



# Determination

Application for authorisation AA1000428

lodged by

Camden Council  
Campbelltown City Council  
Liverpool City Council  
Wingecarribee Shire Council and  
Wollondilly Shire Council

to collectively tender and contract for future waste processing services for the councils' household waste, dry recyclable material, garden organics and clean-up waste; and to continue to give effect to existing waste processing contracts entered into by four of the five applicant councils.

Authorisation number: AA1000428

Date: 22 November 2018

Commissioners:

Rickard  
Keogh  
Court  
Featherston

## Summary

The ACCC grants authorisation to enable five outer Sydney councils to collectively tender and contract for the provision of services by one or more qualified contractors to receive, process, market and dispose of (by sale or otherwise) kerbside collected waste materials. Interim authorisation was granted on 12 September 2018 to enable the councils to begin preparations for the collective tender process.

The ACCC grants authorisation until 1 July 2044.

The ACCC previously granted authorisation (A90886) in 2004 to enable four of the councils to collectively tender and contract for kerbside collected waste processing services. That authorisation will expire in 2021.

The ACCC also grants authorisation to allow these four councils to continue to give effect to the processing contracts entered into following authorisation A90886 until 31 May 2024.

### 1. The application for authorisation

- 1.1. On 7 August 2018 Camden Council, Campbelltown City Council, Liverpool City Council, Wingecarribee Shire Council, and Wollondilly Shire Council (the **Applicants**) lodged application for authorisation AA1000428 with the Australian Competition Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for proposed collective tendering and contracting for the provision of services by one or more qualified contractors to receive, process, market and dispose of kerbside waste material. The Applicants' collective tender proposal does not involve kerbside waste collection services.
- 1.2. Application for authorisation AA1000428 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (the **CCA**). Under this provision, the ACCC can grant authorisation which provides businesses with an exemption from competition law for arrangements that may otherwise risk breaching the law, provided they are likely to result in a net public benefit or are unlikely to substantially lessen competition.
- 1.3. In this case, the participating councils may be considered to be each other's competitors when seeking to procure waste processing services. By conducting their procurement of waste processing services jointly rather than individually, they risk breaching competition laws. Accordingly, the Applicants have sought authorisation from the ACCC, which would give them legal protection to collectively tender and contract.
- 1.4. Authorisation is sought until 1 July 2044, comprising an 18 month collective tendering process, four year initial set-up period, 15 year waste processing period plus a five year extension option. Table 1 provides further detail of the timelines involved in the proposed collective tender and contract arrangements.
- 1.5. On 3 October 2018, the Applicants amended the application to also seek authorisation for four of the five Applicants (the councils of Camden, Campbelltown, Wingecarribee and Wollondilly) to continue to engage in the conduct authorised by the ACCC in 2004 under application for authorisation A90886, from the expiry date of authorisation A90886 on 6 July 2021 until the end of the existing contract with SUEZ Recycling and Recovery Holdings Pty Limited (**SUEZ**) on 31 May 2024.

**Table 1: Applicants’ indicative timetable for the proposed waste tender and contracting process<sup>1</sup>**

<b>Task</b>	<b>Duration</b>	<b>Timing</b>
Prepare tender documents	3 months	September 2018 – November 2018
Industry consultation	2 months	September 2018 – November 2018
Advertise tender and preparation of responses	10 months	November 2018 – July 2019
Close tender		July 2019
Assess tender	3 months	August 2019 – October 2019
Award contract		November 2019
Acquire land (contractor/s)	12 months	December 2019 – December 2020
Develop facilities/ infrastructure (contractor/s)	3 years	January 2021 – January 2024
Start to receive and process waste material (contractor/s)		1 June 2024 – 31 May 2039 + 5 year extension option

1.6. On 12 September 2018, the ACCC granted interim authorisation under subsection 91(2) of the CCA to enable the Applicants to begin preparations for the proposed collective tender process for waste processing services, including preparing the tender documents, conducting industry consultation and advertising the tender.

