contract/s). The ACCC considers that the construction of new large-scale AWP facilities would be facilitated by long-term contracts involving more than one Participating Council.

The ACCC invites submissions in relation to this draft determination by 4 December 2019.

1. The application for authorisation

- 1.1. On 23 August 2019, the Metropolitan Waste and Resource Recovery Group (**MWRRG**), on behalf of itself and 16 councils located in south-eastern metropolitan Melbourne (together, the **Applicants**), lodged application for authorisation AA1000448 with the Australian Competition and Consumer Commission (the **ACCC**)¹. The Applicants are seeking authorisation to jointly investigate, and potentially procure, the provision of advanced waste processing (**AWP**) services.
- 1.2. The Applicants seek authorisation for 30 months to conduct the tender process, and 30 years to give effect to the contract/s for the supply of AWP services (including the ongoing administration of the contract/s).
- 1.3. 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.
- 1.4. The Applicants also requested interim authorisation to commence the tender and contract negotiation process for procuring advanced waste processing services while

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

the ACCC is considering the substantive application. The ACCC granted interim authorisation on 29 August 2019.

The Applicants

- 1.5. MWRRG 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 31 local councils in Metropolitan Melbourne.
- 1.6. The councils that form part of this Application (the **Participating Councils**) are Bayside City, Boroondara City, Cardinia Shire, Casey City, Frankston City, Glen Eira City, Greater Dandenong City, Kingston City, Knox City, Manningham City, Maroondah City, Monash City, Mornington Peninsula Shire, Stonnington City, Whitehorse City and Yarra Ranges Shire.

The Proposed Conduct

- 1.7. The Applicants seek authorisation for:
 - MWRRG, on behalf of the Participating Councils, to conduct a collaborative, competitive tender process for AWP services, to evaluate the responses in collaboration with the Participating Councils, and to negotiate the contractual framework with potential supplier(s)
 - a Special Purpose Vehicle³ (**SPV**) to be established by the Participating Councils to enter into contract(s) for AWP services with the successful supplier(s) and
 - ongoing administration and management of the resulting contracts related to the suppliers and any AWP facilities to be undertaken by the SPV.

(the **Proposed Conduct**)

- 1.8. For the purposes of this application, AWP refers to the processes which are employed to recover alternative resources (such as electricity or fuel) from municipal residual waste. Residual waste is waste which is not capable of being recycled and is typically destined for landfill. The scope of the Proposed Conduct does not extend to commercial and industrial waste.
- 1.9. The Proposed Conduct may facilitate the construction of one or more large-scale AWP facilities. There are currently no large scale facilities operating in Victoria that can recovery energy or other resources from municipal residual waste.

Rationale for the Proposed Conduct

- 1.10. The Applicants submit that the population of Melbourne is growing rapidly and a large portion of the forecast growth is expected to occur in the southern and eastern regions of metropolitan Melbourne, contributing to a projected substantial increase in waste generated in these areas. The Participating Councils anticipate to be managing around 500,000 tonnes per year of residual waste by 2021, increasing to more than 700,000 tonnes by 2046, all of which will be sent to landfill absent alternative processing or disposal options. The Applicants submit the increase in waste

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

³ The Participating Councils are considering potentially procuring this project utilising a new SPV. If such a structure is utilised, the SPV would enter into final contracts with the selected supplier(s).

generation will coincide with the loss of Suez's Hampton Park landfill, which is likely to occur by 2028.⁴

- 1.11. Accordingly, the Participating Councils are seeking to implement AWP measures that will recover resources from residential residual waste. These measures will also reduce the Participating Councils' reliance on new landfills and preserve the use of existing landfills for future waste that cannot be recycled or recovered. The Applicants consider the Proposed Conduct will ensure that a sufficient quantity of waste is aggregated to support the investment required by a provider(s) to invest in AWP facilities in order to provide a suitable and affordable advanced waste processing solution. The Applicants submit that while it understands that advanced waste processing facilities managing municipal waste can exist at all scales, the minimum quantity for a technologically advanced, financially feasible large scale AWP facility is 150,000 tonnes of municipal solid waste per annum, which is beyond the capacity of any individual council.⁵

Interim authorisation

- 1.12. The Applicants also requested interim authorisation to enable them to commence the tender and contract negotiation stage of the Proposed Conduct while the ACCC is considering the substantive application.
- 1.13. On 29 August 2019, the ACCC granted interim authorisation under subsection 91(2) of the Act.⁶ Interim authorisation will remain in place until the date of the ACCC's final determination comes into effect or until interim authorisation is revoked. Interim authorisation does not permit the Applicants to enter into, or give effect to, any agreements.

