



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for revocation and substitution of  
authorisation

lodged by

Northern Sydney Regional Organisation of Councils

in respect of

collective tendering for waste transfer,  
processing and disposal services

Date: 26 February 2014

Authorisation number: A91401

Commissioners: Sims  
Schaper  
Rickard  
Cifuentes  
Court

**The ACCC proposes to revoke authorisation A30231 and grant authorisation A91401 in substitution. The substitute authorisation would be for the Northern Sydney Regional Organisation of Councils and participating member councils to tender and contract jointly for waste transfer, processing and disposal services. The ACCC proposes to grant authorisation until 31 December 2030.**

**The ACCC has also decided to grant interim authorisation, which will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.**

#### **Next steps**

**The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.**

## **The application for authorisation**

1. On 16 December 2013, Northern Sydney Regional Organisation of Councils (NSROC) lodged an application for revocation and substitution of authorisation with the ACCC. NSROC seeks authorisation for it and participating member councils to tender and contract jointly for waste transfer, disposal and processing services.
2. NSROC has sought authorisation until 31 December 2030. It intends to start a tender process in February 2014 and conclude it within 18 months of its start date. It then intends to award a contract or contracts for up to 15 years (10 years plus a five-year option), concluding not later than 31 December 2030.
3. At the time of lodging the application, NSROC also requested interim authorisation to enable it and participating councils to commence the joint tender process.

## **Background**

### **Revocation and substitution**

4. On 16 December 2004 the ACCC granted authorisation A30231 to eight north-Sydney councils for the joint tendering and contracting of waste transfer, processing and disposal services. As requested, the ACCC authorised the councils to run a collective tender process for up to a year from 3 March 2004 and to enter contracts for up to 15 years.
5. NSROC states that the collective tender process the ACCC authorised did not result in finalisation of a joint contract or joint contracts as the councils did not receive any complying offers.

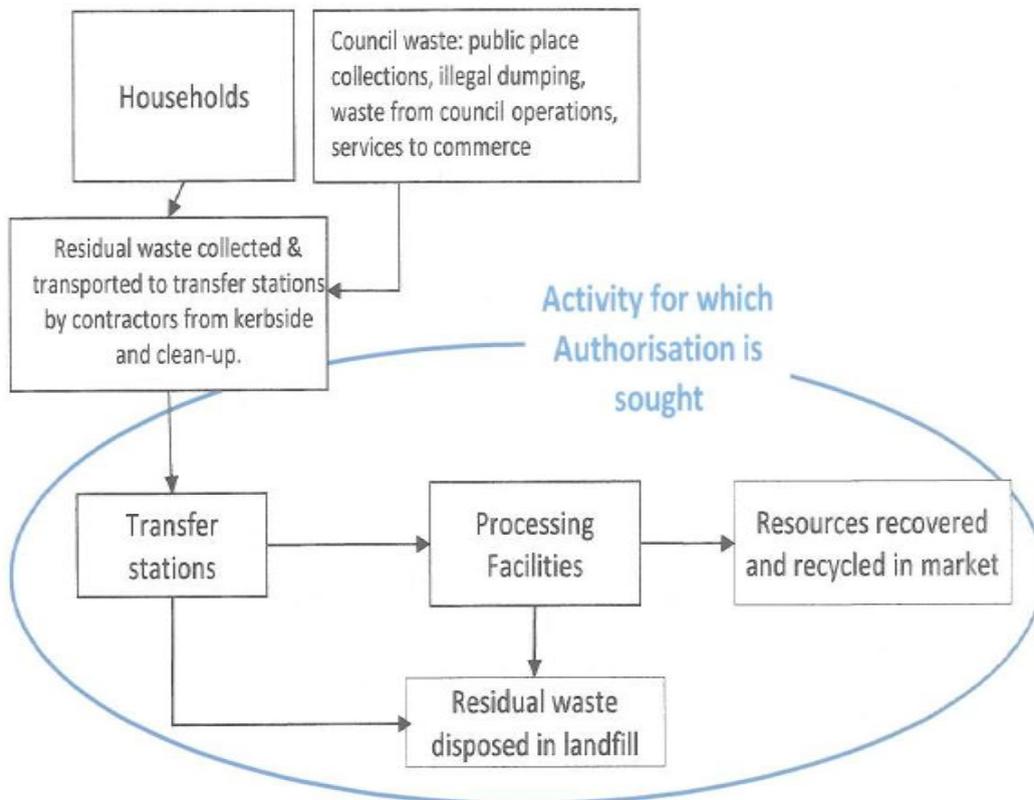
### **The councils and services**

6. NSROC has seven member councils, roughly running north to north-west from the Sydney Harbour Bridge: Hornsby, Hunter's Hill, Ku-ring-gai, Lane Cove, North Sydney, Ryde and Willoughby. One of the service functions of these councils under state law is the provision, management or operation of waste removal, treatment

and disposal services and facilities. These laws also prescribe council tendering processes. Presently, all councils except Hornsby have committed to participate in the proposed joint tender for waste transfer, treatment and disposal.