1.7. On 24 October 2018, the ACCC issued a draft determination proposing to grant authorisation to enable the Applicants to collectively tender and contract for the provision of services by one or more qualified contractors to receive, process, market and dispose of (by sale or otherwise) kerbside collected waste until 1 July 2044. The ACCC also proposed to grant authorisation to allow the councils of Camden, Campbelltown, Wingecarribee and Wollondilly to continue to give effect to the processing contracts entered into following authorisation A90886 until 31 May 2024.

## The Applicants

1.8. The Applicants are:

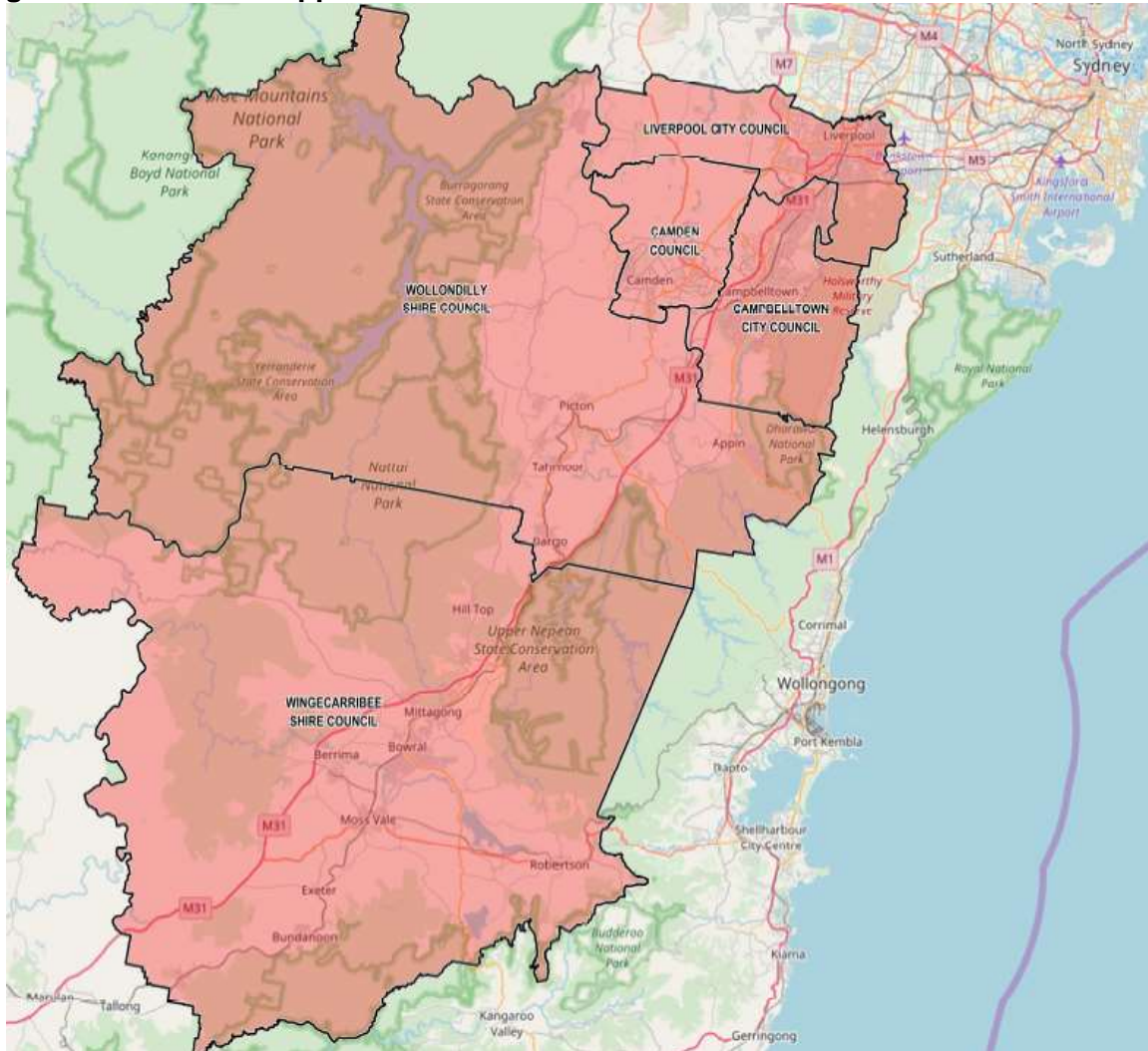
- Camden Council
- Campbelltown City Council
- Liverpool City Council
- Wingecarribee Shire Council
- Wollondilly Shire Council.

