

Our reference
AN/MWVG14315-9152864-01

Your reference
AA1000503

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Ms Tanya Hobbs
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Australian Competition and Consumer Commission
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Dear Ms Hobbs

MWRRG – application for revocation and substitution AA1000503 – response to interested party submissions

As you know, we act for the Metropolitan Waste and Resource Recovery Group (**MWRRG**) in respect of the above application for revocation and substitution dated 21 April 2020 (the **application**), made on behalf of MWRRG and certain local councils including the City of Melbourne, City of Port Philip, City of Whittlesea and City of Yarra (the **additional councils**). The application seeks the revocation of authorisation AA1000458 and the substitution of a new authorisation that includes the additional councils.

We refer to the interested party submissions received by the Australian Competition and Consumer Commission (**ACCC**) from anonymous parties on 22 May 2020 and 11 June 2020 respectively (together, the **interested party submissions**).

This letter sets out MWRRG's response to the interested party submissions.

Capitalised terms in this letter have the same meaning as in the application.

Response to interested party submissions

For ease of reference, each paragraph from the first interested party submission is reproduced in bold italic text below. Where the second interested party submission raises substantially the same issue, we have also reproduced the text from the second interested party submission.

- 1 It is understood that Mornington Peninsula Shire (MPS) was not a part of the MWRRG region when the South East Organics (SEO) tender took place so it is reasonable to assume that once the Council became part of metropolitan Melbourne that it would, at least from a geographical perspective, become part of the South Eastern Organics contract cluster.***

The second interested party submission also states: *The Councils nominated are not geographically linked to the South East cluster.*

As the ACCC is aware, Mornington Peninsula Shire Council was granted authorisation to participate in the South Eastern Organics Group on 12 March 2020 (see authorisation AA1000458). That matter has been resolved and is not relevant to the ACCC's assessment of the application regarding the additional councils.

However, to the extent that the interested party submissions suggest that location should be an overriding consideration for local councils when deciding whether to participate in a particular joint procurement, MWRRG notes that there are various reasons why a council may seek to join a cluster that is not the most geographically proximate. In the case of the additional councils in relation to the South Eastern Organics Group, the commercial rationales are that:

- the additional councils wish to join the South Eastern Organics Group on a contingency basis (e.g., for use in the event that there is a temporary shutdown of their primary, and geographically closer, facilities);
- while Veolia's organics processing facility at Bulla is geographically closer to the additional councils, Veolia has advised that its facility does not have capacity to accept and process organic waste from the additional councils (and a further rationale for Whittlesea City Council is that Veolia's Bulla facility does not accept compostable bags, which MWRRG understands is a key requirement for that additional council); and
- by contrast, the three service providers for the South Eastern Organics Group – Cleanaway, Veolia (at Dandenong) and Sacyr – do have the capacity to accept additional volumes of organic waste from the additional councils.

2 *It is believed that all relevant councils should have been named as participants in any MWRRG regional tendering process at the time of tendering.*

Council participation in any tendering process is entirely voluntary and cannot – and should not – be mandated by MWRRG. There are various reasons why a council may not be able to participate in a particular MWRRG-coordinated tendering process, including because existing contractual arrangements preclude or render unnecessary a council's participation (which was the case for the additional councils), or the council has its own collection and re-processing services and facilities in place.

3 *What MWRRG is endeavouring to achieve here is not strictly in line with its business activities (as cited in 1.3 of the submission) insofar as: this submission is not a 'joint procurement' per se, it is not planning for resource recovery infrastructure nor is it facilitating a contract for joint procurement as this application is retrospective.*

The proposed conduct under the application, and MWRRG's participation in that conduct, is wholly consistent with MWRRG's statutory objectives and functions.

As noted in section 1.3 of the application, MWRRG's statutory objectives are set out in the EP Act and relevantly include to:

- undertake waste and resource recovery infrastructure planning to meet the future needs of MWRRG's waste and resource recovery region while minimising the environmental and public health impacts of waste and resource recovery infrastructure; and
- facilitate the efficient procurement of waste and resource recovery infrastructure and services for MWRRG's waste and resource recovery region through the collective procurement of waste management facilities and waste and resource recovery services in the region.

Further, MWRRG's functions (also set out in the EP Act) relevantly include to:

- plan for the future needs of waste and resource recovery infrastructure within its waste and resource recovery region consistently with the State-Wide Waste and Resource Recovery Infrastructure Plan;
- facilitate the provision of waste and resource recovery infrastructure and services by councils within its waste and recovery region; and
- facilitate the development of contracts for the joint procurement of waste management facilities and waste and resource recovery services;
- manage contracts in the performance of its objectives and functions; and
- undertake waste and resource recovery projects as funded by government, councils and other organisations.

Nothing in the above objectives or functions is inconsistent with the application.