7. The relevant waste-handling chain is as follows: contractors acting for the participating councils collect 'residual' waste (as opposed to 'dry recyclable' and 'green' waste) and transport it to the facilities of waste processing and disposal-service suppliers. This authorisation application relates to the services provided by those processing and disposal-service suppliers, who will process an agreed portion of the waste to recover resources at an Alternative Waste Treatment facility and then deposit remaining waste in landfill. Thus the three key parts of this section of the waste chain are:
  - a. Transfer stations / facilities: where domestic residual waste collected at the kerbside is deposited and consolidated before it is moved to waste processing facilities or landfill
  - b. Alternative Waste Treatment facilities: these reduce the volume of waste going to landfill by converting waste into compost or similar material, extracting recyclables or applying thermal treatment to produce energy
  - c. Landfill facilities.

**Figure 1: 'Activity for which authorisation is sought' (source: NSROC application)**



**Figure 2: Domestic residual waste volumes, council by council**

<b>Council</b>	<b>Domestic residual waste, tonnes, 2011-12</b>	<b>Processed through AWT, tonnes, 2011-12</b>
Hornsby	37,841	-
Hunters Hill	3225	1671
Ku-ring-gai	23,869	-
Lane Cove	8136	-
North Sydney	14,091	7194
Ryde	25,736	-
Willoughby	16,923	4734
Total – NSROC	129,821	13,599
Total – Sydney Metropolitan Area	1,029,387	197,213
Total – NSW	2,105,712	221,397

**Source:** NSROC, citing NSW Environment Protection Authority

8. NSROC states that the tender will result in one or more contracts with a service provider or service providers. The group of councils will be the single purchaser.

## **Similar authorisations**

9. Over the past 15 years, the ACCC has considered a number of similar authorisation applications for joint tendering and contracting for waste services. These applications have generally come from groups of councils in Sydney and regional NSW and Queensland. The ACCC has granted authorisation to each of these applications with terms ranging from seven to 20 years.
10. The ACCC recently concluded its assessment of the following authorisation applications:
  - a. A91352 lodged by the Inner Sydney Waste Management Group, comprising Burwood Council, Ashfield Council, Auburn Council, City of Canada Bay Council, Leichhardt Council and Strathfield Council, to jointly tender and contract for the processing of residential dry recyclable material. On 19 June 2013, the ACCC granted authorisation for a period of 10 years.
  - b. A91361 lodged by Wollongong City Council and Shellharbour City Council to jointly tender and contract for waste collection services and for recyclables processing at a material recovery facility. On 31 July 2013 the ACCC granted authorisation until 30 June 2029.
  - c. A91387 lodged by the Bathurst Regional Council and other councils including Blayney, Blue Mountains, Forbes, Parkes and Wellington to jointly

tender and contract for waste collection, receiving and processing of recyclables and receiving and processing organic waste services. On 12 February 2014, the ACCC granted authorisation for 13 years.

## Submissions received by the ACCC

11. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
12. The ACCC sought submissions from 22 interested parties potentially affected by this application, including waste-services providers, local councils, industry associations and government authorities. The ACCC received two detailed submissions<sup>1</sup>:
  - a. Waste Contractors & Recyclers Association of NSW submitted that:
    - i. any tender awarded should be strictly for the services requested in the tender specification. The Association and its members understand that any 'add-on' services not described in the authorisation application (such as kerbside collection and clean ups and providing bins) will not be part of the tender
    - ii. the tender process and contracts should comply with
      - i. NSW Environment Protection Authority
        1. service timelines [a project management tool for the waste-collection contract-management cycle]
        2. model contracts and
        3. Better Practice Guide for waste management in multi-unit dwellings and
      - ii. WorkCover NSW's Collection of Domestic Waste Code of Practice.
  - b. Veolia Environmental Services, which is one of three businesses now supplying waste services to NSROC member councils, said it did not object to the consolidation of NSROC contracts. It said consolidating waste volumes can provide benefits for small to medium-sized councils and also offers service providers critical volume to develop innovative solutions that may have substantial capital requirements and require economy of scale. However, there should be an opportunity for service providers to contract with individual councils, as joint tendering can restrict competition. Veolia requested that the ACCC consider this as a condition of consolidation.