1.9. The Applicants are local government authorities responsible for the collection and processing of household generated waste material. All five councils are located in the southern and western region of the outer Sydney area, as shown in Figure 1.

<sup>1</sup> Application for Authorisation AA1000428, dated 26 July 2018, p 35.

Together, the five councils represent around 12 per cent (or 239 991 tonnes) of all waste processed in the Greater Sydney Region.<sup>2</sup>

**Figure 1: Location of Applicant councils<sup>3</sup>**



1.10. As at 2017, the combined population of the Applicant councils was approximately 556 500. Table 2 contains the population figures for each council.

**Table 2: Populations of Applicant councils<sup>4</sup>**

<b>Council</b>	<b>Population</b>
Camden Council	80 900
Campbelltown City Council	164 400
Liverpool City Council	214 100
Wingecarribee Shire Council	47 750
Wollondilly Shire Council	49 350
<b>Total</b>	<b>556 500</b>

<sup>2</sup> Applicants' supplementary submission, dated 5 September 2018.

<sup>3</sup> Application for Authorisation AA1000428, dated 26 July 2018, Appendix 5.

<sup>4</sup> Application for Authorisation AA1000428, dated 26 July 2018, p 37.

## The Proposed Conduct

1.11. The Applicants are seeking authorisation for two discrete limbs of proposed conduct. The first relates to the tender process and ongoing management of their next contract(s) for specific waste services, as described in paragraphs 1.12 to 1.14 below. The second limb relates to the final three years of existing contracts that four of the Applicants have in place for waste processing services, as described in paragraphs 1.15 to 1.16. Together, the two limbs make up the **Proposed Conduct**.

### The Proposed Tendering Conduct

1.12. The Applicants are seeking authorisation to collectively tender and contract for the provision of services by one or more qualified contractors to receive, process, market and dispose of (by sale or otherwise) all of the Applicants' kerbside collected waste material (the **Proposed Tendering Conduct**).

1.13. The Applicants' kerbside collected waste material consists of four streams:

- Household waste: domestic waste including food waste that cannot generally be separated into streams of Dry Recyclable Material or Garden Organics.
- Dry Recyclable Material: largely comprised of paper products, glass products and plastic products.
- Garden Organics: organic materials that are compostable.
- Clean-Up Waste: inorganic, bulky waste that cannot be placed into standard garbage or recycling bins.

1.14. Each of the Applicants propose to enter into separate but identical contracts with the successful tenderer(s). The Applicants propose that one contractor will be contracted by all of the Applicants in respect of one or more of the four streams of waste material. More than one contractor will not be contracted for each stream.

### The Existing Contracts Conduct

1.15. Following an amendment to the application for authorisation, Camden Council, Campbelltown City Council, Wingecarribee Shire Council and Wollondilly Shire Council are also seeking authorisation to continue to give effect to the waste processing contracts entered into following authorisation A90886 (the **Existing Contracts Conduct**).

1.16. Each council contracted with WSN Environmental Solutions Pty Ltd (**WSN**), later acquired by SUEZ. The contracts entered into following authorisation A90886 expire on 31 May 2024, but the authorisation itself expires on 6 July 2021.

1.17. Liverpool City Council was initially an applicant to the 2004 authorisation but withdrew during the ACCC's consideration of the application. Liverpool City Council's waste processing contracts will terminate between July 2021 and July 2024.

1.18. Where relevant, the ACCC has assessed the Existing Contracts Conduct alongside the assessment of the Proposed Tendering Conduct.