Related applications for authorisation

- 1.14. MWRRG has lodged two additional applications for authorisation on behalf of itself and groups of participating councils:
- **AA1000449 – Metropolitan Waste and Resource Recovery Group and Ors (landfill) – lodged 2 August 2019:** jointly procure services for receiving residual waste and ancillary services (landfill services).
There are 31 councils involved in this application including the 16 Participating Councils in AA1000448.
 - **AA1000451 – Metropolitan Waste and Resource Recovery Group and Ors (recycling sorting) – lodged 22 August 2019:** collaboratively investigate, and potentially procure, the provision of sorting services for commingled recyclable material that is collected from residents' kerbsides.
There are 30 councils involved in this application including the 16 Participating Councils in AA1000448.
- 1.15. MWRRG has indicated that application AA1000449 (landfill) and AA1000448 (advanced processing) are inter-related. MWRRG intends that the proposed AWP procurement process will provide a means for 16 of the Participating Councils to transition from landfill services to advanced waste processing if they choose to. The

⁴ The majority of the Participating Councils are currently serviced by Suez's Hampton Park landfill.

⁵ The Applicants estimate the quantities of waste that individual councils will be able to make available to a contractor are generally less than 50,000 tonnes a year.

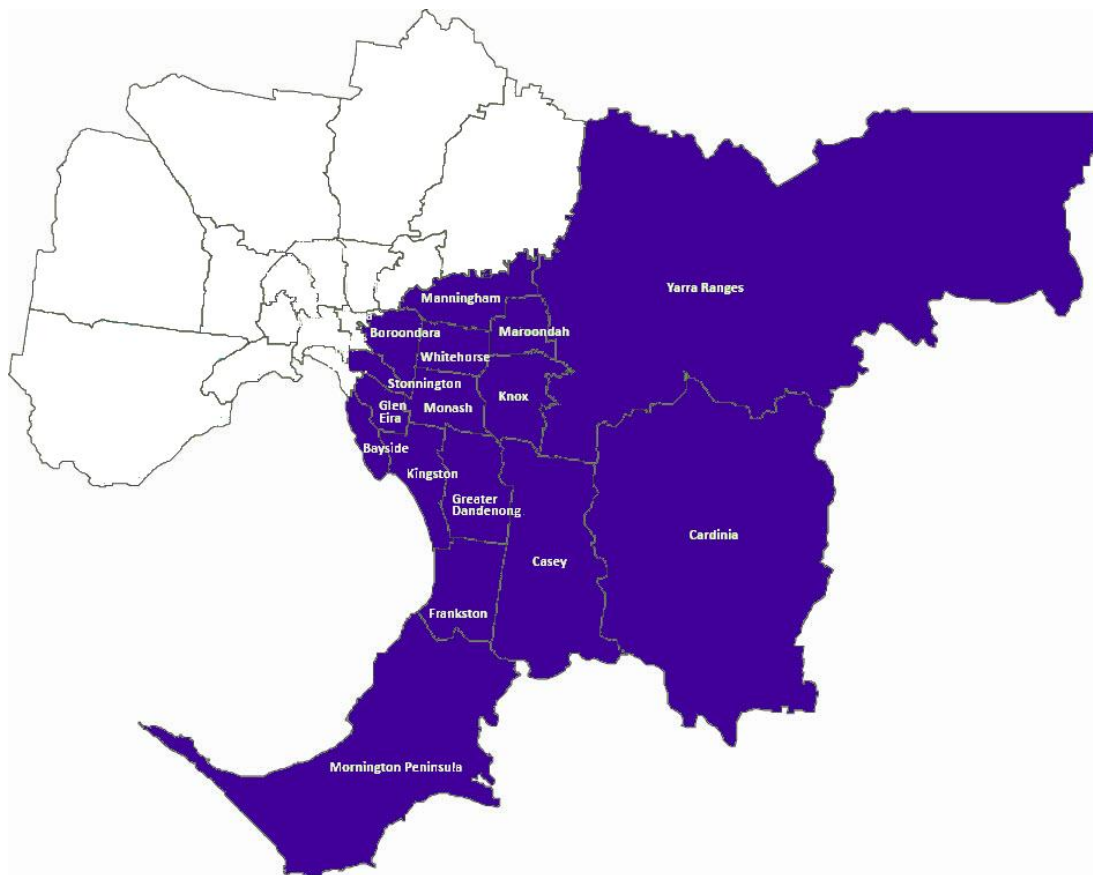
⁶ See ACCC decision of 29 August 2019 available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/metropolitan-waste-and-resource-recovery-group-ors-advanced-processing>.

