



Draft Determination and Interim Authorisation

Application for revocation of A91489 & A91490,
and the substitution of authorisation AA1000422

lodged by

Metropolitan Waste and
Resource Recovery Group

in respect of

joint procurement of recyclable receiving
and processing services

Date: 22 June 2018

Authorisation number: AA1000422

Commissioners: Rickard
Keogh
Court
Featherston

Summary

The ACCC proposes to revoke authorisations A91489 & A91490, and substitute authorisation AA1000422 to enable the Metropolitan Waste and Resource Recovery Group (MWRRG) to jointly procure recyclable receiving and processing services on behalf of itself, four Victorian city councils, and Nillumbik Shire Council (together, the Applicants).

MWRRG and the group of city councils were granted authorisation to jointly procure recyclable receiving and processing services on 9 July 2015. They now wish to add the Nillumbik Shire Council to the bargaining group.

The ACCC proposes to authorise the Applicants to engage in the conduct until 31 July 2027.

The ACCC has also decided to grant interim authorisation to MWRRG to enable the Applicants to participate in joint decision-making and planning while the ACCC considers the substantive application.

Next Steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The Applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 22 May 2018, MWRRG lodged with the ACCC an application for revocation of authorisations A91489 and A91490, and their substitution with authorisation AA1000422 (**re-authorisation**).¹ MWRRG lodged the application for re-authorisation on behalf of:
 - itself
 - the Victorian local councils of Brimbank City, Melbourne City, Port Philip City, and Wyndham City (together, the Central and Western Recyclables Group)
 - Nillumbik Shire Council(together, the **Applicants**).
2. The Applicants are seeking authorisation to enable them to continue the same joint procurement activities the subject of authorisations A91489 & A91490 but with the addition of Nillumbik Shire Council. Namely, the Applicants seek authorisation to jointly tender and negotiate for the following activities:
 - receiving of recyclables from kerbside collections;

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Guidelines for Authorisation of conduct (non-merger) <https://www.accc.gov.au/publications/guidelines-for-authorisation-of-conduct-non-merger>

- sorting and decontaminating of recyclables either manually or mechanically, to remove contaminants and segregated according to material group (for example, glass, plastics, aluminium and paper); and
- compacting or consolidating recyclables before they can be reprocessed into new products, or disposed of in other ways.

(together the **Service Streams**)

3. In particular, the Applicants seek authorisation for:

- MWRRG, on behalf of the Central and Western Recyclables Group and the Nillumbik Shire Council, to conduct further collaborative competitive joint tender processes for services within the Service Streams, to evaluate the responses in collaboration with Central and Western Recyclables Group and Nillumbik Shire Council and to negotiate on behalf of the Central and Western Recyclables Group and Nillumbik Shire any variations to their arrangements with the appointed service provider(s) and
- the councils participating in the Central and Western Recyclables Group and Nillumbik Shire Council to individually enter into separate contracts on identical or near identical terms with each Supplier/Operator (the contracts for all services within the Service Streams will be on the same general terms and conditions)

(the **Conduct**).

4. The Applicants seek re-authorisation until the end of the existing arrangements outlined in the previous authorisations A91489 & A91490 (31 July 2027).

5. The Applicants also seek interim authorisation to enable Nillumbik Shire Council to participate in negotiations currently underway by the Central and Western Recycling Group.

The Applicants

6. MWRRG is a Victorian statutory body established under section 49C of the Environment Protection Act 1970 (Vic) (EP Act). Pursuant to section 49D of the EP Act, MWRRG is the successor organisation to the Metropolitan Waste Management Group.