## Interim authorisation

1.19. At the time the application was lodged, the Applicants also requested interim authorisation to enable them to begin preparations for the Proposed Tendering

Conduct. The Applicants sought interim authorisation to begin preparing the tender documents, conducting industry consultation and advertising the tender while the ACCC is considering the substantive application. On 12 September 2018, the ACCC granted interim authorisation under subsection 91(2) of the CCA.<sup>5</sup> Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

## 2. Background

- 2.1. It is common practice throughout Australia for groups of local councils to collectively tender and contract for waste services.<sup>6</sup> The objective of such collaboration is to reduce transaction costs, pool resources and expertise, and achieve economies of scale.
- 2.2. The ACCC has previously authorised around 30 arrangements of this type, concluding that they were likely to result in net public benefit through improved quality of services at lower cost to the participating councils. Many of these arrangements have involved the procurement of waste processing services.<sup>7</sup>
- 2.3. The collective tender and contracting process that the Applicants have proposed in the application for authorisation AA1000428 is similar to a number of those that the ACCC has previously authorised.

## 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 fifteen potentially interested parties, including a number of waste and recovery service businesses and industry associations.<sup>8</sup>
- 3.3. Prior to the release of the draft determination, the ACCC received three submissions from interested parties and no significant concerns were raised. In particular, waste service providers Cleanaway Operations Pty Ltd and Remondis Australia Pty Ltd both submitted they had no objections to the Proposed Tendering Conduct. The Waste Contractors and Recyclers Association of NSW (**WCRA**) provided support for the Proposed Tendering Conduct conditional on, among other things, the tender process and documents complying with relevant best practices and standards. WCRA also submitted that, due to current market uncertainty, the Applicants need to provide justification for the long duration of authorisation sought. This issue is discussed further from paragraph 4.35.
- 3.4. The Applicants provided a response to WCRA's submission, in particular noting that they intended to publicly consult on issues surrounding market uncertainty and length of contract(s) through industry consultation prior to commencing the tender process. The Applicants also noted that the Proposed Tendering Conduct does not directly relate to the best practice processes set out in WCRA's submission. The Applicants nevertheless agreed to give those best practice processes due consideration.

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<sup>5</sup> See ACCC interim authorisation decision, dated 12 September 2018, available: [ACCC Public Register](#).

<sup>6</sup> NSW examples include St George Region of Councils, Maitland City Council & Ors, Bankstown City Council & Ors and Bathurst City Council & Ors.

<sup>7</sup> Examples include: AA1000422 Metropolitan Waste and Resource Recovery Group; A91596 and A91597 Loddon Mallee Waste and Resource Recovery Group; A91585 North East Waste and Resource Recovery Group; A91483 Maitland City Council and Others.

<sup>8</sup> A list of the parties consulted and the public submissions received is available from the [ACCC Public Register](#).

- 3.5. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.
- 3.6. On 24 October, the ACCC issued a draft determination proposing to grant authorisation until 1 July 2044 for the Proposed Tendering Conduct and until 31 May 2024 for the Existing Contracts Conduct. A pre-decision conference was not requested following the draft determination and no submissions were received.

## 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 CCA.
- 4.2. The Applicants have sought authorisation for the Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of section 45 of the CCA. Consistent with subsection 90(7) and 90(8) of the CCA, 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**).

### Relevant areas of competition

- 4.3. As part of the Proposed Tendering Conduct, the Applicants will jointly procure receiving and processing services for four streams of waste: household waste, dry recyclables, garden organics and clean-up waste. The four Applicants that are seeking authorisation for the Existing Contracts Conduct propose to continue to give effect to contracts for waste processing services relating to a similar portfolio of waste streams.
- 4.4. While the ACCC does not consider it necessary to precisely define the relevant areas of competition in assessing this application, the ACCC notes that the Proposed Conduct will primarily affect the supply of services for receiving and processing the four waste streams in the Greater Sydney Region.

### Future with and without the Proposed Conduct

- 4.5. 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.
- 4.6. The ACCC considers that, in a future without the Proposed Tendering Conduct, each council would likely separately tender for the provision of waste processing services.
- 4.7. In a future with the Proposed Tendering Conduct, all Applicants will collectively tender for and procure waste processing services for all four streams of waste.
- 4.8. In a future without the Existing Contracts Conduct, the ACCC considers that Camden Council, Campbelltown City Council, Wingecarribee Shire Council and Wollondilly Shire Council may have to cease their current contractual arrangements when their existing authorisation A90886 expires on 6 July 2021. Each of the four councils would need to individually source waste processing services for any gap between the expiry of authorisation A90886 and the commencement of any future collectively acquired services.

