



Draft Determination

Application for authorisation
lodged by
Metropolitan Waste and Resource Recovery Group
in respect of
joint procurement of landfill services
Authorisation number: AA1000449

20 November 2019

Commissioners:

Keogh

Rickard

Court

Ridgeway

Summary

The ACCC proposes to grant authorisation to the Metropolitan Waste and Resource Recovery Group (MWRRG) and 31 councils in metropolitan Melbourne to enable them to jointly procure services for receiving residual waste and related ancillary services.

The ACCC proposes to grant authorisation for 10 years.

The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of transaction cost savings and other efficiencies. The ACCC considers that any public detriment arising from the Proposed Conduct is likely to be minimal.

The ACCC invites submissions on the application and in relation to this draft determination by 4 December 2019.

1. The application for authorisation

- 1.1. On 2 August 2019 the Metropolitan Waste and Resource Recovery Group (**MWRRG**), on behalf of itself and 31 councils in metropolitan Melbourne (together, the **Applicants**), lodged application for authorisation AA1000449¹ with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants seek authorisation for 10 years.
- 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 begin the initial stages of the tender and negotiation process, while 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 comprising Metropolitan Melbourne.
- 1.6. The councils that form part of this Application (the **Participating Councils**) are 30 of the 31 councils in Metropolitan Melbourne, in addition to the City of Greater Geelong.

The Proposed Conduct

- 1.7. The Applicants seek authorisation to jointly procure services for receiving residual waste and related ancillary services (landfill services). In particular, they seek authorisation for:
 - MWRRG to conduct a collaborative competitive tender process for the procurement of landfill services

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

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

- negotiating and executing the contractual framework for the supply of landfill services to participating councils and
- ongoing administration and management of the resulting contracts.

(the **Proposed Conduct**)

1.8. MWRRG submits that each existing major landfill 'is almost certain to be contracted to at least one of the Participating Councils, and more likely a group of between 5-10 Participating Councils'. MWRRG further notes that it is anticipated that each Participating Council will decide to enter into contracts with more than one service provider as a contingency in the event of a temporary closure of its primary facility.

Rationale for the Proposed Conduct

1.9. MWRRG submits that the overall objective of the Proposed Conduct is to enable the Participating Councils to efficiently access landfill services, including by achieving a robust tender/contract model and outcomes that may potentially reduce truck movements and transport costs.

1.10. MWRRG notes also that the proposed joint procurement is structured to align with MWRRG's relevant statutory objectives and Victorian state government plans. In particular it submits:

- the Proposed Conduct is consistent with MWRRG's objectives under the Environmental Protection Act to plan, coordinate and facilitate councils' procurement of waste management and resource recovery services.
- the Metropolitan Implementation Plan, developed in accordance with the Environmental Protection Act, identifies the re-tendering of the landfill services as a key performance indicator. The Proposed Conduct will be structured to complement the objectives of the MIP, including less waste sent to landfill, more materials recovered, and an increase in recovery of priority materials from residual waste.

Interim authorisation

1.11. 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.

1.12. On 29 August 2019, the ACCC granted interim authorisation under subsection 91(2) of the Act.³ 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

1.13. MWRRG has lodged two other applications for authorisation on behalf of itself and groups of participating councils:

- **AA1000448 – Metropolitan Waste and Resource Recovery Group and Ors (advanced processing) – lodged 23 July 2019:** joint competitive tender process to investigate, and potentially procure, the provision of Advanced Waste

³ 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>

Processing (**AWP**) services. AWP refers to the processes which are employed to recover alternative resources (such as electricity or fuel) from residual waste (waste which would otherwise go to landfill).

There are 16 councils involved in this application, representing a subset of the Applicants in AA1000449.

- **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, representing a subset of the Applicants in AA1000449.

1.14. MWRRG has indicated that applications 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 Proposed Conduct is therefore intended to act as a bridging arrangement between existing contracts for residual waste disposal services and the commencement of any AWP services entered into under AA1000448.

