



Draft Determination and interim authorisation

Application for authorisation AA1000649
lodged by
City of Greater Geelong
in respect of
joint procurement for recycling services
Authorisation number: AA1000649

16 November 2023

Commissioners: Keogh
Brakey
Carver

Summary

The ACCC proposes to grant authorisation to the City of Greater Geelong to enable the participating councils to jointly tender for recyclables collection and processing services and enter into contracts for these services.

The ACCC proposes to grant authorisation for 7 years.

The ACCC has also decided to grant interim authorisation to enable the participating councils to commence the joint procurement conduct, but not give effect to any contracts, while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 30 November 2023 before making its final decision.

The application for authorisation

- 1.1. On 1 September 2023, the City of Greater Geelong (the **Applicant**) lodged application for authorisation AA1000649 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicant seeks authorisation for itself and 5 other local councils to engage in the joint procurement of recyclables collection and processing services and to give effect to any service contract that may be executed as an outcome of the procurement conduct. The Applicant seeks authorisation for 7 years.
- 1.2. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the Proposed Conduct would or is likely to result in benefit to the public that would outweigh the likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.3. The Applicant also requested interim authorisation to enable it to engage in the joint procurement conduct, but not give effect to any contracts, while the ACCC is considering the substantive application. On 16 November 2023, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act. The request for interim authorisation is discussed in section 5 of this draft determination.

The Participating Councils

- 1.4. The Applicant is the City of Greater Geelong.
- 1.5. The other parties that propose to engage in the Proposed Conduct are:
 - Surf Coast Shire Council
 - Golden Plains Shire Council
 - Borough of Queenscliffe
 - Wyndham City Council
 - Colac Otway Shire.

Together, the Applicant and the Councils listed above are referred to as the **Participating Councils**.

- 1.6. The combined population of the Participating Councils is approximately 675,243. The City of Wyndham represents the highest population of approximately 309,125 residents, and Borough of Queenscliffe the smallest with approximately 3,220 residents.¹

The Proposed Conduct

- 1.7. The **Proposed Conduct** is comprised of the Procurement Conduct and the Award Conduct, as defined in paragraphs 1.8 to 1.90 below.
- 1.8. The Procurement Conduct will involve the Participating Councils working jointly to prepare and issue a single request for tender (**RFT**) for suppliers of the following waste services (**Service Providers**) to tender to supply one or more of the Participating Councils with these services (as a package):
- domestic recyclables and glass recyclables receipt and processing, and
 - bulk haulage of those materials from the receipt site to the processing site (if necessary)
- (together, the **Relevant Services**). The RFT will be structured to meet the varying requirements of the Councils depending on the nature of their recyclable receipt and processing and the location of receipt and processing sites.
- 1.9. The Procurement Conduct will involve the Participating Councils working together to:
- a) discuss procurement of the Relevant Services
 - b) prepare the RFT
 - c) prepare draft service contracts for the Relevant Services (which will be issued with the RFT so potential Service Providers can price their tenders)
 - d) issue the RFT and evaluate responses to it
 - e) appoint the Procurement Department of the City of Greater Geelong to act as the primary contact for administering and coordinating aspects of the RFT process
 - f) establish and conduct an evaluation panel comprising one representative from each Participating Council
 - g) through the evaluation panel, evaluate proposals received from prospective Service Providers (based on predetermined objective criteria) and prepare recommendations in respect of those proposals
 - h) contribute to the costs of conducting the joint procurements, and
 - i) negotiate and execute contracts for supply of the Relevant Services by one or more of the Participating Councils and one or more Service Providers, with such contracts each being subject to a condition precedent of final authorisation being granted by the ACCC. For clarity, the inclusion of the condition precedent means that any contracts that may be executed will not become binding and no services will be delivered under those contracts unless and until the ACCC grants final authorisation.

¹ Australian Bureau of Statistics, [Estimated Resident Population by Local Government Areas \(2022 statistics\)](#), accessed 2 November 2023.

(together, paragraphs 1.8 and 1.9 are the **Procurement Conduct**).

- 1.10. The Award Conduct comprises the giving effect to service contracts that may be executed between one or more of the Participating Councils and one or more Service Providers as an outcome of the Procurement Conduct (the **Award Conduct**).