proposed conduct under AA1000449 (landfill) is therefore intended to act as a bridging arrangement between existing contracts for residual waste disposal services and the commencement of any advanced waste processing services entered into under AA1000448. The Applicants anticipate that an AWP facility is to commence operations between 2025 and 2029.

- 1.16. MWRRG has also previously sought, and been granted, authorisation for similar waste processing conduct on behalf of itself and other metropolitan councils in Melbourne.⁷

2. Background

- 2.1. The Participating Councils are local government authorities located in south-east metropolitan Melbourne, the roles and functions of which are governed by the *Local Government Act 1989* (Vic). The councils are responsible for, among other things, the provision of waste collection and processing services, delivery and maintenance of community services and facilities, and enforcement of local laws and regulations within their respective municipalities.



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Figure 1 – Metropolitan Melbourne (Participating Councils are shaded)

⁷ In 2018, the ACCC granted authorisation AA1000422 to enable MWRRG and a group of six Melbourne councils to jointly procure waste management services. The ACCC granted authorisations (A91414 & A91415) to Metropolitan Waste Management Group (the predecessor of MWRRG) and eight Melbourne councils in 2014 to jointly procure organic waste processing services. Also in 2014, the ACCC granted authorisations (A91445 & A91446) to allow the Metropolitan Waste Management Group and a different group of five Melbourne councils to jointly procuring organic waste processing services.

2.2. The Participating Councils represent 16 of the 31 local councils in the Metropolitan Melbourne area and, based on 2017-2018 numbers, produce approximately 50 per cent of residual waste produced Metropolitan Melbourne.⁸ All the Participating Councils currently send their residual waste to landfill, and as noted above, the majority of the Participating Councils are currently serviced by Suez's Hampton Park landfill (located in South Eastern metropolitan Melbourne).

Advanced Waste Processing

2.3. AWP solutions are technologies that recover more resources (materials and/or energy) from waste compared to landfill or basic recycling sorting. AWP technologies which recover energy from waste can be divided into two broad categories, thermal treatments (such as direct combustion and gasification) and the biological processing of organic waste.⁹ While the technology solutions used to deliver the AWP services will be determined through the tender process, the Applicants submit that the AWP services may be delivered through one, or a combination, of the following technologies:

- (a) **Combustion:** combustion of waste materials at controlled high temperature, with energy recovery in the form of heat, and metals recovery from the bottom ash
- (b) **Mechanical Biological Treatment (MBT):** mechanical separation of materials such as metals together with biological treatment of separated organic material (with the biological treatment producing energy)
- (c) **MBT plus combustion:** following MBT, a refuse derived fuel produced from that process is combusted to recover energy
- (d) **MBT plus gasification:** following MBT, a refuse derived fuel produced from the mechanical process and gasified to recover energy.

2.4. Waste to energy is a mature concept in Europe, North America and Japan and many waste to energy facilities currently in operation in other jurisdictions use municipal residual waste as a primary input.¹⁰ By comparison, waste to energy technology is less common in Australia; there are currently no large scale facilities operating in Australia that can recovery energy or other resources from municipal residual waste. The ACCIONA facility, which is currently under construction in Kwinana, Western Australia, will recover energy from 400,000 tonnes of waste (including municipal residual waste under contracts with Perth councils) per annum.¹¹ The facility is expected to be operational by the end of 2021.¹²

2.5. The ACCC understands that in Victoria two large scale AWP facilities are currently in a planning stage.¹³ There are also several small scale waste to energy facilities currently operating in Victoria which use commercial and industrial waste as

⁸ Based on Sustainability Victoria statistics for the 2017-18 financial year.

⁹ The State Government of Victoria, Department of Environment, Land, Water and Planning, *Turning Waste into Energy – join the discussion*, Department of Environment, Land Water and Planning, Melbourne, 2017, p. 10. <https://engage.vic.gov.au/waste/wastetoenergy>, viewed 7 October 2019.

