



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Muswellbrook Shire Council &
Upper Hunter Shire Council

in respect of

joint tendering for waste collection services

Date: 6 December 2017

Authorisation number: A91598

Commissioners: Sims
Rickard
Schaper
Court
Featherston

Summary

The ACCC has decided to grant authorisation to Muswellbrook Shire Council and Upper Hunter Shire Council to run a joint tender process in relation to the provision of a range of waste collection and processing services.

The ACCC grants authorisation until 28 December 2033.

The application for authorisation

1. On 25 August 2017, Muswellbrook and Upper Hunter Shire Councils (the **Applicants**) applied for authorisation under subsections 88(1A) and (1) of the *Competition and Consumer Act 2010 (CCA)* for 16 years to engage in conduct that may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
2. Pursuant to s183(2), applications for authorisation under subsections 88(1A) and (1) under consideration by the ACCC on or after 6 November 2017 (that is, the commencement date for recent amendments to the CCA) are treated as applications for authorisation under subsection 88(1) of the CCA.

The proposed conduct

3. The Applicants propose to cooperate in inviting tenders, considering the submitted tenders, and selecting preferred tenderer(s) in relation to:
 - the collection of garbage and organics from the kerbside and its transportation to the Applicants' respective facilities for resource processing or disposal
 - the collection of recyclables from the kerbside, its transport and processing
 - the servicing of public place bins and skip bins, and the collection and transport of waste from these, and
 - the collection and transport of bulky waste(together, the relevant services¹) (the **Conduct**).
4. While the Applicants anticipate that a common supplier may be chosen for both Councils, each of the Councils will retain the power to select a different supplier from that selected by the other Council, and each Council will enter into a separate contract with the chosen supplier(s).
5. The Applicants request authorisation for a period of 16 years, comprising a contract period of 14 years with the option of two one year extensions at the Councils' discretion.

¹ The Applicants originally sought authorisation for a smaller range of services, but formally requested an amendment of the conduct for which authorisation was sought, to include all services listed here, on 23 October 2017. Further details are available on the ACCC's public register.

6. On 9 November 2017 the ACCC issued a draft determination proposing to grant authorisation to the Conduct for 16 years. A conference was not requested in relation to the draft determination.

Request for interim authorisation

7. The Applicants also requested interim authorisation to enable them to prepare for, invite, and evaluate tenders, and to seek to enter into contractual arrangements, while the ACCC considered the substantive application. The Councils proposed not to enter into any contract until the ACCC determination is made.
8. On 9 November 2017 the ACCC granted interim authorisation to allow the Applicants to:
 - prepare tender documentation and invite tenders in relation to the services outlined at paragraph 3 above
 - evaluate tender submissions received
 - prepare tender recommendations for Council executives
 - have Council executives endorse recommendations and
 - negotiate contractual arrangements.
9. Interim authorisation commenced immediately and will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

The Applicants

10. The Applicants are responsible for adjoining local government areas, incorporated under the *Local Government Act 1993 (NSW)*, located in the Upper Hunter Valley in New South Wales. To date, the Applicants have made separate arrangements in relation to waste collection and processing.
11. The population of Muswellbrook Shire is about 16,000, with about 7000 dwellings.²
12. The population of Upper Hunter Shire is around 14,000, with about 6500 dwellings.³

Background

13. The ACCC has authorised a number of other groups of councils around Australia to jointly tender for waste management services. For example, authorisation was

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http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA15650?opendocument

3

http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA17620?opendocument

granted to nearby Hunter region councils, Cessnock City Council, Maitland City Council and Singleton Council, in July 2015, for 16 years to allow them to conduct a joint tender process for the collection and processing of organic waste and the collection and delivery of bulky waste services.

14. Previous authorisations concerning joint tendering for waste collection services have typically been granted for periods ranging from 5 to 21 years.

Consultation

15. The ACCC has invited submissions from 19 interested parties including waste collection companies, industry associations and government bodies seeking comment on the application for authorisation.
16. Prior to the draft determination, one submission was received in response from the Waste Contractors & Recyclers Association of NSW (**WCRA**).⁴ WCRA supports the application on the basis that:
 - tenders are advertised and awarded strictly for the services requested in the authorisation application as amended
 - it is the expectation of the WCRA that if any additional services are to be awarded, these will be the subject of another competitive, widely advertised tender process, and
 - the process follows the NSW Environment Protection Authority (**EPA**) service timelines and model collection contracts, and all tender documents comply with the NSW Domestic Waste Code of Practice and the NSW EPA Better Practice Guide for Waste Management in Multi-Unit Dwellings.
17. The ACCC invited submissions in response to the draft determination. No submissions were received.
18. Further information in relation to the application for authorisation, including any public submissions received by the ACCC, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

ACCC assessment

19. Pursuant to subsections 90(7) and 90(8), the ACCC must not make a determination granting authorisation in relation to conduct 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 to the public would outweigh the detriment to the public that would result or be likely to result from the conduct.⁵ In its assessment of the application the ACCC has taken into account:
 - the application and submissions received from the applicant and interested parties;⁶

⁴ Two submissions were in fact received from the WCRA with the latter referring to the amended conduct. Both versions of the submission are available on the ACCC's public register.

