



Statement of Reasons

In respect of a notification lodged by

Byron Shire Council (in its own right and on behalf of
Ballina Shire Council and Richmond Valley Council)

in respect of

collective bargaining with waste services providers

Date: 10 April 2019

Notification number: CB10000464

Commissioners:
Sims
Keogh
Featherston

Summary

The ACCC has decided not to object to the notification lodged by Byron Shire Council to enable Byron Shire Council, Ballina Shire Council and Richmond Valley Council to jointly tender, negotiate and administer contracts with the successful contractor for the receipt and processing of recyclables for their respective local government areas. The notification does not include services for the collection of kerbside waste or recyclables.

The ACCC has also decided to allow the notification to remain in force for a period of six years. The notification came into force on 29 March 2019 and will remain in force until 29 March 2025, unless it is withdrawn or revoked.

The ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the conduct.

The notification

1. On 15 March 2019, Byron Shire Council, in its own right and on behalf of Ballina Shire Council and Richmond Valley Council (collectively, the **Councils**), lodged a collective bargaining notification¹ to enable the Councils to:
 - engage in a joint Request for Tender (**RFT**) to engage an appropriately experienced contractor to provide the following services for their respective local government areas:
 - to receive, sort, recover, and process co-mingled recyclables from the Councils' respective collection services
 - to provide any additional services as agreed by the Councils and the successful tenderer
 - collectively negotiate individual contracts with the successful tenderer for the receipt and processing of recyclables from the Councils' respective collection services, and
 - collectively administer the individual contracts referred to above during the terms of those contracts.
2. This is referred to as the **Notified Conduct**.
3. The Councils have advised that the term of the contract to be entered into as part of the Notified Conduct will be three years with two options to extend for one year, at the sole discretion of the Councils. As such, the contract term will be a maximum of five years. The Councils intend to award the successful tender by 30 May 2019. Accordingly, the Councils are seeking a notification period of six years.²

¹ Businesses can obtain protection from legal action under the *Competition and Consumer Act 2010 (CCA)* for collective bargaining including associated collective boycotts by lodging a collective bargaining notification with the ACCC. Protection for collective bargaining (which does not involve a collective boycott) will generally commence 14 days after the collective bargaining notification is lodged.

² The ACCC may provide a written notice determining the expiry of the collective bargaining notice if the ACCC is satisfied that the standard three year period is not appropriate and another period (up to 10 years) is appropriate in all the circumstances. The ACCC must, in or with the notice, provide a written statement of its reasons for giving the notice.

4. The Councils lodged a similar but narrower collective bargaining notification (CB10000541³) in 2018. The key difference was that the 2018 notification, which remains in place, involves only one counter-party, being the Lismore Materials Recycling Facility (**MRF**), whereas the current notification involves jointly tendering and giving effect to individual contracts with **all** prospective suppliers of the above services (i.e. the counter-party can be **any** tenderer).
5. The Councils intend to engage the same contractor to service all their local government areas under separate contracts. The three Councils will have similar requirements under the agreement.

Consultation

6. The ACCC invited submissions from a wide range of interested parties, including potential targets. No submissions were received.

ACCC's Assessment

7. The ACCC has considered the Notified Conduct in accordance with section 93AC of the *Competition and Consumer Act 2010* Cth (**CCA**).
8. In doing so, the ACCC has taken into account:
 - The likely future with and without the Notified Conduct. The ACCC considers that, absent the Notified Conduct, the Councils may continue to *collectively* negotiate and contract for the receipt and processing of recyclables with the Lismore MRF (under the 2018 notification), or they may choose to *individually* negotiate and contract for these services with any provider.
 - The relevant areas of competition likely to be affected by the Notified Conduct. The ACCC considers that the primary area of competition is the market for the receiving, processing and disposing of co-mingled recyclables in the Northern Rivers region of NSW.

Public Benefit

9. The ACCC considers that, compared to a scenario where each Council conducts its own separate tender processes, the Notified Conduct is likely to result in the following public benefits:
 - Improved efficiency through:
 - sharing transaction costs (such as negotiation and contracting costs) between the Councils
 - coordinating the waste and recycling disposal operations of the Councils, and
 - economies of scale achieved through aggregation of larger volumes of co-mingled recyclables.
 - Improved environmental outcomes through:
 - supporting the viability of recycling waste which might otherwise have gone to landfill, and
 - reducing emissions from the transportation of waste as a result of coordination between the Councils.

³ The 2018 notification involved collectively tendering, negotiating and administering contracts with Lismore Materials Recycling Facility for the receipt and processing of recyclables and for individual refund sharing agreements with Lismore MRF.

10. Further, compared to a scenario where the Councils are permitted to collectively negotiate and contract only with Lismore MRF, the Notified Conduct is likely to result in increased competition between potential suppliers to provide processing services to the Councils. All else being equal, this is likely to be reflected in improved terms and conditions negotiated in service agreements.

Public Detriment

11. The ACCC considers that the Notified Conduct is likely to result in minimal, if any, public detriment from any reduction in competition between the Councils to acquire waste services because:
 - there are a number of remaining potential acquirers of waste processing services, both in NSW and Australia, such that the Notified Conduct is unlikely to limit the ability of unsuccessful tender applicants and other market participants to continue to compete for waste processing work
 - the Councils propose to use a tender process which will ensure that there is competition between waste services providers to win the contract, and
 - participation in the Notified Conduct is voluntary for the Councils.

Period for which the Notification will be in force

12. A collective bargaining notification (and therefore the protection it confers) will be in force for a period of three years from the date it is lodged unless the ACCC determines that another period is appropriate or the notification is withdrawn or revoked.
13. In this case, as part of the Notified Conduct, the Councils are proposing to enter a contract with a maximum five year term, comprising a three year contract term and two extension options of one year. As such, the Councils sought to have the notification extend for a six year period.
14. Having regard to these estimated dates and the term of the proposed contracts, the ACCC considers that it is appropriate for the notification to remain in force until 29 March 2025 for the following reasons:
 - the likely benefits of the Notified Conduct may be expected to continue for the duration of the Notified Conduct and therefore total benefits are likely to be greater with the extended notification period
 - the extended notification period is likely to improve business certainty for potential suppliers and the Councils, which may support further investment in recycling services
 - the extended notification period is unlikely to increase the minimal public detriment which is likely to result from the Notified Conduct
 - in this case, it is administratively efficient for the period of legal protection to cover the maximum five year period of the contracts and an additional period to enable the Councils to carry out the tender process and award the successful tender, which they expect to do by 30 May 2019.

Decision

15. The ACCC considers that the benefit to the public that is likely to result from the Notified Conduct will outweigh the detriment to the public that is likely to result.
16. Accordingly, the ACCC does not object to the notification at this time. As with any notification, in accordance with s 93 AC of the CCA, the ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the likely

benefit to the public from the Notified Conduct will not outweigh the likely detriment to the public from the conduct.

17. With respect to the period for which the notification will remain in force, for the reasons set out in paragraph 14 above, in accordance with s 93AD(5), the ACCC is satisfied that:
 - a three year notification period is not appropriate in all the circumstances, and
 - another period is appropriate in all the circumstances, being the period ending on 29 March 2025.⁴
18. Accordingly, the protection provided by notification CB10000464 commenced on 29 March 2019 and will continue until 29 March 2025, unless the notification is withdrawn or revoked.
19. This Statement of Reasons serves as the written notice and written statement of reasons for giving that notice required by section 93AD(6) of the CCA.

⁴ As required by s 93AC(5)(b), this period will end no later than 10 years after the day that the notification was lodged.