As noted above, a key reason for the additional councils' proposed inclusion in the South Eastern Organics Group is to ensure that contingency arrangements are in place for those councils. This clearly falls within MWRRG's remit of undertaking waste and resource recovery infrastructure planning to meet the future needs of the metropolitan Melbourne region, co-ordinating and facilitating the efficient provision of waste and resource recovery infrastructure and services by councils and managing contracts in the performance of MWRRG's objectives and functions.

- 4** ***This business has over the past 4 years expended significant time, resources and funds to secure the relevant approvals to be able to receive and process food and green organics and their subsequent composting. If this MWRRG application is approved, this business will be denied natural justice to tender for part or all of this organic material from the 4 councils.***

The second interested party submission also states: *There are new companies offering both transfer and processing opportunities since the South East Organics Tender was advertised and There has been changes in Government Policy for the Resource Recovery Sector. There needs to be a*

stronger alignment between the contracts released by MWRRG and the new Policy.

Businesses will have the opportunity to participate in future tenders. MWRRG is currently developing the *Metropolitan Organics Procurement Strategy (Strategy)*, and it is envisaged that the Strategy may result in further opportunities for the joint procurement of organic waste services across metropolitan Melbourne and greater Victoria that will be open to all businesses (i.e., in the same manner as all previous tenders). The Strategy is expected to be completed over the next 12 months.

- 5** ***Historically (between 2010-2020), MWRRG has had the opportunity to engage and include any ‘outstanding’ councils (ie. Melbourne, Port Phillip, Yarra, Whittlesea, Stonnington and Boroondara) in the North West Organics (NWO), the South East Organics (SEO) or the Eastern Organics (EO) tender processes or otherwise proceed with another collective tender. These council’s could have resolved at the time to participate and commit at the expiration of any existing council organics contracts. The fact that the councils did not get on board at the time of tendering should preclude them from retrospective inclusion. The quantum of the retrospective inclusion of these councils (inclusive of MPS) and their quantities of organics in an existing contract such as the SEO contract is restrictive to this business and therefore anticompetitive as I estimate it will potentially add over 50% more organics to the SEO cluster of processors. The question also arises could there later be a subsequent retrospective submission to include either Stonnington or Boroondara in an existing organics contract ie. SEO?***

The second interested party submission also states: *Overall, we have concerns that the continued amalgamation of Councils into existing Processing Deeds is not in the best interest of the Industry.*

First, as noted in 2 above, MWRRG cannot and should not mandate participation by councils in a tender (whatever the reason for non-participation may be). In this case, the additional councils approached MWRRG (and not vice versa) in respect of their proposed participation in the South Eastern Organics Group, based on their respective needs (including in terms of contingency arrangements).

Second, there is no basis for additional councils to be precluded from participating in the South Eastern Organics Group if they were not able or willing to participate at an earlier time. Again as noted in 2 above, council participation in all MWRRG tendering processes is voluntary and there are valid reasons why a council may choose not to participate in a tender at the time it is being run. The adoption of a blanket rule preventing councils from participating in collective arrangements at a later date would:

- create inefficiencies by depriving councils of the flexibility to participate when it is convenient or possible to do so;

- create incentives for councils to break pre-existing contractual arrangements at the time of a tender (if such contractual arrangements otherwise prevent councils from participating); and
- prevent the public benefits that flow from the joint procurement of waste and resource recovery services (e.g., transaction cost savings, improved contract management, economic efficiencies – see further 13 below) from being realised to the greatest possible extent.

Third, while it is possible that other councils (e.g., Stonnington City Council and/or Boroondara City Council) may seek to participate in the South Eastern Organics Group at a later date, that is not relevant to the ACCC's assessment of the application. The possible "continued amalgamation" of local councils under other arrangements (i.e., beyond the additional councils' participation in the South Eastern Organics Group) is also not relevant to the ACCC's assessment of the application. Where necessary, future proposals would be subject to further ACCC authorisation processes, and the ACCC would have the opportunity to assess net public benefits in that context.

Finally, the inclusion of organic waste volumes from the additional councils will not be "restrictive" or "anticompetitive". As noted in 1 above, Mornington Peninsula Shire Council's additional volumes are not relevant to the application. The relevant comparison is between the volumes collected by the members of the South Eastern Organics Group (including the Mornington Peninsula Shire Council), and the volumes collected by the additional councils. On that basis, it is incorrect to suggest that the inclusion of organic waste volumes from the additional councils would add 50% more volume to the South Eastern Organics Group region. In fact, as noted in section 4.2 of the application, the additional councils' volumes would comprise only 16.7% of the approximately 188,743 tonnes collected annually for the councils in the enlarged South Eastern Organics Group.