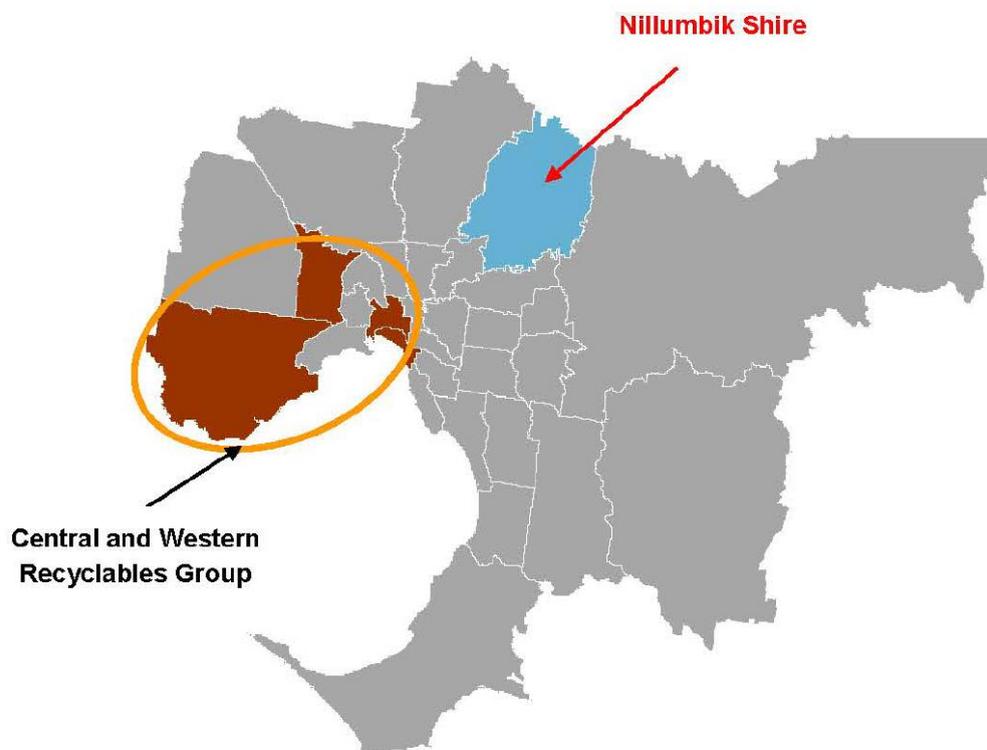
7. The participating councils are local government authorities in metropolitan Victoria whose functions are governed by the Local Government Act 1989 (Vic). The councils are responsible for, among other things, providing residential waste collection services, recyclables processing services and organic waste processing services to their respective local communities.

Background

8. The Metropolitan Waste and Resource Recovery Group region is concentrated around the inner west of Melbourne, with the exception of Nillumbik Shire, which is in the North East of Melbourne, as shown in Figure 1.

9. MWRRG and the Central and Western Recyclables Group were previously granted authorisations A91489 and A91490 on 9 July 2015. Authorisations A91489 and A91490 enabled MWRRG and the Central and Western Recyclables Group to:
- jointly tender for, negotiate, and contract for the supply of recyclables receiving and processing services
 - make joint decisions regarding variations to the contract for the supply of recyclables and receiving processing services, and if necessary, about the allocation of recyclables volumes amongst suppliers.
10. Authorisations A91489 and A91490 did not include the Nillumbik Shire Council as, at the time, it had decided to continue its pre-existing recyclable service agreement with SKM Recycling. That arrangement expired in August 2017. Nillumbik Shire Council has since been in bilaterally agreed interim recyclables processing arrangements with SKM Recycling. SKM Recycling is also currently providing recyclable receiving and processing services to the Central and Western Recyclables Group.
11. As of 2017, the combined population of the Central and Western Recyclable group is around 721,000. The population of Nillumbik Shire Council is around 65,000, for a combined total of around 786,000. The inclusion of Nillumbik Shire Council to the Central and Western Recyclables Group would represent a 9% increase to the population serviced by MWRRG. Table 1 below contains the population figures of the region, supplemented by data from the Australian Bureau of Statistics (**ABS**).