## Public benefits

4.9. The CCA 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.*<sup>9</sup>

4.10. The ACCC has considered the following public benefits:

- transaction cost savings
- cost efficiencies
- increased competition, and
- environmental benefits.

### Transaction cost savings

4.11. The ACCC considers that the Proposed Tendering Conduct is likely to provide transaction cost savings for both the Applicants and the service provider(s). Without such an arrangement, each Applicant would separately tender, negotiate and enter into contracts with individual service providers, resulting in more time, effort and resources being expended. Additionally, the Proposed Tendering Conduct is likely to result in transaction cost savings for the waste processing service providers who engage in the tender process. The providers will only be required to participate in a single tender process per waste stream, which may reduce their administrative burden.

4.12. Regarding the Existing Contracts Conduct, the ACCC considers that allowing Camden Council, Campbelltown City Council, Wingecarribee Shire Council and Wollondilly Shire Council to continue to give effect to the contracts entered into following authorisation A90886 will avoid transaction costs associated with re-negotiating individual contracts with service providers to cover the period from 6 July 2021 to 31 May 2024.

4.13. Therefore, compared to a future without the Proposed Conduct, the ACCC considers that the Proposed Conduct is likely to result in transaction cost savings.

### Cost efficiencies

4.14. The Applicants submit that by having a single team across the participating councils to assess the service contracts entered into, there will be no need for each council to duplicate resources, thereby reducing contract management costs.

4.15. The Applicants also submit that they are likely to experience waste processing cost savings and that centralised processing and handling of their combined volume of waste materials is likely to increase transportation and materials handling efficiencies for the successful service provider(s).

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<sup>9</sup> 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.



- 4.16. The Applicants submit that waste processing cost savings would ultimately flow through to lower domestic waste management charges for ratepayers. Under the current contracts entered into following authorisation A90886, significant savings have been achieved through the collaborative arrangements. In particular, the Applicants submit that following authorisation A90886, the domestic waste charge payable by ratepayers<sup>10</sup> has been reduced in the order of \$100 per annum per rateable property.<sup>11</sup> The Applicants advise that there are approximately 130 000 residential rateable properties served by the current SUEZ contracts.
- 4.17. The ACCC considers that the Proposed Tendering Conduct is likely to result in public benefit through improved cost efficiencies. Specifically, aggregation of waste volumes is likely to result in service providers offering the Applicants lower prices for processing, and there may be some efficiencies in transport and handling of waste across the municipal areas. The ACCC also considers that the Proposed Tendering Conduct is likely to allow for ongoing contract management efficiencies wherein the suite of contracts is managed centrally, as opposed to a situation in which each council manages its contract separately.
- 4.18. Regarding the Existing Contracts Conduct, the ACCC considers that allowing Camden Council, Campbelltown City Council, Wingecarribee Shire Council and Wollondilly Shire Council to continue to give effect to the contracts entered into following authorisation A90886 will avoid the additional administrative burden and additional service costs that may be incurred by the councils should they be required to revert to individual contracts for the period between 2021 and 2024.
- 4.19. The ACCC concludes that the Proposed Conduct is likely to result in public benefit in the form of increased efficiencies.

### **Increased competition**

- 4.20. The ACCC considers that the Proposed Tendering Conduct may increase competition by offering prospective tenderers a substantial volume of waste for processing. The combined waste volumes from the five applicant councils will present service providers with a more attractive amount of waste supply than would be the case if the Applicants tendered for processing services separately. As such, the ACCC would expect that existing service providers, and potential new entrants, will compete more vigorously for the waste processing contracts on offer.
- 4.21. Additionally, the ACCC considers that long lead times built into the Proposed Tendering Conduct, including an 18 month tender process that involves industry consultation and a three-to-four year period where the successful tenderer(s) will be able to construct the necessary facilities, may better facilitate the entry of new participants. The potential for new entrants to compete to service the Applicants is likely to further increase competition.