¹⁰ The State Government of Victoria, Department of Environment, Land, Water and Planning, *Turning Waste into Energy – join the discussion*, Department of Environment, Land Water and Planning, Melbourne, 2017, p. 25. <https://engage.vic.gov.au/waste/wastetoenergy>, viewed 7 October 2019.

¹¹ Australian Government, Australian Renewable Energy Agency, *Kwinana Waste to Energy Project*, 2019, <https://arena.gov.au/projects/kwinana-waste-to-energy-project/>, viewed 21 October 2019.

¹² Australian government, Australian Renewable Energy Agency, *Kwinana Waste to Energy Project*, 2018, <https://arena.gov.au/news/australias-first-energy-from-waste-plant-to-be-built-in-wa/>, viewed 21 October 2019.

¹³ Australian Paper obtained in November 2018 works approval for the construction of a thermal combustion waste to energy facility with the capacity to process 650,000 tonnes per annum of residual municipal waste and commercial industrial waste in the Latrobe Valley. Recovered Energy Australia is proposing to construct in Laverton North a municipal waste gasification to energy facility capably of converting 200,000 tonne per annum of residual municipal waste into energy

feedstock.¹⁴ Before the Environmental Protection Agency will grant a works approval for proposed waste to energy facilities in Victoria, an operator must demonstrate that they can meet strict environment protection standards.¹⁵

The tender process

- 2.6. MWRRG proposes to act on behalf of the Participating Councils to facilitate the procurement, negotiating and contract process for the AWP services. It is proposed that MWRRG will issue a request for Expressions of Interest (**EOI**) to the marketplace to identify interested potential suppliers, and to understand the likely number, nature and scale of facilities required to manage the Participating Council's waste. Based on the EOIs received, MWRRG and the Participating Councils will then decide whether to proceed to a competitive tender.
- 2.7. The Applicants submit that the tender process will be designed to encourage the construction of more than one facility, ideally with each facility being delivered and operated by a different supplier. The Applicants consider such an arrangement would help the Participating Councils with contingency options to cover periods of scheduled maintenance and breakdowns at any one plant. Accordingly, the EOI will be open to responses from suppliers to provide AWP services to smaller groups of Participating Councils. The request for EOI will also be extended to suppliers of landfill services.
- 2.8. The Participating Councils are considering establishing a new special purpose vehicle¹⁶ (**SPV**) to enter into final contracts with the selected supplier(s). The use of an SPV would allow suppliers to deal with one entity (rather than contract with multiple councils). Councils that choose to not be members of the SPV may still participate in the procurement by entering into contracts with the SPV for their waste volumes.

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties, including waste management companies, industry associations and government bodies.¹⁷
- 3.2. The ACCC received seven public submissions from interested parties (including three of the Participating Councils) in relation to the application, all of which were broadly supportive of granting authorisation.
- 3.3. The Bayside City Council asserts that it is unable to secure waste disposal services at an affordable cost whilst acting alone. The Bayside City Council considers the Proposed Conduct would result in significant economies of scale, which can be designed to lead to more sustainable waste disposal opportunities than landfill.

¹⁴ The State Government of Victoria, Department of Environment, Land, Water and Planning, *Turning Waste into Energy – join the discussion*, Department of Environment, Land Water and Planning, Melbourne, 2017, p. 25. <https://engage.vic.gov.au/waste/wastetoenergy>, viewed 7 October 2019.

¹⁵ The project developers must demonstrate that they will incorporate best practice measures for the protection of the land, air and water environments, as well as for energy efficiency and greenhouse gas emissions management. They must provide evidence of how they will minimise and manage emissions including pollutants, odour, dust, litter, noise and residual waste – Environment Protection Authority Victoria, *Guideline: Energy from waste*, 2017.

¹⁶ A special purpose vehicle is a legal entity created to fulfil a specific obligation.