Figure 1. Location of Central and Western Recyclable group and Nillumbik Shire council districts²



² MWRRG, supporting submission to the application, p. 5

Table 1 Councils in the Central and Western Recyclables Group and Nillumbik Shire

Council/resort	Abbreviation	Permanent population ³
<i>Brimbank City</i>	<i>Brimbank</i>	<i>208,443</i>
<i>Melbourne City</i>	<i>Melbourne</i>	<i>159,992</i>
<i>Port Philip City</i>	<i>Port Philip</i>	<i>110,397</i>
<i>Wyndham City</i>	<i>Wyndham</i>	<i>241,902</i>
<i>Nillumbik Shire</i>	<i>Nillumbik</i>	<i>64,720</i>

China's National Sword policy

12. On 1 January 2018 China implemented its National Sword policy restricting the import of 24 categories of waste. This has had a severe impact on Australian local councils' ability to export recyclable materials. In 2014-2015, waste facilities in Victoria exported overseas 1.28 million tonnes (or 16%) of recyclable materials.⁴ In part due to China's National Sword policy, the price of certain recyclables has changed substantially in recent years, which in turn has reduced the revenues for many waste management service providers. It has resulted in the need for re-negotiations between some councils and service providers to adapt to the new market conditions.
13. In February 2018, the Victorian Government provided a \$13 million package to support ongoing kerbside collection of household recyclable waste in response to China's National Sword decision⁵. This assistance will be provided to councils until 30 June 2018, after which the councils will be required to meet any increase in recycling costs.

Statewide Waste and Resource Recovery Infrastructure Plan

14. The Victorian Government introduced the Statewide Waste and Resource Recovery Infrastructure Plan (SWRRIP) in 2015 to provide a roadmap for the waste and resource recovery system over the next 30 years. The SWRRIP seeks to establish the right conditions to attract the investment needed to:
- protect the community, environment and public health
 - recover valuable resources from the materials being discarded by households, businesses and industry
 - provide investment and job opportunities that contribute to our economy

³ ABS, *Census Data by Local Government Area 2017*.

⁴ Australian National Waste Report 2016, p. 65, viewed 14 Jun. 18,
[Nhttps://www.environment.gov.au/system/files/resources/d075c9bc-45b3-4ac0-a8f2-6494c7d1fa0d/files/national-waste-report-2016.pdf](https://www.environment.gov.au/system/files/resources/d075c9bc-45b3-4ac0-a8f2-6494c7d1fa0d/files/national-waste-report-2016.pdf)

⁵ Media release for the Victorian Government relief package can be found here
<https://www.premier.vic.gov.au/stepping-in-to-support-industry-and-councils-with-recycling/>

- minimise long term costs to households, industry and government.⁶
15. The 2018 SWRRIP outlines the benefits of collective procurement include providing an opportunity to consolidate materials to facilitate recovery and provide the feedstocks needed to underpin new or expanded infrastructure. Additionally, the 2018 SWRRIP states that collaborative approaches can be more efficient and attract more cost-effective outcomes for communities.⁷

Previous authorisations

Authorisations to jointly tender and contract for waste management services

16. The ACCC has authorised a number of other groups of councils around Australia to jointly tender and contract for waste management services. Many of these have involved the procurement of processing services.
17. The ACCC has also previously granted a request by a similar group, North East Waste and Resource Recovery Group (A91585), to revoke an existing authorisation and substitute a new one in its place which added another council.
18. Previously there have been four applications lodged by MWRRG (then the Metropolitan Waste Management Group) (A91445-6 and A91414-5 on 24 September 2014 and A91489 and A91490 on 9 July 2015), which involved seeking authorisation for similar conduct on behalf of itself and other metropolitan councils in Melbourne.⁸
19. Previous authorisations concerning the joint procurement of processing services have typically been granted for periods ranging from 5 to 21 years.

Consultation

20. The ACCC tests the claims made by applicants in support of their application for authorisation through an open and transparent public consultation process.
21. The ACCC invited submissions from 76 potentially interested parties, including a number of waste and resource recovery service businesses.⁹ The ACCC has received a submission from the Australian Packaging Covenant Organisation in support of the proposed authorisation.

