



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation of Authorisation

lodged by

**Council of Camden, Campbelltown City Council,
Wollondilly Shire Council and
Wingecarribee Shire Council**

in respect of

*Collaboratively tendering for the services of qualified contractors
able to process, market or otherwise dispose of
kerbside collected waste materials
(excluding bulky materials)*

Authorisation number: A90988

Date: 23 November 2005

Reference file: C2005/167/9

Commissioners: Samuel
Sylvan
Martin
King
McNeill
Smith
Willett

1. The Application

- 1.1 On 29 September 2005, Councils of Camden, Campbelltown City, Wollondilly Shire and Wingecarribee Shire (the Councils) lodged an application for a minor variation to authorisation A90886, under s 91A of the *Trade Practices Act 1974* (TPA).
- 1.2 Authorisation A90886 relates to the making and giving effect to the provisions of an agreement that would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of s 45 of the TPA.
- 1.3 On 16 December 2004, the Australian Competition and Consumer Commission (ACCC) granted authorisation to the Councils to conduct a collective tender process and to enter into contracts pursuant to that process in relation to the processing, marketing or disposal of kerbside collected waste material. Authorisation was granted for the following periods:
 - for the period of the collective tender process up to a maximum of 12 months from the date the final determination comes into effect (to 7 January 2005); and
 - for the term of the contracts entered into under the tender process up to a maximum of 15 years.
- 1.4 The application for minor variation proposes to vary the period in which the collective tender process is to be completed from 12 to 18 months (to 7 July 2006).

2. Statutory provisions

- 2.1 Under section 91A of the TPA, the ACCC must invite submissions from interested parties if it is satisfied that the variation sought is a minor variation.
- 2.2 A minor variation is defined by section 87D of the TPA as a single variation that does not involve a material change in the effect of the authorisation.
- 2.3 The ACCC considers the application and any submissions received, and then may make a determination varying the authorisation or dismissing the application.
- 2.4 Under sections 91A (4) and (5) of the TPA, the ACCC must be satisfied that the variation would not result, or would be likely not to result, in a reduction in:
 - the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation; or
 - the benefit to the public that arose from the original authorisation.

3. Minor Variation

- 3.1 In previous considerations the ACCC has declined to treat as minor an application for variation which seeks to extend the period of authorisation.

- 3.2 The ACCC considers however that Councils' application may be distinguished from its previous considerations of such requests. In reaching this view the ACCC noted the following:
- (i) the application seeks to vary a component of the period of authorisation only and does not extend the period in which the resulting contracts may be in force; and
 - (ii) the additional period sought is small in the context of the matter.

4. Submissions

The Councils' submission

- 4.1 The Councils have submitted that the application for variation has been made as a safeguard should there be any delay in the collective tendering process allowed under the original authorisation.
- 4.2 The Councils submit that since authorisation was granted on 16 December 2004, the Councils have made significant progress through the tendering process and have committed extensive resources to the project during the development of tender documents.
- 4.3 The Councils note that they have developed the tender documents with the aim of allowing the proponents to submit conforming tenders.
- 4.4 The councils submit that, should a non-conforming tender be the preferred option under the collective tender process, addressing requirements under the Local Government (General) Regulations would be likely to result in considerable delay. In such circumstances it would be unlikely that the tender process would be completed in the period provided by authorisation A90988.
- 4.5 The Councils submit that the variation to the original authorisation is required so that any non-conforming tenders can be considered on their merits without being restricted by current time frames.

Submissions from interested parties

- 4.6 Two submissions were received from Waste Contractors and Recyclers Association of NSW and WSN Environmental Solutions. Both submissions had no objection to the application to vary the period for completing the tender process.

5. Commission's Evaluation

- 5.1 The ACCC's reasons for granting authorisation A90886 are set out in the determination issued on 16 December 2004.
- 5.2 With regard to the application for minor variation, the ACCC accepts the submissions by the Councils that the proposed variation will act as a safeguard should the tender process not be completed within the period provided for by the original authorisation.

5.3 The ACCC is of the view that granting the minor variation will not lessen the public benefits or increase the public detriment arising from the conduct authorised by authorisation A90886.

6. Determination

6.1 The ACCC is satisfied that the variation to authorisation A90886 is minor, as it does not involve a material change in the effect of the authorisation.

6.2 The ACCC is further satisfied that the variation to authorisation A90886 which is the subject of this application would not result, or would be likely not to result, in a reduction in:

- the extent to which the benefit to the public of the authorisations outweighs any detriment to the public caused by the authorisations; or
- the benefit to the public that arose from the original authorisations.

6.3 The ACCC therefore varies authorisation A90886 to provide:

- for the period of the collective tender process up to a maximum of 18 months from the date the original authorisation came into effect (7 January 2005)

6.4 This determination is made on 23 November 2005. If no application for a review of this determination is made to the Australian Competition Tribunal, it will come into force on 15 December 2005. If an application for review is made to the Tribunal, the determination will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
- where the application is withdrawn – on the day on which the application is withdrawn.