¹⁷ 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. Whitehorse City Council states that while the collective waste of the 16 councils is a significant amount, it remains a small portion of Metropolitan Melbourne's overall waste and the joint procurement will ensure that a suitably sized facility is attractive to potential tenderers seeking to supply the services.
- 3.5. The City of Greater Dandenong and Whitehorse City Council submit that the expected closure of the Hampton Park landfill necessitates planning for replacement options. Without alternatives, Whitehorse City Council submits that residual waste will need to be transported to the remaining landfills across Melbourne, which will increase the cost of obtaining landfill services.
- 3.6. Steinert Australia¹⁸ submits that short term contracts (7-10 years) and below cost bids have limited investment in advanced waste technology in the waste industry, and that the Proposed Conduct would facilitate the investment required for improved service in this space by providing economy of scale in terms of waste volume. However, Steinert Australia is concerned that the Proposed Conduct may place a large percentage of Victoria's waste in the hands of a single supplier. Steinert Australia requests the ACCC place restrictions of the way tenders are evaluated to avoid a 'race to the bottom', and recommends continued oversight to ensure sustainable outcomes for all parties. In response, MWRRG submits that while value for money will always be a relevant factor for councils, the expectation is that tenders will demonstrate innovation together with environmentally beneficial outcomes. MWRRG does not expect the tender to result in unsustainably inexpensive contracts.
- 3.7. CPR¹⁹ submits that a large scale waste-to-energy (**WTE**) facility would reduce the amount of waste sent to landfill. CPR asserts that the greatest impediment to investment in a WTE facility is obtaining long-term access to council waste and that individually, councils do not produce sufficient waste volumes to justify the construction of a large-scale facility.
- 3.8. Australian Paper²⁰ has works approval to construct an AWP facility in Laverton North, Victoria with the capacity to process 650,000 tonnes per annum of residual municipal solid waste and commercial and industrial waste. It is now seeking long-term waste supply contracts and intends to tender for the joint contract. Australian Paper submits that, to secure financing for a large scale AWP facility, certainty in access to waste volumes is necessary. The long-term contract proposed in the application (25 to 30 years) is required to obtain cost-effective finance and the absence of long-term certainty increases the risk premium applied by lenders. Australian Paper also claims smaller-scale WTE facilities are likely to be less efficient, produce smaller net reductions in greenhouse gases and charge higher gate fees.
- 3.9. In response to Australian Paper's stated intention to process commercial and industrial waste, and possibly municipal waste from regional councils in their AWP facility, MWRRG states that it believes that the quantities aggregated from the Participating Councils are sufficient, of themselves, to support the construction of a large scale AWP facility. MWRRG further submits that the markets for commercial and industrial waste, and regional municipal waste, remain discrete.

¹⁸ Steinert Australia is a metal and other waste sorting and separation services company and listed as a potential tenderer in the application.

¹⁹ CPR is a media, public policy and communications consultancy firm that has been working with international investors on establishing large-scale waste-to-energy facilities in Victoria.

²⁰ Australian Paper is a manufacturer of pulp, paper, envelope and stationery products that is listed as a potential tenderer in the application for authorisation.

- 3.10. The Australian Industry Group (**AIG**)²¹ is concerned about the voluntary nature of the collective tendering process, stating that the potential for councils to opt out would create uncertainty for potential suppliers about which councils, and what tonnages, they would ultimately be contracting with; and may enable the Participating Councils to use confidential information, received within the Proposed Conduct, to negotiate for a lower price outside the collective tendering process. AIG asked that ACCC give consideration to conducting a 'post tender review' of any contracts.
- 3.11. In response, MWRRG states that it would not be reasonable nor commercially viable for the Participating Councils to pre-commit to the joint procurement process, as potential suppliers would not have conformed the commercial terms they are offering to the councils. It notes that the Participating Councils will be subject to confidentiality obligations (both during and after the procurement), that will restrict the use of information obtained during the process. MWRRG also considers a post-tender review by the ACCC is unnecessary.
- 3.12. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the 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 submissions received from interested parties and the Applicants
 - other relevant information available to the ACCC, including other relevant applications for authorisation
 - the period for which authorisation has been sought
 - the relevant areas of competition are likely to be the supply and acquisition of disposal and advanced processing services for municipal residual waste in metropolitan Melbourne
 - that absent the Proposed Conduct, it is likely that each Participating Council will individually procure residual waste disposal services. For most of the Participating Councils this is likely to be limited to landfill services because they do not have sufficient demand to support the construction of new AWP facilities. However, the ACCC notes that a prospective supplier of AWP services could secure the minimum quantity of waste required to support the construction of a new AWP facility by entering into individual contracts with multiple councils for their

²¹ The submission was provided by the Waste Industry Alliance Victoria, which forms a part of the Australian Industry Group, an industry association representing employers in a wide range of sector across Australia, from construction to transport.

respective waste volumes, which could enable an individual council to procure AWP services without participating in a joint procurement. Accordingly, the ACCC recognises that the likely future without could involve a combination of some Participating Councils procuring landfill services and others procuring AWP services (potentially involving the construction of one or more AWP facilities).