### **Environmental benefits**

- 4.22. The Applicants submit that there are likely to be environmental benefits from the Proposed Tendering Conduct, including assisting with the development of an alternative waste treatment (**AWT**) facility, reduction of disposal of waste to landfill and conservation of the limited landfill space in the Greater Sydney Region.
- 4.23. The Applicants submit that the current waste-related environmental issues in the Greater Sydney Region are significant, particularly due to the growing pressure on

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<sup>10</sup> Each rateable property paying for a waste service.

<sup>11</sup> Applicants' supplementary submission, dated 12 October 2018.

finite landfill capacity. The Applicants submit that they are seeking, by way of the Proposed Tendering Conduct, to secure long term processing, recycling and disposal solutions on behalf of their communities that are environmentally and commercially sustainable. It is estimated that the primary remaining landfill site, Lucas Heights, will be at capacity by 2034, which, along with projected population growth and the commensurate additional waste generation,<sup>12</sup> means that any predominantly landfill-based strategy is not considered sustainable. The Applicants submit that currently no single Applicant produces enough residual waste to justify the design, development and construction of an AWT facility. The Applicants estimate that such a facility will cost approximately \$80-\$100 million.<sup>13</sup> Additionally, due to recent policy developments,<sup>14</sup> there is a likelihood that waste to energy may form part of the technology mix to deal with residual waste, as an alternative to landfill. A facility of this type can cost in excess of \$300 million.<sup>15</sup>

- 4.24. The Applicants also submit that the collective tendering process undertaken in 2004, following authorisation A90886, resulted in the construction of an AWT facility (the Ecolibrium facility), which was operated from June 2009 until it was closed in 2011 due to excessive odour problems. The facility was then incorporated by SUEZ to form part of a new waste transfer station.
- 4.25. Additionally, the Applicants contend that the Proposed Tendering Conduct will assist them to meet their waste avoidance, recycling and resource recovery and reduction in disposal of waste to landfill targets under the Waste Avoidance and Resource Recovery Strategy (**WARR**) strategy.<sup>16</sup>
- 4.26. The ACCC notes that the Applicants would be obliged to comply with relevant environmental policy regardless of whether they are authorised to tender collectively. For this reason, it is not clear that authorisation materially affects the environmental outcomes the councils are likely to achieve over the period of authorisation. However, noting that the last collective tendering process undertaken by some of the Applicants following authorisation A90886 resulted in the construction of an AWT facility, the ACCC considers that the Proposed Tendering Conduct is likely to facilitate the councils achieving their environmental goals faster or at lower cost. To the extent that the Proposed Tendering Conduct assists in diverting waste from landfill into alternative waste and resource recovery programs, it is likely to result in public benefit in the form of improved environmental outcomes.

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<sup>12</sup> Waste tonnages to be processed by the Applicants are projected to increase from 232 518 tonnes in FY17 to approximately 300 000 tonnes in FY24 and to exceed 450 000 tonnes in FY37, an increase of 93%. Application for Authorisation AA1000428, dated 26 July 2018, p 38.

<sup>13</sup> Applicants' supplementary submission, dated 12 October 2018.

<sup>14</sup> NSW Energy recovery facilities, NSW EPA, viewed 8 October 2018, <https://www.epa.nsw.gov.au/your-environment/waste/waste-facilities/energy-recovery>.

<sup>15</sup> Applicants' supplementary submission, dated 12 October 2018.

<sup>16</sup> The New South Wales Government introduced the most recent Waste Avoidance and Resource Recovery Strategy (WARR) in 2014. The WARR strategy provides a government framework for reducing waste and making better use of resources extracted from waste. Under the *Waste Avoidance and Resource Recovery Act 2001*, the WARR Strategy is required to be reviewed and replaced every five years.

## Public detriments

4.27. The CCA does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined public detriment 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.<sup>17</sup>*

4.28. The ACCC considers that public detriments may arise as a result of arrangements such as these where the joint procurement group comprises such a substantial proportion of the market that it reduces competition for providers of the relevant services.

