



Draft Determination and interim authorisation

Application for Authorisation

lodged by

Gippsland Waste and Resource Recovery Group

in respect of residual waste (excluding recyclable and organic) services

Authorisation number: AA1000560

27 July 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes 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 residual waste services. The councils are likely to sign individual contracts with the successful tenderer/s but are also seeking authorisation to jointly manage their contracts with the supplier(s) as they may wish to engage in some joint management activities. Waste service suppliers will be able to tender to supply each council and/or groups of councils (Proposed Conduct).

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.

Residual waste is considered to be the balance of domestic waste, which is not recyclable or organic waste.

The ACCC considers the joint tendering, procurement and management of residual waste services is likely to result in public benefits in the form of 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; transaction cost savings for councils; and environmental and health benefits.

The ACCC considers that the Proposed Conduct is likely to result in limited public detriment. Councils will independently decide whether it is in their best interests to procure residual waste services through the joint tender process, or through individual negotiations with a supplier. All potential waste service suppliers 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.

Due to the need for long term contracts to underpin investment in potential new residual waste management solutions, the ACCC proposes to grant authorisation until 30 September 2042.

The ACCC has decided to grant interim authorisation to enable the councils to commence the tender process while the ACCC is considering the substantive application. Interim authorisation does not extend to the councils selecting or entering into contracts with waste service suppliers.

The ACCC invites submissions in relation to this draft determination by 10 August 2021.

1. The application for authorisation

- 1.1. On 18 June 2021, the Gippsland Waste and Resource Recovery Group (**GWRRG**), on behalf of itself and 6 councils located in Gippsland, Victoria lodged application for authorisation AA1000560 with the Australian Competition and Consumer Commission (the **ACCC**).¹ GWRRG is seeking authorisation for approximately 21 years, to jointly tender, and for the 6 participating councils to jointly procure the disposal and

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

treatment of residual waste services. 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. GWRRG also requested interim authorisation to enable GWRRG and the participating councils to progress the tender process, including identifying appropriate suppliers and commencing the process of preparing contractual documentation, while the ACCC is considering the substantive application. Interim authorisation is not sought to release a formal request for tender or enter into contracts with a supplier. The request for interim authorisation is discussed further in section 6.

Participants in the Proposed Conduct

- 1.4. GWRRG is a Victorian statutory body corporate,² 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 (the **Participating Councils**) are Bass Coast Shire Council, Baw Baw Shire Council, East Gippsland Shire Council, Latrobe City Council, South Gippsland Shire Council and Wellington Shire Council.
- 1.6. GWRRG has also sought authorisation to extend to any new waste authority or 'successor entity' of GWRRG.³

The Proposed Conduct

- 1.7. Authorisation is sought for:
 - GWRRG, on behalf of the Participating Councils, to conduct a collaborative competitive tender process for residual waste 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**)

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

³ 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.

Residual Waste Services

- 1.8. Residual Waste is considered to be the balance of domestic waste, which is not recyclable or organic waste. Examples include, textiles such as clothing, upholstery, floor coverings, non-recyclable plastics such as toys, tools, broken car parts, sanitary items such as nappies, engineered or treated timber products.
- 1.9. The Participating Councils are seeking tenders for two types of services:
 - (a) Alternative waste treatment – as an alternative to landfill, the Participating Councils are looking to treat Residual Waste with alternative solutions, such as:
 - Waste to Energy (where waste is processed (for example, by incineration) to create energy (such as heat)).
 - Treatment through dirty materials recovery facilities, or mechanical and biological treatment.
 - Other treatment of materials using emerging technologies, such as gasification or autoclaving.
 - (b) Disposal in landfill
 - Regular landfill services – alternatives to the continuation of owning and operating comparatively small and expensive regional landfills (and provide Baw Baw Shire Council with a continued landfill service).
 - Contingency landfill services – to secure additional landfill services to mitigate emergency events in the Gippsland area, which risk closing or reducing capacity at the current facilities.

The joint conduct

- 1.10. The Participating Councils and GWRRG have formed a collaborative alliance through a Memorandum of Understanding to jointly investigate and explore the procurement of the Residual Waste services and prospective providers. The proposed joint activities include the following:
 - Development of a request for tender and advertising the Residual Waste 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 Residual Waste services.
- 1.11. 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).