1.15. MWRRG has also previously sought authorisation for similar conduct on behalf of itself and other metropolitan councils in Melbourne.⁴

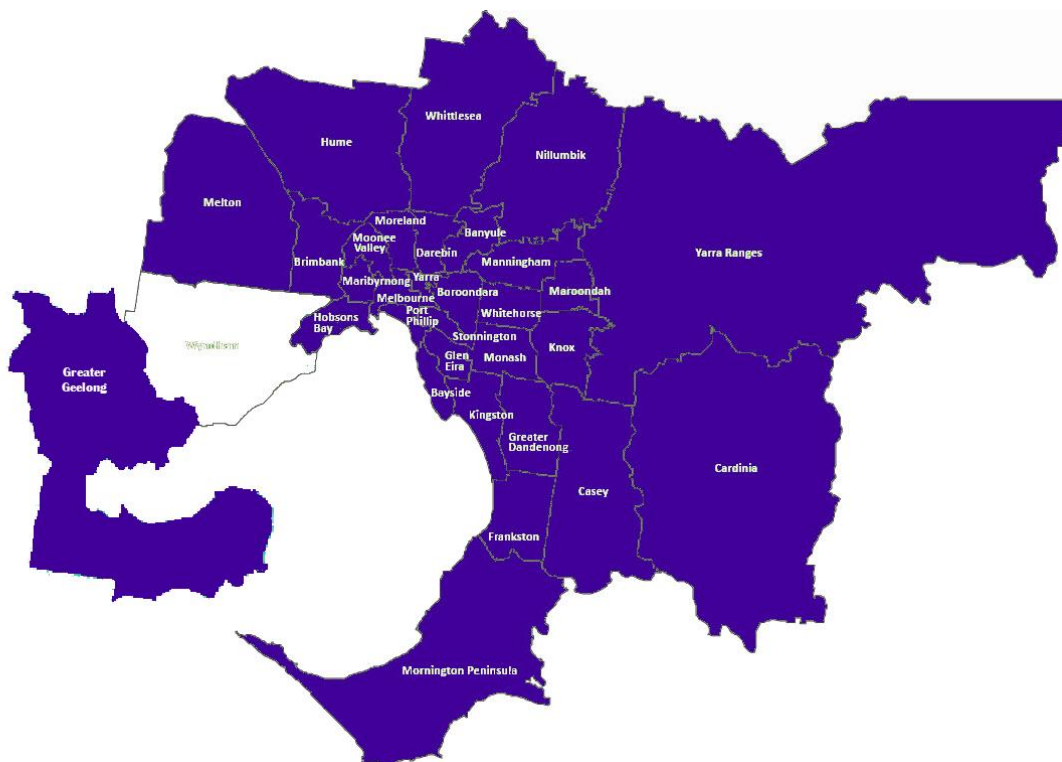
2. Background

2.1. The Participating Councils are local government authorities, 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.

2.2. A map of the Participating Councils is below.

⁴ 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 authorisation (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.

Figure 1: Map of participating councils



Source: adapted from MWRRG and SBWRRG sites

2.3. Each of the Participating Councils is responsible for providing residential waste collection and procession services in their local government areas. In 2018, the total landfill volume for the Participating Councils was 838,754 tonnes. The individual tonnages of the participating councils are in the table below.

Table 1: Landfill tonnages by Participating Council⁵

Council	Landfill tonnages 2018
Banyule	21,349
Bayside	20,957
Boroondara	35,732
Brimbank	42,742
Cardinia	18,843
Casey	58,557
Greater Dandenong	26,133
Darebin	25,253
Frankston	29,979
Geelong	48,324
Glen Eira	29,799
Hobsons bay	19,272
Hume	46,344

⁵ Based on [Sustainability Victoria 2017 – 2018 Waste Survey](#).

Kingston	28,789
Knox	28,508
Manningham	20,535
Maribyrnong	19,300
Maroondah	20,327
Melbourne	29,316
Melton	27,200
Monash	32,486
Moonee valley	24,950
Moreland	30,393
Mornington peninsula	31,776
Nillumbik	7,786
Port Philip	21,014
Stonington	22,095
Whitehorse	28,223
Whittlesea	45,489
Yarra	15,452
Yarra ranges	30,154
TOTAL	838,754

2.4. The Participating Councils represent 31 of the 79 local government areas in Victoria and, based on 2017-2018 numbers, produce 69.6 per cent of Victoria's residual waste.⁶

2.5. There are five landfills in metropolitan Melbourne:

- Cleanaway Melbourne Regional Landfill in Ravenhall (Western metropolitan Melbourne)
- Hanson Wollert (Northern metropolitan Melbourne)
- Suez Hampton Park (South Eastern metropolitan Melbourne)
- Wyndham (South Western metropolitan Melbourne)
- Mornington Peninsula (South Eastern metropolitan Melbourne).