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<sup>1</sup> Waste-management company J.J. Richards & Sons also told the ACCC that it had no objections to the application.

13. Copies of public submissions may be obtained from the ACCC's website [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

## ACCC evaluation

14. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests<sup>2</sup> contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
15. In order to assess the effect of the proposed conduct and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

## The relevant area of competition

### NSROC's submissions

16. NSROC submits that its councils manage about 12 per cent of the household residual (not dry recyclable or green) waste generated in the Sydney Metropolitan Area (which includes about 40 local government authorities). It submits that the market for goods or services proposed to be tendered consists of the facilities noted above in paragraph 7: transfer stations, waste treatment facilities and landfill facilities. NSROC's existing service providers for domestic residual waste transfer, disposal and processing assistance are Global Renewables, SembCorp SITA and Veolia Environment Services.
17. NSROC submits that
- a. Waste treatment and landfill facilities accessible to the transfer stations in northern Sydney to process or dispose of domestic residual waste are limited in both number and capacity
  - b. Barriers to entering the waste disposal and processing service market for Sydney councils are considerable and a lengthy period is required to become established. For example, it takes a lot of time and effort to consult stakeholders about and get approvals for new facilities; and it can be a challenge to access transfer stations (which, in the case of road-based transfer stations, are all owned by one company [SembSITA Australia]).
  - c. Competition in the waste disposal and processing market is presently limited as there are few service providers who have the existing infrastructure and capacity to respond to the tender.
18. NSROC submits that approaching the market with a larger volume over a significant contract term will help to address the barriers facing new entrants and the investment uncertainty for expanding existing facilities as the tender may attract

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<sup>2</sup> Subsections 90(5A) and 90(5B), 90(6) and 90(7). The relevant tests are set out in **Attachment A**.

new entrants and underpin the development of new sites and the introduction of new technologies.

### **ACCC consideration**

19. The ACCC does not consider it necessary to identify the relevant areas of competition precisely in assessing this application. However, the ACCC considers that the relevant areas of competition likely to be affected are: the provision of waste transfer, processing (Alternative Waste Treatment) and disposal (landfill) services in or otherwise able to service metropolitan Sydney.

## **The future with and without**

20. To assist in its assessment of the proposed conduct against the authorisation tests, the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.

### **NSROC's submissions**

21. NSROC notes that the ACCC granted authorisation in 2004 for certain north-Sydney councils to tender and contract jointly for waste transfer, processing and disposal services but NSROC states that the councils did not receive any complying offers. Since that time NSROC councils have been independently sourcing waste management services through individual contracts.

### **ACCC consideration**

22. The ACCC considers that without the joint tender, the councils would continue to tender and contract for services independently. Given that long-term processing and disposal contracts are prevalent, individual councils might or might not enter into contracts for periods similar to those proposed under the joint tender.

## **Public benefit**

23. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>3</sup>

### **NSROC's submissions**

24. NSROC submits that jointly tendering and contracting is likely to result in public benefits as follows.

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<sup>3</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- a. The contract or contracts awarded under the joint tender would provide an incentive for the provision of Alternative Waste Treatment processing capacity and assist councils in achieving the NSW state environmental policy target of reducing landfill and diverting 70 per cent of waste by 2021. NSROC submits that in the next three to four years waste processing will cost more than sending to landfill, however this is likely to change in the future as more processing capacity is created and landfill taxes continue to rise.<sup>4</sup>
- b. Approaching the market with a larger volume of waste, over a significant [long] contract term will help to address barriers facing new entrants and reduce investment uncertainty when parties are considering expanding facilities.
- c. Service providers could offer lower prices to councils through passing on economies of scale.
- d. Councils would be able to reduce transaction costs related to such matters as staying abreast of technology and legislative changes, assessing tenders, negotiating, reporting to other governments, getting legal input into contract drafting and taking action on any service failures.
- e. Collaboration between the councils also represents and encourages, for example, information exchange and joint problem solving regarding issues surrounding waste management.

### **ACCC consideration**

25. Consistent with its conclusions on similar recent matters, the ACCC considers that the proposed conduct is likely to result in some public benefit, as follows:

- a. **Increased competition, by incentivising new entry and / or expansion:** If the councils combine to offer a larger volume of waste, this may make suppliers, including existing providers and possible new entrants, compete harder to win the tender. Aggregating volume can provide:
  - i. Improved economies of scale and reduced operational risk for providers (which can also lower funding costs)
  - ii. Improved incentives for capital investment: Against a background of considerable challenges in expanding or creating new waste facilities in Sydney (such as lack of space and the complexity of obtaining approval), if the councils offer this combined volume of waste material, it might improve the chance of providers being willing to invest capital and of providers other than those now servicing the councils being interested in the tender.