⁶ SWRRIP 2018, p. 12, viewed 12 Jun. 18, <http://www.sustainability.vic.gov.au/About-Us/What-we-do/Strategy-and-planning/Statewide-Waste-and-Resource-Recovery-Infrastructure-Plan>

⁷ SWRRIP 2018, p. 39, viewed 12 Jun. 18, <http://www.sustainability.vic.gov.au/About-Us/What-we-do/Strategy-and-planning/Statewide-Waste-and-Resource-Recovery-Infrastructure-Plan>

⁸ For A91445-6, the councils involved were Knox City Council, Manningham City Council, Maroondah City Council, Whitehorse City Council, and Yarra Ranges Shire Council. For A91414-5 the councils of Bayside, Cardinia Shire, Casey, Frankston, Glen Eira, Greater Dandenong, Kingston, and Monash were involved. A91489 and A91490 involved the local councils of Brimbank city, Melbourne city, Port Philip City, and Wyndham city.

⁹ A list of the parties consulted is available from the ACCC's public register: www.accc.gov.au/authorisationsregister

The Applicants' submission

22. The Applicants submit that the Conduct:

- supports long-term investment into the recyclables receiving and processing services. Compared to each local council acting individually, the Conduct reduces the risks related to making long-term investments by providing greater certainty regarding recyclable volumes. The current service provider to the Central and Western Recyclables Group, SKM Recycling, has made substantial investments in new technologies under the existing authorisations¹⁰
- will achieve cost savings in the form of reducing transaction costs, as it has for the Central and Western Recyclables Group from the previous authorisations
- will improve contract management through the Applicants being able to utilise MWRRG's experience and expertise, as well as their shared collective experience. This is of particular benefit to the current adjustments to their recyclables processing following the recent changes in China's policy on importing recyclables (known as China's National Sword policy)
- will improve bargaining power, which will result in the Applicants being able to negotiate more effectively for lower rates and improved services with service providers
- leads to economic efficiencies due to economies of scale in delivering recyclables receiving and processing services. This lowers the costs per unit of waste that are incurred by the relevant local councils when recyclables are received and processed
- will result in improved environmental and health outcomes for residents of the relevant council areas. The previous authorisations have led to additional planning going into selecting safer locations for newly constructed resource recovery facilities for the Central and Western Recyclables Group. As a result, the new facilities have led to a reduction in the environmental risks to residential areas from the accumulation of waste volumes, and improved access for the delivery of recyclables¹¹.

23. The Applicants submit that the Conduct will result in minimal public detriment.

24. The Applicants note the inclusion of Nillumbik Council will not lead to a material change in the volumes of recyclables already generated by the Central and Western Recyclables Group under the existing authorisations.

25. The Applicants also note that the substituted authorisation will not result in any material changes to the services currently provided to the Applicants. SKM Recycling is currently the service provider for both the Central and Western Recyclables Group and the Nillumbik Shire Council. SKM Recycling will continue to provide the same services using the same facilities and infrastructure as it currently does for the Central and Western Recycling Group. By revoking the existing

¹⁰ MWRRG, supporting submission to the application, p. 13

¹¹ MWRRG, supporting submission to the application, p. 14

authorisations and substituting them with an authorisation that includes Nillumbik Shire Council, that council will participate in the public benefits.

ACCC assessment

26. Pursuant to subsections 91C(7) and 90(7) of the *Competition and Consumer Act 2010* (Cth) (the **Act**), 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.

27. In its evaluation of the Conduct, the ACCC has taken into account:

- the application and submissions received from MWRRG and interested parties
- information available to the ACCC from consideration of previous relevant matters, in particular authorisations A91489 and A91490
- the likely future with and without the Conduct for which authorisation is sought
- the relevant areas of competition likely to be affected by the Conduct
- the 9 year period for which authorisation has been sought.

Relevant areas of competition

28. Under the Conduct, the Applicants will jointly procure recyclable receiving and processing services. While the ACCC does not consider that it is necessary to precisely identify the relevant areas of competition in assessing this application, the ACCC notes that the Conduct will primarily affect the supply of services for receiving and processing recyclable material in the Melbourne metropolitan area.

The future with and without

29. To assist in its assessment of the Conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct for which authorisation is sought.