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.”²²

4.5. The Applicants submit that the Proposed Conduct is likely to result in public benefits, including:

- procurement process benefits, including transaction cost savings
- environmental benefits
- increase in competition
- increased efficiencies
- investment in the State and
- achievement of government objectives.

4.6. The ACCC’s assessment of the likely public benefits from the Proposed Conduct follows.

Transaction cost savings

4.7. The ACCC accepts that the Proposed Conduct is likely to provide transaction cost savings, including by reducing or eliminating the unnecessary duplication of administrative, legal and evaluation costs associated with each Participating Council conducting separate tenders.

4.8. The ACCC also considers the Proposed Conduct is likely to deliver transaction cost savings to potential suppliers of AWP services, including by reducing or eliminating the administrative burden of dealing with the procurement processes of multiple Participating Councils.

Increased efficiencies

4.9. The ACCC considers that the aggregation of the Participating Councils’ residual waste is likely to result in suppliers of AWP services achieving efficiencies and economies of scale in the delivery of AWP services, which may facilitate lower average costs for each Participating Council.

²² 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.

Increased competition

- 4.10. Based on information provided to the ACCC, the ACCC accepts that the combined volumes of the Participating Councils will present suppliers of AWP services with a more attractive volume of waste supply than would be the case if the Applicants tendered for advanced waste processing services individually (or in smaller groups).²³ In particular, this is likely to result in greater feasibility of constructing large-scale AWP facilities in order to meet the demand under the contracts with Participating Councils compared to without the Proposed Conduct. This is likely to result in greater competition to supply the AWP services to Participating Councils.²⁴
- 4.11. The ACCC considers that new AWP facilities may be constructed without the Proposed Conduct, i.e. that AWP service providers may be able to contract with individual councils to a sufficient extent to support construction of new AWP facilities. However, the ACCC considers that the combined tendering that would be entailed by the Proposed Conduct is likely to facilitate the construction of larger-scale AWP facilities and to make such construction more likely to occur. Therefore the increased competition to supply AWP services resulting from the Proposed Conduct is also likely to result in a greater number of new large-scale AWP facilities being constructed and a greater total capacity of AWP facilities that are constructed. This would promote competition in the supply of AWP services. If there is excess capacity, this would also promote competition in supply to third parties (i.e. councils that are not Participating Councils and to commercial and industrial customers).

Environmental benefits

- 4.12. To the extent that the Proposed Conduct results in the establishment of a greater number of large-scale AWP facilities and a greater total capacity of AWP facilities compared to without the Proposed Conduct, this means that there will be a greater volume of AWP services supplied. A greater volume of AWP services supplied means that more residual waste is diverted from landfill than would otherwise occur. Therefore, the ACCC considers that there is likely to be public benefit arising from the diversion of residual waste from landfill, reducing the negative environmental impacts associated landfill use.
- 4.13. To the extent that the Proposed Conduct aligns with relevant government strategies on environmental preservation, the ACCC considers the achievement of government objectives may be supported by the Proposed Conduct.

Public detriments

- 4.14. 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.*²⁵

²³ Whitehorse City Council submits that the aggregation of the residual waste of the Participating Councils will ensure that a suitably sized facility is attractive to the market, and CPR asserts that no single council has sufficient waste volumes to justify the construction of a large-scale facility.

²⁴ Whitehorse City Council expects the Proposed Conduct to attract new players to the industry and Australian Paper submits that the conduct will facilitate competition between landfill and advanced waste processing service suppliers.

