



# Draft Determination and interim authorisation

Application for authorisation

lodged by

Southern Sydney Regional Organisation of Councils

in respect of

joint tendering of councils for processing services for hard waste

Authorisation number: AA1000431

19 December 2018

Commissioners:

Sims

Keogh

Rickard

Court

Featherston

## Summary

The ACCC proposes to grant authorisation to enable the Southern Sydney Regional Organisation of Councils (SSROC), on behalf of a group of seven Councils, to invite tenders for the processing of hard waste (otherwise known as clean up materials or kerbside clean up). The tenders will relate only to processing and disposal (not collection). Each of the Councils will then choose which tenderer they wish to contract with for the provision of the services.

The ACCC proposes to grant authorisation for 14 years.

The ACCC has also granted interim authorisation to enable the Councils to proceed with the tender process including inviting, receiving, analysing and evaluating tenders, but not entering into contracts, while the ACCC is considering the substantive application.

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

### 1. The application for authorisation

- 1.1. On 16 November 2018, the Southern Sydney Regional Organisation of Councils (**SSROC**), on behalf of a group of seven Sydney councils: Bayside Council; Burwood Council; Georges River Council; Inner West Council; Strathfield Council; Waverley Council; and Woollahra Council (the **Councils**) (together, the **Applicants**) lodged application for authorisation AA1000431 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants are seeking authorisation for SSROC, on behalf of the Councils, to run a tender process (and subsequently enter into contracts) in relation to the processing of hard waste and disposal of residuals (the **Proposed Conduct**).
- 1.3. Service providers may elect to tender to supply one or more of the Councils. Each Council will then choose only one tenderer to provide their required hard waste processing services. All successful tenderers will be contracted to SSROC through a Master Supply Agreement, and the Councils will contract with one or more of the successful tenderers through a Commissioning Agreement that is subject to the SSROC Master Supply Agreement.
- 1.4. Authorisation is sought for 14 years to provide for up to one year for a tender process, a seven year contract term and two possible three year extensions. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (the **CCA**).
- 1.5. The ACCC can grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law, provided the arrangements are likely to result in a net public benefit or, in some cases, are unlikely to substantially lessen competition.
- 1.6. The Applicants also requested interim authorisation to enable the parties to proceed with the tender process including inviting, receiving, analysing and evaluating tenders while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in section 6.

## 2. Background

- 2.1. SSROC is an association of 11 local government councils spanning Sydney's southern suburbs, eastern suburbs, CBD and inner west. Collectively the 11 councils account for a population of 1.7 million people.
- 2.2. Seven of these Councils wish to participate in the Proposed Conduct. These seven account for a total population of 740 000. SSROC submits the estimated collecting population of the areas covered by councils not participating in the Proposed Conduct within the Sydney region is 4.8 million. Currently, each Council is separately responsible for the disposal of hard waste – that is, items too large to be included in general waste, such as furniture, appliances, scrap metal and timber - and the ACCC understands that in some cases hard waste is compacted rather than processed for recovery or reuse. SSROC advises that some Councils' current contracts for hard waste processing will expire before, or soon after, the ACCC makes a final decision regarding authorisation.

## 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 a range of potentially interested parties including major providers of hard waste processing services and their industry associations, non-participating councils in the region, and state government agencies.<sup>1</sup>
- 3.3. The ACCC received one submission, from Macarthur Strategic Waste Alliance, expressing support for the application.

## 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 Proposed Conduct that may 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. This is because the Councils may otherwise be considered competitors in the acquisition of hard waste processing services. 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).
- 4.3. In its assessment of the application the ACCC has taken into account:
  - the application and submissions received from the Applicants and interested parties
  - other relevant information available to the ACCC, including information from consideration of previous matters

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<sup>1</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- the likely future without the Proposed Conduct that is the subject of the authorisation. In particular, the ACCC considers that, absent the Proposed Conduct, it is likely that each Council will continue to individually seek and contract for hard waste processing services, or alternatively that hard waste may be processed along with general waste
- the relevant areas of competition likely to be affected by the Proposed Conduct, particularly competition between suppliers and acquirers of hard waste processing services in the Sydney region, and
- the 14 year authorisation period requested.