30. In the future with the Conduct, all Applicants (including Nillumbik Shire Council) will jointly tender for and procure recyclables receiving and processing services. In the short term this will result in Nillumbik Shire Council continuing to be serviced by SKM Recycling, but instead of this service being provided under an individually negotiated contract, it will be under the same conditions as the Central and Western Recycling Group under the previous authorisations A91489 and A91490. MWRRG will also conduct collaborative future tender processes for the Service Streams and each council will separately enter contracts with each supplier or operator on identical or near identical terms.

31. In the future without the Conduct, the ACCC considers it likely that the Central and Western Recycling Group will continue to rely on authorisations A91489 and A91490 to jointly tender for and procure recyclables receiving and processing services until 31 July 2027 and that Nillumbuk Council is likely to continue to make individual arrangements for recycling receiving and processing services.

Public benefits

32. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it 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.”¹²

33. The ACCC has considered whether the Conduct is likely to deliver public benefits in the form of:

- transaction cost savings
- potential for cost efficiencies, and
- environmental benefits.

Transaction cost savings

34. In authorisations A91489 & A91490, the ACCC concluded that the joint procurement was likely to result in some transaction cost savings relative to each Council individually tendering for the recyclables processing services.

35. As noted earlier, the ACCC has assessed the Conduct in the current matter against a future in which MWRRG and the Central and Western Recycling Group continue to jointly procure as a group without Nillumbik Shire Council, which would conduct its own procurement.

36. Compared to this ‘future without’, the ACCC considers that the Conduct is likely to result in some transaction cost savings for recyclable receiving and processing service providers who bid to supply services to both the Central and Western Recycling Group and Nillumbik Shire Council. Those providers will only be required to participate in one tendering process per stream, potentially reducing their administrative burdens. This will also lead to decreased administrative costs for the group of councils, particularly the Nillumbik Shire Council, as MWRRG will conduct the negotiations on their behalf.

Cost efficiencies

37. The ACCC considers that the proposed conduct is likely to result in public benefit by allowing Nillumbik Shire to acquire recycling services at lower cost due to the greater cost efficiencies able to be achieved by the volume of recyclables of the Central and Western Recycling Group.

38. The ACCC also considers that the inclusion of Nillumbik Shire’s recycling services requirements is likely to allow suppliers to realise some further efficiencies (which

¹² *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

will be passed on, at least in part, to the councils and the communities they represent). The ACCC accepts that the Central and Western Recycling Group and Nillumbik Shire Council aggregating demand and appointing a single supplier is likely to facilitate the realisation of some further economies of scale, compared to separate supply arrangements for the Central and Western Recycling Group and Nillumbik Shire Council, including potentially through helping to underwrite investment in facility upgrades or technological developments.

39. The ACCC concludes that the aggregation of the Applicants' waste volumes under the Conduct is likely to result in some public benefit in the form of improved efficiencies in the Service Streams.

Improved environmental outcomes

40. The ACCC notes that the Conduct will lead to the aggregation of a larger volume of recyclables. To the extent that the additional volume would help underwrite the investment required to upgrade an existing facility or develop a new facility utilising newer and more efficient technology, this may result in some environmental benefits by reducing the amount of resources used to process the recyclables collected and increasing recovery rates for recyclables collected by the Applicants.

Public detriments

41. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

“...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”.¹³

42. The ACCC considers that public detriments may arise as a result of arrangements such as these where the collective procurement group comprises such a substantial proportion of the market that it reduces competition for providers of the relevant services.
43. However, the ACCC considers that the Conduct in this case is likely to result in minimal public detriment.
44. The ACCC has not received any information which indicates that the addition of Nillumbik Shire Council is likely to give the group a degree of bargaining power that would allow it to achieve prices below a competitive level.
45. The ACCC considers that the Conduct is likely to result in limited, if any, public detriment for the following reasons:
- the Nillumbik volumes are relatively small compared to the volumes of recyclables collected and processed for the councils in the Central and Western Recycling Group. As a result, the increase in bargaining power for the Applicants is likely to be insubstantial
 - a significant volume of recyclable waste collected by Melbourne councils is not subject to the Conduct and will remain available to alternative suppliers other than SKM Recycling. The conduct is unlikely to have a significant