²⁵ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.15. 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.
- In practice, no one council would be able to undertake a procurement that prompted the construction of an AWP facility (with the ensuring benefits), as a minimum quantity of waste is required to make the project viable, and therefore it is unlikely that the Proposed Conduct will give rise to any public detriment.
 - The tender process will allow for suppliers to submit bids to supply a smaller area than that represented by the group of 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. Selected suppliers will not be in any way restricted from offering services to other councils.
 - While the councils in this matter represent a significant proportion of the total number of metropolitan councils, it is likely there would still remain at least two more procurements of similar services in metropolitan Melbourne. The broader market for AWP services and facilities throughout Australian and international continues to grow.
- 4.16. The Participating Councils may be considered to be each other's competitors for the acquisition of disposal and AWP services in metropolitan Melbourne. By conducting their procurement jointly rather than individually, the Participating Councils are agreeing to no longer compete. The Proposed Conduct therefore will lessen competition in the acquisition of disposal and AWP services.
- 4.17. The ACCC recognises that the Participating Councils account for approximately 50% of the municipal residual waste volumes in metropolitan Melbourne. However, the ACCC considers that any detriment resulting from the Participating Councils' enhanced buying power is likely to be limited, due to the following factors:
- The tender process will be competitive and transparent, supporting the countervailing power of AWP service providers.
 - The majority of AWP suppliers identified by the Applicants as potential tenderers operate either nationally or internationally and there will continue to be other future opportunities for AWP services in Australia and elsewhere, and there are no suppliers of AWP services currently servicing councils in Metropolitan Melbourne.
 - Participation in the Proposed Conduct is voluntary for the Participating Councils and for potential suppliers.
- 4.18. The ACCC has also considered the effect of the Proposed Conduct on the supply of disposal and advanced waste processing services in metropolitan Melbourne. In particular, the ACCC has considered the potential for the Proposed Conduct to result in the municipal residual waste volumes of the Participating Councils (who account for approximately 50% of those volumes in Metropolitan Melbourne) being contracted to a single supplier for an extended period of time. Compared to the likely future without (where there are likely to be multiple service providers), the appointment of a

single service provider for an extended period may result in public detriment by reducing the number of parties competing to supply AWP services in the future.

4.19. The ACCC considers that the extent of this public detriment is likely to be limited for the following reasons.

- The proposed tender will be open to responses from suppliers seeking to provide AWP to a subset of the Participating Councils and suppliers of landfill services. The ACCC considers that the net effect of this approach is likely to be to stimulate greater competition for the proposed contract, 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.
- Aggregated quantities of waste are needed to support the construction of a large scale AWP facility, and no single council produces the requisite volume. All public submissions are broadly supportive of these propositions.
- The ACCC understands a supplier of AWP services could secure the minimum quantity of waste required to support an AWP facility without participating in a joint procurement, by entering into individual contracts with multiple councils for their respective waste volumes. However, based on submissions received, the ACCC considers it likely that for suppliers who are looking to enter the market for the supply of AWP services in Melbourne, the aggregated waste volume offered by the Participating Councils is likely to be a more attractive proposition than if each Participating Council tendered individually.
- The 15 other councils in metropolitan Melbourne, not participating in the Proposed Conduct, present alternative opportunities for suppliers of residual waste AWP and disposal services. The ACCC recognises that it is unknown whether any of the non-participating councils will elect to procure AWP services, instead of landfill services, in the future. The ACCC understands AWP facilities are often capable of handling residual waste generated by both municipal customers and commercial and industrial customers.²⁶ The ACCC notes the possibility for AWP suppliers to use commercial and industrial waste as feedstock for large scale AWP facilities, if sufficient volumes of municipal waste are not available.
- As already noted, the majority of AWP suppliers identified by the Applicants as potential tenderers operate either nationally or internationally and there will continue to be other future opportunities for AWP services in Australia and elsewhere.
- Also as already noted, participation in the Proposed Conduct is voluntary for the Participating Councils and for potential suppliers.

4.20. Apart from the competition issues outlined above, the ACCC notes AIG's concerns about the voluntary nature of the collective tendering process, including the risk of misuse of confidential information by councils. On the latter point, the ACCC understands MWRRG intends to impose requirements that limit the use of the commercially sensitive information to the joint tendering process. More generally, the ACCC considers the voluntary nature of a collective bargaining arrangement can limit the potentially anti-competitive effects of the group.²⁷

²⁶ For example Australia Paper is proposing to construct an AWP facility with the capacity to process 650,000 tonnes per annum of both residual municipal solid waste and commercial and industrial waste.

²⁷ ACCC, [Small business collective bargaining](#).

- 4.21. AIG also recommends that the ACCC give consideration to conducting a ‘post tender review’ of any contracts, focusing on terms and conditions of each individual contract, on the basis that often ‘terms and conditions suggested during the tender may be dramatically altered in the lead up to the signing of the contract’. The role of the ACCC in the authorisation process is limited to assessing whether the Proposed Conduct is likely to result in a net public benefit rather than determining the outcome of specific clauses that are ultimately executed as part of the Proposed Conduct.
- 4.22. Overall, the ACCC considers that the Proposed Conduct is likely to result in some limited public detriment.