⁵ As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).

⁶ Please see the ACCC's Public Register for more details, including a list of parties consulted.

- the likely future without the Conduct that is the subject of the application.⁷ In particular, the ACCC considers that, absent the Conduct, it is likely that the Applicants will continue to separately tender for a provider (or providers) of the required services independently of each other;
- the relevant areas of competition likely to be affected by the Conduct, particularly competition between suppliers of waste collection, transport and processing services in the Hunter region; and
- the 16 year authorisation period requested.

Public benefits

20. The Applicants claim the Conduct will result in the following public benefits:

- environmental benefit through reduction of greenhouse gas emissions as a result of optimising the use of collection vehicles
- cost savings to the Applicants achieved through economies of scale from one contractor servicing both areas, flowing through to increased resources available to residents of the Councils
- cost savings to the Applicants in administrative, legal, preparation and evaluation costs in relation to the tender process
- economies of scale resulting in a more robust and consistent education program for residents, which will foster better management of wastes, separation of recyclable items, and the conservation of resources.

21. The ACCC is satisfied based on the information before it that the Conduct is likely to result in some public benefit from:

- transaction cost savings for the Applicants (in calling for a single tender) and for suppliers of waste collection, transport and processing services (in reducing the number of tendering services in which they will be required to participate)
- the possibility of improved efficiency through aggregating demand and appointing a single supply arrangement, should the Applicants choose a common supplier as anticipated
- the possibility of improved environmental outcomes, to the extent it assists divert waste from landfill into alternative waste and resource recovery programs and/or reduced greenhouse gas emissions through more efficient use of collection vehicles.

Public detriments

22. The Applicants submit that the Conduct will not result in any public detriment, because:

- the public tender process will afford all potential service providers the opportunity to respond

⁷ For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

- the tendering process is to be conducted in accordance with Section 55 of the *NSW Local Government Act 1993*
 - the contract term sought is in line with normal industry practice, and will provide sufficient time for the successful bidder to amortise capital investment in collection vehicles and to allow sufficient notice of a further tendering process to solicit another round of competitive bids.
23. The ACCC considers that the Conduct is likely to result in minimal, if any, detriment since:
- both councils are relatively small, and therefore the Conduct is unlikely to have a significant effect on the ability of any waste services company to remain in the market
 - the tender process will enable competition between waste collection service providers to win the contract, and
 - the process is to be open to all suitably qualified operators and/or suppliers to bid for the contracts, and will follow state government guidelines.

Balance of public benefit and detriment

24. For the reasons outlined in this determination, the ACCC considers that the Conduct is likely to result in public benefit that would outweigh any public detriment, including from any lessening of competition.

Determination

The application

25. Application A91598 was made using a Form B, under subsections 88(1) and 88(1A) of the CCA seeking authorisation to engage in conduct to which certain provisions of Part IV of the CCA would or might apply.
26. On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 182(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.
27. The Conduct involves the Applicants cooperating in inviting tenders, considering the submitted tenders, and selecting preferred tenderer(s) in relation to:
- the collection of garbage and organics from the kerbside and its transportation to the Applicants' respective facilities for resource processing or disposal
 - the collection of recyclables from the kerbside, their transport and processing

- the servicing of public place bins and skip bins, and the collection and transport of waste from these, and
- the collection and transport of bulky waste

for a period of 16 years.

28. Authorisation is sought as the Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.⁸

The net public benefit test

29. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsections 90(7) and 90(8) of the CCA, that in all the circumstances the Conduct for which authorisation is sought would result or be likely to result in a public benefit that would outweigh any detriment to the public that would result or be likely to result from the Conduct.⁹

30. Therefore the ACCC has decided to grant authorisation A91598 to Muswellbrook Shire Council and Upper Hunter Shire Council to engage in the Conduct until 28 December 2033.

Date authorisation comes into effect

31. This determination is made on 6 December 2017. If no application for review of the draft determination is made to the Australian Competition Tribunal it will come into force on 28 December 2017.

⁸ The reference to “within the meaning of section 45 of the CCA” includes the making and/or giving effect to a provision of a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect or likely effect of substantially lessening competition.

⁹ As a cartel provision applies to the proposed conduct, subsection 90(7)(a) does not apply: section 90(8).