- 6 *It is noted that Whittlesea council is in a high residential growth corridor and it is not unreasonable to expect a doubling in its green organics quantities in say the next 5-8 years ie. it can achieve a tonnage similar to Casey council. Coupled with this growth the current move by councils to mandate including food (currently estimated as 40% of the garbage bin volume) in the garden organics collection will also substantially increase Whittlesea's organic tonnes. It is anticipated that all metropolitan councils will be moving to include food in their organic collections in the next few years and so substantial increases will also be apparent in Melbourne, Port Phillip and Yarra council organic collections. As such the tonnages provided by MWRRG are notional only and don't reflect the effect of compulsory food collection.***

The organic tonnages given in the application are estimates based on data provided to MWRRG by the relevant local councils (based on their forward

projections) and service providers. MWRRG has no reason to believe that the data collected from the relevant local councils and service providers is inaccurate.

Regardless, MWRRG does not accept that the additional collection of food organics from the additional councils will lead to “substantial” increases in overall organics volumes collected based on evidence to date. MWRRG’s experience is that the collection of food (in addition to garden) organics adds only small volumes to the overall volume of organic waste collected – generally around 5-10%. Consistent with that experience, an audit conducted at Veolia’s facility in the north-west region indicated that most FOGO collections lack any significant presence of food waste.

Further, the reference to “compulsory food collection” is inaccurate, as FOGO implementation is varied among councils. There are a range of options available to councils in terms of implementing the collection of FOGO materials. For example, Whittlesea City Council has an opt-in approach for the collection of garden organics (which is being utilised by approximately 45,000 residents), and from July 2020 those residents with green organic bins will have the option to also include food organics in those bins for collection.

- 7** *In the light of the above, the MWRRG submission statement 4.2 (Relevant volumes are insubstantial) appears out of context and flawed. The argument is predicated on the total number of metropolitan tonnes, an amount that is distributed amongst 3 MWRRG contract regions with the balance being with individual councils. More importantly all of the proposed organics in the submission, and not allowing for the inclusion of food, is to go to one MWRRG contract region. In this context it is a substantial change to what was presented at tendering. Based on the supplied council tonnes, the original tender proposed 132,243 tonnes. Addition of MPS (25,000 tpa) is an increase of 18.9% on the quantity of organics out to tender. Addition of Melbourne, Port Phillip, Yarra, Whittlesea (31,500 tpa) then presents an increase of 20.0% to the organics on the 157,243 tpa inclusive of MPS. From another perspective, the ‘incremental’ addition of MPS (25,000 tpa) and now Melbourne, Port Phillip, Yarra, Whittlesea (26,500 tpa) then presents an increase of 42.7% on the 132,243 tpa of organics originally out to tender. In this context, and excluding the inclusion of food in collections, the relevant change in volume is substantial and is the result of 2 submissions to ACCC within the space of less than a year! In this context the preparation of separate ACCC authorisation applications (AA1000458 and AA1000503) should have been better managed.*

First, as noted in 5 above, Mornington Peninsula Shire Council’s additional volumes are not relevant to the application and the correct comparison is that between the volumes collected by the additional councils and the volumes collected by the existing members of the South Eastern Organics Group (including the Mornington Peninsula Shire Council).

Second, the application correctly considers volumes from the perspective of the overall volumes of organic waste in metropolitan Melbourne. The first interested party submission appears to be considering volumes from the perspective of what volumes might previously have been available to businesses versus what would be available to businesses with the addition of the additional councils. While that difference may be perceived as substantial for a single tenderer, that does not have any significant impact on the ACCC's assessment of public benefits and detriments.

Third, the first interested party submission also appears to assume (incorrectly) that all volumes from the additional councils would have been committed at the time of tendering. However, as the ACCC is aware, councils retain a choice as to whether to participate in a tender.

Fourth, MWRRG re-iterates that the volumes provided in the application are estimates based on data provided to MWRRG by local councils (based on their forward projections) and service providers, and MWRRG has no reason to doubt the accuracy of that data.

Finally, in any event, additional volumes of food organics will be negligible as described in 6 above.

8 *Other processors would have tendered for the South Eastern Organics contract at the time of public advertising had it been known that the engaged contractors would have access to more organic material as evidenced by retrospective applications for the addition of 5 more council applicants to the original tender process, namely Mornington Peninsula Shire, Melbourne, Port Phillip, Yarra, and Whittlesea. This application also effectively stymies local metropolitan organics processing competition and growth which by its nature spreads any risk.*

Again, council participation in tender processes is voluntary and MWRRG has no ability to mandate council participation (and should not have the ability to do so). Past tenders have been undertaken based on information available to MWRRG about the participating councils at the time.