2. Consultation

- 2.1. The ACCC has considered, and granted, many applications for authorisation involving local councils jointly procuring and contracting for recycling services. In the ACCC's experience, a streamlined process is appropriate if the following features are in place:
 - the parties to the proposed conduct include only local councils
 - the participating councils propose to jointly tender for and procure services from an unrelated commercial entity
 - the joint tender and procurement will be the result of a competitive process
 - participation by service providers is voluntary and no collective boycott activity is involved
 - the participating councils are free to choose to negotiate outside the joint procurement process, and
 - contracts are entered voluntarily and participating councils may jointly enter into contracts, but remain free to enter into their own contracts.
- 2.2. Where proposed conduct has the above features, the ACCC considers it appropriate to proceed directly to a draft determination, without an initial consultation phase. Interested parties with concerns about proposed conduct are able to make submissions on the draft determination.
- 2.3. The ACCC considers that in these circumstances, the Proposed Conduct does have the above features and it has therefore decided to issue a draft determination without initial consultation. Interested parties are now invited to make submissions in response.

3. ACCC assessment

- 3.1. The Applicant has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.
- 3.2. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur. The ACCC considers that the likely future without the Proposed Conduct would involve each Participating Council carrying out a separate tender process for recycling collection and processing services.
- 3.3. To assist with the assessment of the Proposed Conduct, the ACCC also considers the relevant areas of competition likely to be affected by the Proposed Conduct.
- 3.4. The ACCC considers that the relevant areas of competition are likely to be the supply and acquisition of services for:
 - the collection, sorting and processing of kerbside waste from residents, namely general, co-mingled recyclables and glass, and

- the haulage of the bulked co-mingled recyclables and glass recyclables to processing facilities for recycling (where necessary).
- 3.5. The ACCC considers that there are national and state-based Service Providers of the Relevant Services which are positioned to provide their services to local councils.

Public benefits

- 3.6. The Applicant submits that the Proposed Conduct would result in the following public benefits:
- transaction cost savings
 - efficiencies, capacity utilisation and investment
 - increased competition
 - environmental benefits
 - consistency with statutory objectives
 - inclusion of smaller Service Providers, and
 - ability to respond to significant factors impacting the market.
- 3.7. With regard to the Applicant's last 3 public benefit claims:
- The Applicant submits that the Proposed Conduct is consistent with, and supports, the State Government's statutory objectives as outlined in the *Circular Economy (Waste Reduction and Recycling) Act 2021*, and the *Environment Protection Act 2017*. However, the ACCC does not consider that this benefit is causally connected to the Proposed Conduct because it is also likely to result in the future without the Proposed Conduct. That is, the Participating Councils would be expected to act consistently with State Government statutory objectives in any event.
 - The ACCC does not consider that the 'inclusion of smaller Service Providers' is a public benefit, as smaller Service Providers would also be able to bid to provide the Relevant Services to individual Participating Councils in the future without the Proposed Conduct.
 - The ACCC does not consider that the 'ability to respond to significant factors impacting the market' constitutes a separate public benefit, as it does not appear to be materially different to the public benefit described at section 10.2 of the application for authorisation.
- 3.8. The other claimed public benefits are discussed below.

Transaction cost savings

- 3.9. The ACCC accepts that the Proposed Conduct is likely to result in the public benefit of transaction cost savings for both Participating Councils and potential Service Providers, including by reducing or eliminating the administrative and legal costs associated with conducting or responding to separate tender processes. However, the ACCC considers that any transaction cost savings to Participating Councils will be partially offset by the additional costs they may incur in the coordination and administration of their service agreements, such as attending joint meetings.

Increased efficiencies and economies of scale

- 3.10. The Applicant submits that the aggregation of the Participating Councils' waste volumes will create efficiencies and economies of scale. Specifically, that the more efficient aggregation and bulk haulage of waste materials could reduce haulage costs from receipt sites to processing sites. This may lead to lower costs for rate payers in the Participating Councils' local government areas.
- 3.11. The Applicant further submits that these efficiencies and economies of scale will, in turn, encourage innovation and new investments by Service Providers. It submits that increased volumes may encourage Service Providers to increase their capabilities in respect of co-mingled recyclables and glass (which are typically transported out of the region for re-processing) and may also incentivise Service Providers to invest in new technologies, such as advanced waste processing, or in service streams that are not currently offered in the region (such as glass re-processing) or for which insufficient infrastructure exists.
- 3.12. The ACCC accepts that the aggregation of the Participating Councils' waste volume would likely enable Service Providers to realise operational efficiencies and economies of scale in the delivery of waste services. This may facilitate lower average costs for each of the Participating Councils to the extent they are passed onto councils by the Service Provider(s), which could lead to lower costs for rate payers.
- 3.13. The ACCC considers it possible that the Proposed Conduct may also incentivise investment and innovation by Service Providers. However, the ACCC notes that this benefit will only flow in the event that Service Providers actually engage in such investment and/or innovation, and has therefore given little weight to this benefit.