- 1.12. 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 formal contract, GWRRG may assume the role of contract negotiator in collaboration with the relevant Council representative.
- 1.13. 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.
- 1.14. 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.
- 1.15. It is proposed that service providers in the bidding process may bid for:
 - the provision of services to each Participating Council, and
 - the provision of services to a cluster of the Participating Councils (more than two) determined by geographic proximity, volume or any other relevant factors.
- 1.16. 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.
- 1.17. 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 waste and resource recovery contracts on behalf of the Participating Councils. However, it may assist in facilitating contract management meetings to ensure best outcomes for the services procured.

Length of authorisation sought

- 1.18. 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 20 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.
- 1.19. The rationale for the time period proposed is to promote competitive tender submissions that allow service providers to realise a return on any capital investments undertaken. GWRRG and the Participating Councils expect that service providers will make capital investments in the form of processing infrastructure for

such large scale alternative waste treatment, and may upgrade existing resource recovery facilities and/or construct new facilities.

Rationale for the Proposed Conduct

- 1.20. GWRRG submits that due to the expected increase in population in Gippsland by 2031, Residual Waste is also expected to increase from 126,000 tonnes of waste to 130,000 tonnes of waste per annum. Landfills utilised by the Participating Councils are limited in scale and long term access to a facility is currently not guaranteed for all Councils.
- 1.21. 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 waste generated are not great enough to encourage investment in more advanced solutions. However, when several councils aggregate kerbside waste volumes, economies of scale are improved, and avenues for innovation and capital investment are opened up, attracting greater interest from industry.
- 1.22. Further, GWRRG considers that collaborative procurement should allow for a more reliable and co-ordinated solution for the Gippsland region, which would overcome the existing patchwork of existing small facilities for each Council and the lack of resilience which has been exposed when the region is confronted with emergency events.
- 1.23. It submits that if alternative waste management is not pursued, it is likely that the demands on existing landfills will increase, and overall size and cost of landfills will also increase due to access becoming more difficult. Negative environmental and social impacts will also follow, including greenhouse gas emissions and liquid waste water, odour and litter pollution, and traffic congestion.
- 1.24. GWRRG submits that joint procurement arrangements are intended to encourage resource sharing and efficiencies, and to support the “overarching governance principles” for the Councils set out in section 9 of the Local Government Act 2020 (Vic) (LG Act).

2. Background

- 2.1. The Participating Councils constitute all the local government authorities located in Gippsland, Victoria, the roles and functions of which are governed by the *Local Government Act 1989* (Vic). The Participating Councils are responsible for, among other things, the provision of waste collection and processing services, delivery and maintenance of community services and facilities, and enforcement of local laws and regulations within their respective municipalities.
- 2.2. A map of Gippsland showing the location of the Participating Councils is below.

Figure 1: Map Gippsland Councils



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

Government initiatives to increased waste and changing markets

- 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 from a range of potentially interested parties, including waste management companies, industry associations and government bodies. The ACCC received a submission in response to the application, from Hitachi

Zosen Inova Australia Pty Ltd⁴, who did not oppose the application for authorisation or interim authorisation.

- 3.3. The authorisation application and any public submissions by GWRRG and interested parties will be 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. GWRRG has 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 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 conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 4.3. In making its assessment of the Proposed Conduct, the ACCC has considered:
- the application and other relevant information available to the ACCC, including information available to the ACCC regarding similar previous matters
 - the period for which authorisation has been sought
 - the relevant areas of competition likely to be affected by the Proposed Conduct, particularly competition to supply and acquire residual waste treatment and disposal 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 provision of residual waste treatment and disposal services. The ACCC considers that without the aggregation of waste of the individual Participating Councils, it is unlikely that investment in new residual waste processing facilities will proceed.

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:

⁴ Hitachi Zosen Inova (HZI) is a global cleantech company operating in energy from waste (EfW) and renewable gas: <https://www.hz-inova.com/about-us/hzi-group/> (accessed 8 July 2021).

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.

- long-term certainty with respect to the management and disposal of Residual Waste 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)
- environmental benefits, including the reduction in greenhouse gases, waste avoidance and reducing the dependence on landfills in Gippsland
- increase in competition, where the combination of volumes and services by 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 waste 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:

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

The aggregation of a larger volume of Residual Waste, and the duration of the proposed contracts, are likely to provide long term certainty for potential suppliers of the services. The greater certainty is also likely to lead to greater incentives for potential suppliers to invest in new or upgraded facilities to secure the Residual Waste processing contracts. This will also likely increase competition for the provision of the Residual Waste services, and lower barriers to new entrants into the market.

The aggregation of a larger volume of Residual Waste 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.