¹³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

effect on the availability of business for which providers of recyclable receiving and processing services compete

- participating councils are free to elect not to enter into the joint contractual framework and, instead, independently select, negotiate and contract with any suppliers of recyclables receiving and processing services
- as its previous contract approached expiry, Nillumbik Shire Council tendered for a recyclables receiving and processing service provider in August 2017. Nillumbik Shire Council independently evaluated the submissions they received and concluded that the overall benefits (including in terms of costs) would be greatest if the council joined the arrangements agreed between SKM Recycling and the Central and Western Recycling Group under the existing authorisations. The competitive nature of the tendering process ensures that the proposed arrangement between MWRRG and Nillumbik Shire Council is likely to be the most efficient option.

Balance of public benefit and detriment

46. 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..
47. For the reasons outlined in this determination, the ACCC is satisfied that the likely benefit to the public would outweigh the minimal likely detriment to the public constituted by any lessening of competition.
48. Accordingly the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

49. The CCA allows the ACCC to grant authorisation for a limited period of time.¹⁴ This enables the ACCC 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.
50. In this instance, the Applicants seek authorisation for a total period of 9 years until 31 June 2027.
51. The ACCC did not receive any submissions in relation to the length of authorisation sought.
52. Given the assessment of public benefits and detriments outlined above, the ACCC proposes to grant authorisation to the Applicants for 9 years until 31 June 2027.

¹⁴ Subsection 91(1).

Draft determination

The application

53. On 22 May 2018, MWRRG applied for revocation of A91489 and A91490 and their substitution with AA1000422 under subsection 91C(7) of the Competition and Consumer Act 2010 (the Act).
54. 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 CCA¹⁵.
55. Subsection 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.¹⁶

The net public benefit test

56. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to subsection 91(C)(7) of the Act, that in all the circumstances the Conduct for which authorisation is sought 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.
57. The ACCC proposes to revoke authorisation A91489 & A91490 and grant authorisation AA1000422 in substitution. The substitute authorisation will allow MWRRG, the Central and Western Recycling Group and Nillumbik Shire Council to:
- jointly tender for, negotiate, and contract for the supply of recyclables receiving and processing services
 - make joint decisions regarding variations to the contract for the supply of recyclables and receiving processing services, and if necessary, about the allocation of recyclables volumes amongst suppliers.
58. This draft determination is made on 22 June 2018.

Next steps

59. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

Interim Authorisation

60. In light of China's National Sword policy, the Applicants seek interim authorisation to enable Nillumbik Shire Council to participate in the joint decision-making and planning that is currently underway by the Central and Western Recyclables Group.

¹⁵ 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, effect, or likely effect of substantially lessening competition.

¹⁶ For applications for the revocation and substitution of a new authorisation, s 91C(5) of the CCA also requires the ACCC to comply with the requirements of section 90A prior to making a determination.

The Applicants submit that interim authorisation would provide Nillumbik Shire Council with access to the collective expertise of MWRRG and the other relevant councils at this time of negotiations. The Applicants also submit that it would allow Nillumbik Shire Council to appropriately manage adjustments to their own recyclables processing operations.

61. Subsection 91(2) of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.

62. In granting interim authorisation, the ACCC has taken the following into account:

- there is an urgent need for interim authorisation to enable Nillumbik Shire Council to participate in discussions in relation to changes which must be implemented quickly in response to changes in China's policies
- the relevant areas of competition are unlikely to be permanently altered if interim authorisation is granted
- interim authorisation allows Nillumbik Shire Council to obtain benefits from the joint negotiations through allowing it to appropriately manage adjustments to its recyclables processing operations
- the Conduct is likely to lead to some public benefit and is unlikely to result in any public detriments.

63. The ACCC grants interim authorisation to the Applicants to participate in joint decision-making and planning in response to recent changes in Chinese government policy impacting on recyclable receiving and processing services. Interim authorisation commences 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.