Increased competition between service providers

- 3.14. The ACCC considers that the Proposed Conduct is likely to result in a public benefit by offering prospective tenderers a more substantial volume of waste for bulk haulage and processing and therefore a higher value contract, which may result in Service Providers competing more vigorously to win the service contract. It also considers that the joint procurement is likely to attract interest from a greater number of Service Providers.
- 3.15. Absent the joint procurement, some local councils with small catchment areas may have difficulty in procuring the Relevant Services. The ACCC also notes that materials recovery facilities require a minimum volume of throughput to warrant Service Providers investing in their construction. Again, some local councils are not of sufficient scale to support such investment.

Environmental benefits

- 3.16. The Applicant submits that the more efficient aggregation and bulk haulage of materials will reduce greenhouse gas emissions in transport (between receipt and processing sites) and from the energy used for facility operations. The ACCC acknowledges that the Proposed Conduct may result in some minor reductions in greenhouse gas emissions in respect of transport efficiencies. However, it is unclear to the ACCC how less energy would be used for facility operations given the amount of waste being sorted and processed would presumably be unchanged.
- 3.17. The Applicant also submits that to the extent the Proposed Conduct assists in diverting waste from landfill to alternative waste and resource recovery solutions, it is likely to result in improved environmental outcomes in the form of improved resource recovery rates. However, the ACCC considers that it is unclear how likely it is that a Service Provider(s) would actually implement such waste diversion or alternative solutions, or

whether they would choose to do so regardless, in the future without the Proposed Conduct. It is therefore uncertain whether this public benefit would be likely to result from the Proposed Conduct, and if it did result, its extent or significance. The ACCC has therefore given little weight to this public benefit.

Public detriments

- 3.18. The Applicant submits that the proposed joint procurements will not result in any discernible public detriments.
- 3.19. The ACCC considers that public detriments may arise from joint procurement processes where the group of councils (which would otherwise compete independently to acquire the relevant services) comprises a substantial portion of the market and the joint procurement reduces competition for service providers.
- 3.20. In this case, the Proposed Conduct potentially forecloses competition in the collection, sorting and processing of kerbside co-mingled recyclables and glass, and the haulage of the bulked co-mingled recyclables and glass recyclables to processing facilities markets, in the Participating Council areas for a 7-year period. However, the ACCC considers that the Proposed Conduct is likely to result in limited, if any, public detriment, because:
- It is limited in scope to the joint procurement of co-mingled and glass recyclables receipt, processing and/or bulk haulage services. The 6 Participating Councils represent only a small proportion of recyclable waste collected in Victoria from all 79 local council areas.
 - Participation is voluntary for each Participating Council, and they will not be required to contract with any particular Service Provider.
 - Potential Service Providers are free to tender for one, or for multiple, Participating Councils.
 - No collective boycott is proposed.
 - Where limited detriment from a loss of competition may occur for the Relevant Services, it is likely to be mitigated by an increase in competition because the aggregated volumes, a potentially higher value contract, and the ability to tender for one or more of the Participating Councils, is likely to increase competition for Service Providers to win the service contract(s). In particular, the Proposed Conduct is unlikely to have a foreclosing effect on Service Providers because there are a number of large-scale, state-based or national suppliers of the Relevant Services, which could continue servicing other local councils.

Balance of public benefit and detriment

- 3.21. The ACCC considers that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

4. Draft determination

- 4.1. For the reasons outlined in this draft determination, the ACCC considers that the authorisation test is met. Accordingly, the ACCC proposes to grant authorisation AA1000649 in relation to Division 1 of Part IV of the CCA, and section 45 of the CCA,

for 7 years to enable the Participating Councils to engage in the Proposed Conduct (as defined at paragraph 1.3).

4.2. This draft determination is made on 16 November 2023.

5. Interim authorisation

- 5.1. On 1 September 2023, the Applicant requested interim authorisation to engage in the Procurement Conduct, but not the Award Conduct (the **Interim Conduct**).
- 5.2. The ACCC has decided to grant interim authorisation to the Applicant for the Interim Conduct. The ACCC considers that because no contracts will be given effect to, interim authorisation is unlikely to permanently alter the competitive dynamics of the market and the market will be able to return to substantially its current state if final authorisation is later denied. The ACCC also recognises that if interim authorisation is denied, this could result in the Participating Councils not having sufficient time to secure new contracts prior to their current contracts expiring.
- 5.3. 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.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 30 November 2023. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.