The Proposed Conduct will also provide Participating Councils greater certainty of service, especially for Baw Baw Shire Council which does not own landfill sites from which to service ratepayers, and solely relies on contracted landfill services.

- **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.

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 under the Proposed Conduct.

- **Environmental and health benefits**

The Proposed Conduct is likely to facilitate investment in new or upgraded facilities for Residual Waste management, and may provide alternatives to the current landfill options, which are limited in scale. A reduction in the use of landfill is likely to result in associated environmental benefits, including a reduction in greenhouses gases, contaminated water, traffic congestion and vermin.

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. 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, they submit the following.

- The tender process will allow for suppliers to submit bids to supply smaller areas and single councils and therefore there will remain scope for smaller suppliers to secure work for a particular area, 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. 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.

4.9. The ACCC notes that the Participating Councils are considered to be each other's competitors for the acquisition of Residual Waste services in Gippsland. By collectively conducting a tender process for these services, the Participating Councils are agreeing to no longer compete, and therefore will lessen competition in the acquisition of processing services for Residual Waste in Gippsland.

4.10. However, the ACCC considers that the impact on competition will 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, either from the options available through the joint tender process or through separately contracting with a supplier, best suits their needs.

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

Balance of public benefit and detriment

- 4.11. For the reasons outlined in this draft 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

- 4.12. 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.
- 4.13. In this instance, GWRRG seeks authorisation for approximately 21 years. Substantial investment in new entry and/or upgrading existing facilities will be required in order to satisfy the Participating Councils' need for greater capacity and complexity of Residual Waste processing services. GWRRG submits that in addition to a 10 month period to run the tender process, authorisation is needed to cover the 20 year contract period required to allow service providers to realise a return on any capital investments undertaken with respect to the Residual Waste processing services.
- 4.14. 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 Residual Waste processing services to the Participating Councils. Therefore, the ACCC considers the proposed term of authorisation, though longer than the ACCC typically grants for collective tendering of waste services by councils, is likely to be necessary for the Proposed Conduct to achieve this outcome and the associated public benefits.
- 4.15. The ACCC proposes to grant authorisation until 30 September 2042.

5. Draft determination

The application

- 5.1. On 18 June 2021, GWRRG lodged application AA1000560 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and 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

⁷ Subsection 91(1)

would result or be likely to result from the Proposed Conduct, including any lessening of competition.

5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000560 to enable GWRRG and the Participating Councils to conduct a joint tender process to investigate, procure and administer contracts for the provision of residual waste processing services, as described in paragraph 1.7 and defined as the Proposed Conduct.
- 5.7. The ACCC proposes that authorisation apply to any successor entity of the Gippsland Waste and Resource Recovery Group.
- 5.8. 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.
- 5.9. The ACCC proposes to grant authorisation AA1000560 until 30 September 2042.
- 5.10. This draft determination is made on 27 July 2021.

6. Interim authorisation

- 6.1. At the time of lodging the application, the GWRRG requested interim authorisation to enable it to progress the tender process, including identifying appropriate waste service suppliers and commencing the process of preparing contractual documentation, while the ACCC is considering the substantive application. Interim authorisation is not sought to release a formal request for tender or select or enter into contracts with suppliers.
- 6.2. GWRRG submits that interim authorisation is necessary due to the time that is likely to be required to progress the overall tender process. GWRRG considers it necessary to commence the procurement process as soon as possible in order to avoid any delays that may compromise the procurement being undertaken in a timely manner. GWRRG submits that interim authorisation is important to ensure sufficient time to proceed to subsequent stages of the procurement and not disrupt the continuous provision of waste services to the Participating Councils' residents as existing supply arrangements expire.
- 6.3. The ACCC has decided to grant interim authorisation for the following reasons:
 - there is a need for the Participating Councils to commence preparations for the joint tender process in order to minimise the risk of interruption of service, or having to enter into short term supply arrangements, if long term arrangements for the processing of Residual Waste are not in place when the Participating Councils existing contracts expire
 - the relevant areas of competition are unlikely to be permanently altered if interim authorisation to commence preparations for the tender process but not release the formal request for tender or enter into contracts, is granted
 - based on the ACCC's assessment to date, the Proposed Conduct is likely to result in public benefits and is unlikely to result in significant public detriments.

- 6.4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect or when the application for authorisation is withdrawn.

7. Next Steps

- 7.1. The ACCC now invites submissions in response to this draft determination by 10 August 2021. In addition, consistent with section 90A of the Act, GWRRG, Participating Councils, or an interested party may request that the ACCC hold a conference to discuss the draft determination.