4.29. However, the ACCC considers that the Proposed Conduct in this case is likely to result in minimal public detriment.

4.30. The ACCC considers that the Proposed Tendering Conduct is likely to result in limited, if any, public detriment as a significant volume of waste material collected by other councils in the Greater Sydney Region will not be subject to the Proposed Tendering Conduct.<sup>18</sup> As such, that volume will remain available to unsuccessful tender applicants and other market participants. The Proposed Tendering Conduct is unlikely to have a significant effect on the availability of business for which providers of waste processing services compete.

4.31. Regarding the Existing Contracts Conduct, the ACCC considers that allowing Camden Council, Campbelltown City Council, Wingecarribee Shire Council and Wollondilly Shire Council to continue to give effect to the contracts entered into following authorisation A90886 is unlikely to result in public detriment. The ACCC notes that the Existing Contracts Conduct will only be in effect for a relatively short period of three years. Any prospective service provider that may have serviced the councils during this three year period will be able to participate in the next tender process under the Proposed Tendering Conduct.

## Balance of public benefit and detriment

4.32. For the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

4.33. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>19</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the likely public 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.

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<sup>17</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>18</sup> The Applicant councils represent approximately 12% of the overall waste processed in this area. Application for Authorisation AA1000428, dated 26 July 2018, p 39.

<sup>19</sup> Subsection 91(1).

## Proposed Tendering Conduct period of authorisation

- 4.34. For the Proposed Tendering Conduct, the Applicants seek authorisation until 1 July 2044 (approximately 25 years). This period comprises:
- A five year period to establish contracts, which are proposed to commence in June 2024. The Applicants submit this period will allow for industry to be consulted, the tender process to be conducted, existing contracts to conclude, and new infrastructure to be commissioned (where applicable).
  - A 15 year waste processing period of operation.
  - An extension option of five years.
- 4.35. The ACCC received one submission that raised concerns about the length of authorisation sought for this conduct. WCRA's submission cited the recent changes to China's policy on importation of recyclables, as well as domestic legislative changes and other still unknown issues as presenting significant commercial risks to the waste processing industry. WCRA questioned whether the long contract term proposed by the Applicants was appropriate, given what they perceive as current uncertainty in the market.
- 4.36. In response to WCRA's concerns, the Applicants noted that consultation with industry will be a part of the tender process and will include seeking industry views on how best to align the tender specification to current market conditions and expectations, such as the impact of China's revised approach to the importation of recyclables, and changes to domestic waste legislation. The Applicants also submitted that a long tender and initial set-up period of five years is necessary for any contractor(s) to be operationally ready to receive and process waste material, immediately following the expiry of the existing contracts in 2024. This longer period may also facilitate new entrants and/or the construction of a new AWT facility by allowing land to be purchased and relevant approvals to be obtained.
- 4.37. The Applicants propose to offer tenderers a substantial waste processing contract period of 15 years, following tenderers obtaining the necessary approvals, licences, land, infrastructure and AWT facility. The Applicants note this period is similar to the period of waste processing operations secured in the contracts following authorisation A90886. The Applicants submit that this period is generally acknowledged by the waste processing industry as providing sufficient time for a service provider to amortise costs and establish a commercially viable facility.<sup>20</sup>
- 4.38. Further, the Applicants propose to offer tenderers a five year optional extension period in order to provide the successful contractor with the flexibility to take advantage of newly developed technology. The Applicants submit that technology developments in the waste processing industry are continually evolving and they are confident that during the term of the proposed contract(s), new technologies and upgrades will become available to improve efficiencies and output quality.<sup>21</sup> The Applicants submit that a five year extension option would enhance the ability of the councils to consider such improvements and upgrades, and provide the contractor(s) with the opportunity to obtain a return on investments.

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<sup>20</sup> Applicants' application for authorisation AA1000428, dated 26 July 2018, p. 14.

<sup>21</sup> Applicants' supplementary submission, dated 12 October 2018.

