



# Determination

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

14 February 2019

Commissioners:

Sims

Keogh

Rickard

Featherston

## Summary

The ACCC has decided 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 Council will then choose which tenderer they wish to contract with for the provision of the services.

The ACCC has decided to grant authorisation until 8 March 2033.

### 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 sought 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**, see paragraph 5.2).
- 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. On 22 December 2018, the ACCC issued a draft determination proposing to grant authorisation to the Proposed Conduct for 14 years. A pre-decision conference was not requested in response to the draft determination.
- 1.7. At the time of its draft determination, the ACCC also granted interim authorisation under subsection 91(2) of the CCA, to enable the parties to proceed with the tender process (but not enter into contracts), while the ACCC considered the substantive application. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.
- 1.8. On 21 January 2019, the Applicants clarified that, contrary to what was initially proposed, Councils would not require the successful tenderer to develop and provide

an education program for residents.<sup>1</sup> The Applicants advised that each Council may still choose to accept a tender offering education services, but this would not be a requirement of submitting a tender.

## 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. Upon receiving the application, 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>2</sup>
- 3.3. Prior to issuing its draft determination, the ACCC received one submission, from Macarthur Strategic Waste Alliance, expressing support for the application.
- 3.4. The ACCC did not receive any submissions in response to the draft determination.

## 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 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

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<sup>1</sup> See Clarification of Application, dated 21 January 2019, available at: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/southern-sydney-region-of-councils-ssroc>.

<sup>2</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).

would outweigh the detriment to the public that would be likely to result (authorisation test).

4.3. As part of its assessment 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
- 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>3</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).
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## 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:

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<sup>3</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.

*...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>4</sup>*

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

### The authorisation test

- 5.3. For the reasons outlined in this determination, and consistent with subsections 90(7) and 90(8) of the CCA, 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.
- 5.4. Accordingly, the ACCC has decided to grant authorisation.

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<sup>4</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

## Conduct which the ACCC authorises

- 5.5. The ACCC has decided to grant authorisation AA1000431 to enable the Applicants to jointly tender and enter into contracts as described in paragraph 5.2.
- 5.6. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA and may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
- 5.7. The ACCC grants authorisation AA1000431 until 8 March 2033.

## 6. Date authorisation comes into effect

- 6.1. This determination is made on 14 February 2019. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 8 March 2019.