2.6. MWRRG characterises four of these landfills (Cleanaway MRL, Hanson Wollert, Suez Hampton Park and Wyndham) as 'major landfills'. All of the five landfills currently service at least one of the Participating Councils.

2.7. In its related application for authorisation AA1000448 (advanced waste processing), MWRRG has indicated that Suez Hampton Park is expected to close by 2028.

⁶ Based on [Sustainability Victoria 2017 – 2018 Waste Survey total Victorian residual waste of 1.2 million tonnes.](#)

The tender process

- 2.8. MWRRG proposes to issue a competitive tender for the supply of landfill services on behalf of the participating councils, with the focus of the tender on seeking rates from existing landfill operators.
- 2.9. MWRRG submits that the structure of the tender, tender schedules and proposed contract durations have been designed to receive bids for landfilling and waste transfer services. On that basis, while it is possible that non-conforming bids may be received (such as from potential AWP services), MWRRG expects that submissions will be received from landfill and transfer station operators. MWRRG notes there is a separate AWP procurement process which will provide opportunities for potential AWP services suppliers.
- 2.10. MWRRG expects that existing landfill operators will offer two schedules of rates: one for guaranteed supply, and one for non-guaranteed supply. A panel, comprising MWRRG and representatives of the participating councils, will assess the tenders and make recommendations to the Participating Councils.

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties including waste management companies, industry associations, and government bodies.
- 3.2. The ACCC received two public submissions in relation to the substantive application.
- 3.3. City Of Casey supports the application as necessary to ensure security and continuity of disposal services for municipal solid waste generated by Participating Councils. It also notes that the Proposed Conduct will allow an orderly transition away from landfill as the default waste disposal method.
- 3.4. The Australian Industry Group (**AIG**)⁷ is concerned about the voluntary nature of the collective tendering process, stating that the potential for councils to opt out would create uncertainty for providers about which councils, and what tonnages, they would ultimately be contracting with; and may enable 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.
- 3.5. In response, MWRRG stated that it would not be reasonable nor commercially viable for Councils to pre-commit to the joint procurement process, as service providers would not have conformed the commercial terms they are offering to the councils. It noted 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.
- 3.6. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.

⁷ 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.

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 the 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.
- 4.3. 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 Proposed 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).
- 4.4. 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 relevant areas of competition are likely to be the supply and acquisition of disposal services for municipal residual waste in metropolitan Melbourne
 - that absent the Proposed Conduct, it is likely that each Participating Council will individually tender for, and procure, residual waste disposal services and related ancillary services.

Public benefits

- 4.5. 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.*⁸
- 4.6. The Applicants submit that the Proposed Conduct will lead to public benefits including:
 - transaction cost savings
 - increased efficiencies
 - environmental benefits
 - achievement of legislative and government objectives.
- 4.7. The ACCC's assessment of the likely public benefits from the Proposed Conduct follows.

⁸ 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.

Transaction cost savings

- 4.8. The ACCC accepts that conducting a collective tender for, and administration of contracts regarding, the supply of landfill services is likely to result in public benefits from transaction cost savings compared to the situation where individual negotiations and contract administration is conducted by each Participating Council. These savings are likely to arise from reducing the total time of negotiation and making collective use of MWRRG's legal and technical advice to inform the negotiation.
- 4.9. The ACCC also considers the Proposed Conduct is also likely to deliver transaction cost savings to potential suppliers of disposal services, including by reducing or eliminating the administrative burden of dealing with the procurement processes of multiple Participating Councils.

Increased efficiencies

- 4.10. The ACCC has previously recognised that the aggregation of waste volumes through joint procurement of waste services by councils can result in public benefits by facilitating suppliers' realisation of efficiencies. The ACCC considers that, to the extent that it reduces truck movements and that guaranteed waste volumes and contract terms allow providers to plan for and underwrite infrastructure development (including improvements to transfer stations), the Proposed Conduct is likely to result in benefits in the form of efficiencies.
- 4.11. The ACCC notes MWRRG's submission that the geographic spread of both the Participating Councils and suppliers of disposal services means each supplier will secure volumes mostly from Participating Councils in the catchment area for which the supplier is the most convenient and cost-effective option. This may serve to limit the efficiencies achieved by the Proposed Conduct.