The application will not stymie local competition for organic waste processing services and growth. Relevant to the ACCC's assessment of the application is whether there may be a lessening of competition in the metropolitan Melbourne region. The application involves only a portion of local councils in the metropolitan Melbourne region, and the quantity of waste collected by the additional councils as a proportion of the overall market for organic waste in the metropolitan Melbourne region is relatively small (only 8.6% of the approximately 363,000 tonnes of organic waste collected in the wider metropolitan Melbourne region annually – see section 4.2 of the application).

It is also unclear how the additional councils' participation in the South Eastern Organics Group increases risk – as explained in 1 above, a key reason for the additional councils' proposed inclusion is to ensure that those councils have

contingency arrangements in place (i.e., in the case of a temporary shutdown of their primary facilities). In that context, the application substantially *reduces* risk.

- 9** *The issue of risk is also apparent from the SKM recycling debacle last year where due to there only being 3 principal recycling processors in Melbourne, thousands of tonnes of council recyclables were sent to landfill.*

MWRRG refers to its responses in 1 and 8 above, and re-iterates that a key reason for the additional councils' proposed inclusion in the South Eastern Organics Group is to ensure that those councils have contingency arrangements available to them – that is, to avoid the very situation that the first interested party submission refers to.

- 10** *Retrospectively annexing additional councils to existing contracts is anticompetitive by shutting other processors out from growing their businesses and tendering their services, particularly now when government funding is available to grow smaller organic recycling businesses as we strive for a circular economy.*

As noted in 4 and 5 above, the proposed inclusion of the additional councils will not exclude any businesses from tendering for and obtaining work from the additional councils, and further opportunities to tender are likely to arise in the future. The opportunities to tender or participate remain the same as at all other times.

- 11** *The submission acknowledges in 4.2 (No change to services or infrastructure) that there will be no change to processor facilities or infrastructure. From a risk-based perspective it would appear more prudent to nurture current capacity for the inclusion of food as well as organic growth as set out in the original tender documents and seek to secure more capacity via separate tender. This business submits a separate tender is the appropriate outcome to foster competition between organics processors.*

MWRRG's view is that it is prudent to utilise existing organics processing infrastructure while the Strategy is being developed, given that the results of the Strategy may call for large investments in new organics processing infrastructure (e.g., in areas where there is currently only one operator).

- 12** *The MWRRG submission is reducing market share and is cutting out the existing council processors from an opportunity to respond to a tender to keep or grow their arrangements from currently servicing one or more of the 4 councils.*

It is not clear on what basis the first interested party submission suggests that the application will reduce market share. As noted in 8 above, the application involves only a portion of councils in the metropolitan Melbourne region and the quantity of waste collected by the additional councils is only 8.6% of the approximately 363,000 tonnes of organic waste collected in the metropolitan Melbourne region annually. MWRRG also disagrees that the application will cut

out existing processors from providing services to the additional councils and refers to the opportunities available to businesses, as set out in 4 above.

- 13** *The assertion in Section 7 (Public Benefits) of the MWRRG submission “..... investment in improved technologies” has already taken place predicated on the quantum of organics reported as being available at the time of tendering so no significant change on this front is apparent. Councils had the opportunity to be involved in the initial collective public tender process therefore the assertion “..... reducing transaction and service delivery costs for the additional councils as a result of the collective bargaining of MWRRG” is also questioned as it then relates to a ‘closed market’ which is with the SEO contracted processors. The proposal does not consider haulage distances and closer proximity to other MWRRG organics contract clusters such as NWO and EO. The reference to ‘.... Economic efficiencies’ is also unsubstantiated whilst “..... Environmental and health benefits” relates to the initial authorisations and does imply additional benefits from securing additional councils within the SEO contract cluster.*

The public benefits set out in the application are ongoing and should be accepted by the ACCC specifically in relation to additional councils’ participation in the South Eastern Organics Group. In particular: (i) transaction cost savings and reduced outlays resulting from the sharing of legal and administration costs will apply to the additional councils; (ii) the additional councils will be able to utilise MWRRG’s experience (in respect of negotiating with service providers, obtaining specialist waste and resource recovery advice, and strategic planning for various risks), leading to improved contract management; and (iii) further efficiencies and economies of scale in delivering organic waste processing services will be achieved with the additional councils (including lower costs per unit of waste incurred by the additional councils). In addition, it is clearly an efficiency for the additional councils to have access to contingency arrangements as a risk mitigation measure.

- 14** *Geographically it also doesn’t add up to include Whittlesea in the SEO collective.*

As described in 1 above, geographic location is not necessarily an overriding consideration for local councils when deciding whether to participate in a particular joint procurement and there are various reasons why a council may wish to join a contract cluster that is not the most geographically closest to it – which is the case for the additional councils.

Should the ACCC have any questions or require any further information in relation to this letter, please do not hesitate to contact us.

Yours sincerely



Alistair Newton
Partner