Balance of public benefit and detriment

- 4.23. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
- 4.24. The ACCC considers the Proposed Conduct is likely to result in public benefits in the form of transaction costs savings, increased efficiencies, environmental benefits and increased competition.
- 4.25. The ACCC considers that the Proposed Conduct is likely to result in limited public detriment due to a number of mitigating factors including: the tender process will be competitive and transparent; the majority of AWP suppliers identified by the Applicants as potential tenderers operate either nationally or internationally; there will continue to be other future opportunities to supply AWP services in Australia and elsewhere; and participation in the Proposed Conduct is voluntary for the Participating Councils and for potential suppliers. Further, the ACCC notes the proposed tender will be open to responses from suppliers seeking to provide AWP services to smaller groups of Participating Councils and suppliers of landfill services.
- 4.26. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
- 4.27. Accordingly, the ACCC proposes to grant authorisation.

Length of authorisation

- 4.28. The Act allows the ACCC to grant authorisation for a limited period of time.²⁸ 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.
- 4.29. In this instance, the Applicants seek authorisation for 30 months to conduct the tender process and negotiate and execute contracts, along with a further 30 years to give effect to the contracts for the supply of AWP services (including the ongoing administration of the contracts).
- 4.30. The Applicants submit that 30 years is required to:

²⁸ Subsection 91(1)

- accommodate the time required for the planning and construction of one or more advanced processing facilities. Based on the time required to deliver comparable facilities,²⁹ the Applicants anticipate a three to five year period for the delivery of the facility.
 - support the investment in an advanced waste processing facility. The construction of one or multiple AWP facilities will require substantial capital investment. The Applicants submit long term contracts which provide certainty as to the quantity and continuity of waste will enable a service provider to secure the financing necessary to deliver a viable large scale AWP facility. The Applicants submit that large scale AWP facilities are often supported by contracts of 25 years or more.³⁰ The Applicants also consider that a 20 to 25 year contract term will enable councils to pay affordable monthly service charges to cover the costs associated with the AWP solution.
- 4.31. Australian Paper states that the long-term contract proposed in the application is required to obtain cost effective finance and that the absence of long-term certainty increases the risk premium applied by lenders.
- 4.32. Steinert Australia submits short term contracts (7-10 years) have limited investment in advanced waste technology in the waste industry.
- 4.33. The ACCC notes that the Proposed Conduct will not necessarily result in the construction of a large scale AWP facility. However, compared to the likely future without the Proposed Conduct, the ACCC considers that aggregating the Participating Councils' residual waste volumes is more likely to facilitate the construction of a greater number of large scale AWP facilities, and a greater total capacity of AWP facilities.
- 4.34. The ACCC accepts that long term contracts (e.g. 25-30 years) are likely required to support the level of investment necessary to construct a large scale facility capable of delivering affordable AWP 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.
- 4.35. The ACCC proposes to grant authorisation for 30 months to conduct the tender process, negotiate contracts and execute contracts, and 30 years to give effect to the contract/s for the supply of AWP services (including the ongoing administration of the contract/s). The ACCC invites further submissions on this proposed period of authorisation.

5. Draft determination

The application

- 5.1. On 23 July 2019, the Applicants lodged application AA1000448 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

²⁹ Construction of the ACCIONA facility in Kwinana, WA commenced in March 2019 and is due to be completed by the end of 2021. In the case of the Four Ashes facility in Staffordshire, UK, the Applicants submit the design phase commenced in July 2010, and waste was first processed through the facility in 2013.

³⁰ The Applicants have provided examples of comparable large scale AWP facilities which are supported by contracts of 25 years and longer, including the ACCIONA facility in Kwinana, WA and a number of facilities in operation in the UK. Australia paper is also seeking 25 year municipal waste supply contracts for the AWP facility it plans to build in Gippsland, Victoria.

- 5.2. The Applicants seek authorisation for the 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 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 AA1000448 to enable the Applicants to conduct a joint competitive tender process to investigate, and potentially procure, the provision of advanced waste processing services, as described in paragraph 1.5 and defined as the Proposed Conduct. This may include the construction and operation of one or more facilities for the recovery of value from residual waste.
- 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 AA1000448 for 30 months to conduct the tender process, negotiate contracts and execute contracts, and 30 years to give effect to the contract/s for the supply of AWP services (including the ongoing administration of the contracts/s).
- 5.9. This draft determination is made on 20 November 2019.

6. Next Steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 4 December 2019. 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.