Environmental benefits

- 4.12. The ACCC considers that the Proposed Conduct is likely to result in public benefit in the form of improved environmental outcomes to the extent that it reduces truck movements and assists diverting waste from landfill into alternative waste and resource recovery programs.
- 4.13. To the extent that this outcome 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.⁹

- 4.15. The Applicants submit that the Proposed Conduct will not result in any discernible public detriment for the following reasons:
- The tender process will be competitive and transparent.

⁹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- Participating Councils' participation in the joint procurement and negotiation process will be voluntary.
 - Service providers are not required to deal with Participating Councils on a collective basis, and may choose to seek to contract with each Participating Council on a purely bi-lateral basis.
 - Service providers have countervailing power.
 - It is expected that each existing major landfill will be contracted to at least one Participating Council under the Proposed Conduct, and in that event there would be no change to the existing market structure.
- 4.16. The Participating Councils could be considered each other's competitors for the acquisition of municipal residual waste disposal services in metropolitan Melbourne. By conducting their procurement jointly rather than individually, the councils are agreeing not to compete. The Proposed Conduct therefore will lessen competition in the acquisition of municipal residual waste disposal services, noting that the Participating Councils account for all but one of the councils in metropolitan Melbourne.
- 4.17. However, the ACCC considers that the risk of this outcome is mitigated by the fact that there are a limited number of existing landfills in the Melbourne metropolitan area, giving landfill services providers countervailing power, supported by a competitive and transparent tender process.
- 4.18. The ACCC has also considered the potential for lessening of competition in the supply of landfill services. The ACCC considers that councils are unlikely to act in a way that will result in a lessening of competition by shutting out a landfill service provider, noting MWRRG's submission that it is likely that all major landfills will be contracted with at least one Participating Councils. The ACCC further notes that landfills would also have the opportunity to receive residual waste from industrial and commercial sources as well as municipal waste.
- 4.19. The ACCC has also considered the potential for lessening of competition in the supply of landfill services as a result of the tender being structured in such a way that AWP providers are dissuaded from putting in a bid.¹⁰ The information available to the ACCC suggests it is unlikely there will be sufficient AWP facilities operational by 2021 to receive council waste. The ACCC also notes that, while the structure of the tender may result in any AWP tenders being 'non-conforming', AWP providers are still able to provide tenders and councils are still able to individually contract with an AWP provider outside of the Proposed Conduct.
- 4.20. 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.
- 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

¹⁰ On 7 October 2019, MWRRG clarified that the structure of the tender has been designed to receive bids for landfilling and waste transfer services, and that though it was possible that non-conforming bids 'from potential AWP services or other parties' may be received, the expected tenders were from landfill providers.

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 assessing the contract that may be executed as part of the Proposed Conduct.

Balance of public benefit and detriment

- 4.22. The ACCC considers that the Proposed Conduct is likely to result in public benefits from transaction cost savings and other efficiencies.
- 4.23. The ACCC considers that any public detriment arising from the Proposed Conduct is likely to be minimal, noting that:
- tenders will be conducted by a competitive and transparent process, and
 - there is a limited number of existing landfills in the Melbourne metropolitan area which gives landfill services providers countervailing power.
- 4.24. Overall, the ACCC is satisfied that the Proposed Conduct is likely to result in public benefits and that these public benefits would outweigh the minimal detriment to the public likely to result from the Proposed Conduct.

Length of authorisation

- 4.25. The Act allows the ACCC to grant authorisation for a limited period of time.¹¹ 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.
- 4.26. In this instance, the Applicants seek authorisation for 10 years. This period is intended to cover the length of conducting and finalising the tender process, a period between execution of contracts and their commencement, an initial term of the supply agreements, and an additional term to cover a possible extension of the agreements.
- 4.27. The Applicants note that this term reflects feedback from service providers and councils that such a term would appropriately balance flexibility and certainty for all parties. AWP facilities are expected to commence operation between 2025 and 2029, meaning that the 10 year authorisation period sought can act as a bridging arrangement for councils to commence using those AWP facilities.
- 4.28. In light of its assessment of the public benefits and detriments likely to result from the Proposed Conduct, the ACCC proposes to grant authorisation for 10 years.

5. Draft determination

The application

- 5.1. On 2 August 2019, MWRRG lodged application AA1000449 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 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.

¹¹ Subsection 91(1)

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, based on the information before it, 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 would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000449 to enable MWRRG and its Participating Members to jointly procure services for receiving residual waste and related ancillary services (the **Proposed Conduct**).
- 5.7. The Proposed Conduct may involve making or giving effect to 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 AA1000449 for 10 years.
- 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.