- 4.39. In its draft determination, the ACCC proposed to grant authorisation to the Proposed Tendering Conduct for 25 years, which is longer than the ACCC would normally grant for collective tendering of waste services by councils. The ACCC invited submission in relation to the proposed 25 year period of authorisation. No submissions were received on this issue.
- 4.40. The ACCC considers there are a number of particular circumstances that distinguish this matter from other waste services collective tendering authorisations. The Proposed Conduct is limited in scope, is intended to support new infrastructure being built, and the Applicants have provided explanations as to why this duration (in three distinct periods as discussed below) will support the realisation of public benefits. In particular, the ACCC considers:
- The five year period to establish waste processing contracts is likely to better facilitate new entrants participating in the tender process as it will provide prospective entrants with sufficient time to obtain necessary land, approvals and equipment. This is likely to increase competition in the tender process.
  - While the 15 year waste processing period is a relatively long contract term, in this case investment in new waste processing infrastructure is a key objective of the application, given the declining landfill capacity available to the Applicants and their obligations to divert an increasing proportion of waste from landfill. This period of operation is likely to better facilitate new investment as it is more likely to allow the successful service provider to recoup the cost of its investment.
  - The ability for the Applicants to offer a five year contract extension beyond the 15 year contract period may allow for incremental investment in new waste processing technology such as upgrading existing waste processing facilities. In circumstances where new technology becomes available, this contract structure is likely to allow for public benefits to continue to be realised over the proposed period of authorisation.
- 4.41. Given the ACCC's conclusions about the public benefits and public detriments likely to result from the Proposed Tendering Conduct, the ACCC grants authorisation until 1 July 2044.

### **Existing Contracts Conduct period of authorisation**

- 4.42. The Applicants also seek authorisation for four of the five Applicants to continue to give effect to the waste processing contracts entered into following authorisation A90886, until those contracts expire. This period comprises 6 July 2021 to 31 May 2024.
- 4.43. Given the ACCC's conclusions about the public benefits and public detriments likely to result from the Existing Contracts Conduct, the ACCC authorises Camden Council, Campbelltown City Council, Wingecarribee Shire Council and Wollondilly Shire Council to continue to give effect to the contracts entered into under authorisation A90886 beyond 6 July 2021 and until they expire on 31 May 2024.

## 5. Determination

### The application

- 5.1. On 7 August 2018, the Applicants lodged application AA1000428 with the ACCC, seeking authorisation for proposed collective tendering and contracting for waste processing services under subsection 88(1) of the CCA (**Proposed Tendering Conduct**).
- 5.2. On 3 October 2018, the Applicants amended application for authorisation AA1000428 to also seek authorisation for the councils of Camden, Campbelltown, Wingecarribee and Wollondilly to continue to engage in the conduct authorised by the ACCC in 2004 under application for authorisation A90886, for a further three years to continue to give effect to the contracts entered into following that authorisation until 31 May 2024 (**Existing Contracts Conduct**).
- 5.3. Together these two limbs of conduct make up the Applicants' **Proposed Conduct**.

### The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the CCA, 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 the benefit would outweigh the detriment to the public that would be likely to result from the proposed conduct.
- 5.5. For the reasons outlined in this 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 would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC has decided to grant authorisation.

### Conduct which the ACCC authorises

- 5.7. The ACCC grants authorisation AA1000428 to:
  - enable the Applicants to collectively tender and contract for the provision of services by one or more qualified contractors to receive, process, market and dispose of kerbside waste material, as described in paragraphs 1.12 to 1.14 (the **Proposed Tendering Conduct**), and
  - allow the councils of Camden, Campbelltown, Wingecarribee and Wollondilly to continue to give effect to contracts entered into following Authorisation A90886, as described in paragraph 1.15 and 1.16 (the **Existing Contracts Conduct**).
- 5.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
- 5.9. The ACCC grants authorisation for the Proposed Tendering Conduct until 1 July 2044. The ACCC grants authorisation for the Existing Contracts Conduct until 31 May 2024.

## Date authorisation comes into effect

5.10. This determination is made on 22 November 2018. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 14 December 2018.