## Public benefits

4.4. 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>2</sup>*

4.5. The ACCC is satisfied, based on the information before it, that the Proposed Conduct is likely to result in substantial public benefits in the form of:

- increased competition through encouraging new entrants, and encouraging tenderers to provide more competitive tenders than they may otherwise
- economic benefits through reduced transaction costs, through reducing the total administrative, legal, preparation and evaluation costs borne by Councils and waste service providers in conducting the tenders, and managing the contracts, separately
- environmental benefits, by increasing the recovery of resources from hard waste and therefore decreasing the amount of waste disposed of in landfill (particularly when compared to compacting of hard waste)
- improved education (as successful tenderers will be required to develop and provide education programs for residents to foster better management of waste) and increased opportunities for access to affordable re-used goods.

## Public detriments

4.6. 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 it 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>3</sup>*

4.7. The ACCC considers that the Proposed Conduct is likely to result in minimal public detriments because:

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2 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.

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

- waste service providers will be free to tender to supply as many, or as few, Councils as they elect
- there is significant population in the Sydney region not covered by the Proposed Conduct, which remains open for providers of hard waste processing services, such that this procurement process is unlikely to lessen competition for future contracts, and
- each Council is free to choose its own service provider on an individual basis.

## Balance of public benefit and detriment

4.8. For the reasons outlined in this draft 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.

## 5. Draft determination

### The application

- 5.1. On 16 November 2018, the Applicants lodged application AA1000431 with the ACCC, seeking authorisation under subsection 88(1) of the CCA.
- 5.2. The Applicants seek authorisation to enable:
- SSROC, on behalf of the Councils, to invite, receive, analyse and evaluate tenders for the processing of hard waste and disposal of residuals
  - SSROC to enter into contracts with each successful tenderer through a Master Supply Agreement, and
  - each Council to enter into a Commissioning Agreement with the tenderer of their choice
- (the **Proposed Conduct**).
- 5.3. Subsection 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### 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 draft 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 proposes to grant authorisation.

## Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to grant authorisation AA1000431 to enable the Applicants to jointly tender and enter into contracts as described in paragraph 5.2.
- 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 proposes to grant authorisation AA1000431 for 14 years.
- 5.10. This draft determination is made on 19 December 2018.

## 6. Interim authorisation

- 6.1. At the time of lodging the application, the Applicants requested interim authorisation to enable the parties to proceed with the tender process including inviting, receiving, analysing and evaluating tenders, but not to enter into any contracts, while the ACCC is considering the substantive application.
- 6.2. The Applicants submit that interim authorisation is required because:
  - the tender process is lengthy and will take several months or longer. Interim authorisation would allow SSROC to begin this process while waiting for a final decision by the ACCC, and
  - current hard waste processing contracts are nearing expiration and a suitable replacement is required.
- 6.3. The ACCC notes that the Applicants have requested interim authorisation only to enable it to run the tender process (not to enter into contracts). For this reason, it is unlikely that granting interim authorisation will result in any changes which could not be reversed should substantive authorisation ultimately be denied.
- 6.4. The ACCC considers that the expiration of current contracts, and the time frames involved in running the tender process, constitute a level of urgency for the Applicants to be able to commence the tender process, and that there may be harm to the Applicants should interim authorisation not be granted (in the form of a gap in the provision of hard waste processing services for some Councils).
- 6.5. Further, the ACCC's initial view, as set out in this draft determination, is that the Proposed Conduct is likely to result in substantial public benefits and minimal public detriment.
- 6.6. Therefore, the ACCC has decided to grant interim authorisation to allow the Applicants to proceed with the tender process including inviting, receiving, analysing and evaluating tenders, while the ACCC is considering the substantive application.
- 6.7. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

## 7. Next steps

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