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<sup>4</sup> About half the NSROC region's waste now goes to landfill and this has become expensive, due to state and Commonwealth taxes and transportation costs. The applicants explain that, in particular, a state-government waste levy that increases annually makes disposal of waste to landfill gradually more expensive and moves Alternative Waste Treatment towards becoming relatively cost effective. See also NSW Environment Protection Authority, *Draft NSW Waste Avoidance and Resource Recovery Strategy 2013-21*, page 7.

Whether and to what extent these benefits might be realised may depend on the tender's terms and whether one or more than one service provider wins the work.

- b. **Transaction cost savings:** The process of tendering for waste management services in NSW is not trivial. It involves considerable documentation, assessments and government supervision. Negotiating and contracting with the winning tenderer is also likely to be complex. The ACCC considers that the transaction costs are lower where a single process is employed, relative to a situation where each council conducts its own individual tender process.
- c. **Better purchasing power for the Councils:** compared with each council bargaining individually, councils will be in a stronger bargaining position. This may help them get a lower price and / or higher level of service.
- d. **Environmental benefits:** the collective tender may encourage the development of further Alternative Waste Treatment capacity and / or more diversion to AWT more quickly than might otherwise be the case.

## Public detriment

26. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...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>5</sup>

## NSROC's submissions

27. NSROC says it expects no public detriment to arise from the conduct. It submits, among other things, that the volume it is offering is large enough to create incentives for existing and potential market participants but not so large as to risk distorting the market. The proposed collective tender will not reduce the pool of buyers for waste services significantly, as there are more than 40 local government authorities in the Sydney Metropolitan Area managing waste and NSROC councils account for about 12 per cent of the Area's household residual waste.

## ACCC consideration

28. Once NSROC awards a contract or contracts, businesses not winning a contract will not be able to compete for the councils' waste transfer, processing and disposal business for the duration of the contracts, which may be up to 15 years. However, the ACCC considers that the proposed conduct is likely to result in limited public detriment for the following reasons:

- a. Given the long-term nature of the contract, there may be little or no competition for up to 15 years but there should be competition 'for the market' (competition to win the contract for the specified contract period) at the time of the tender and, again, at the time the contract or contracts end<sup>6</sup>

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<sup>5</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

<sup>6</sup> This is in contrast to ongoing competition 'in the market'.

- b. Although the councils as a group (that is, NSROC) will be a single purchaser, NSROC is prepared to engage more than one service provider to deal with the group's waste
  - c. NSROC-member councils are not bound to participate in the collective process, as evidenced by Hornsby's decision at this stage to decline to participate
  - d. Likewise, potential service providers can still seek to approach individual councils if they wish.
29. With regard to the submissions from Waste Contractors & Recyclers Association of NSW, the ACCC notes that:
- a. authorisation granted to NSROC and the councils would be for the conduct they have proposed to the ACCC – tendering and contracting jointly for waste transfer, processing and disposal services. They have not sought statutory protection for and would not have statutory protection for the joint tendering and contracting of such other services as kerbside collection and providing bins
  - b. While the tender documents are yet to be drafted, the ACCC's expectation would be that NSROC would apply and comply with applicable guidelines issued by the NSW Environment Protection Authority<sup>7</sup>, and WorkCover NSW<sup>8</sup>.
30. Veolia Environmental Services has asked that the ACCC consider making it a condition of authorisation that there is the opportunity to separately let multiple service contracts with separate individual councils to more than one service provider.
31. The ACCC considers that the condition suggested by Veolia is not required, as potential service providers can still seek to approach individual councils if they wish. NSROC-member councils are not bound to participate in the collective process, as evidenced by Hornsby's decision at this stage to decline to participate.
32. The ACCC also notes that NSROC has said it will consider engaging more than one service provider to manage the volume of group waste.

## **Balance of public benefit and detriment**

33. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

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<sup>7</sup> This states among other things, that model contracts should be designed to save time and money when tendering and contracting, including through the use of standard documents and consistent approaches.

<sup>8</sup> This states that its waste-collection code of practice provides guidance to prevent injury and illness.

34. In the context of applying the net public benefit test in subsection 90(8)<sup>9</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>10</sup>

35. For the reasons outlined in this draft determination, the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.

36. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

## Length of authorisation

37. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>11</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the 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.

### NSROC's submissions

38. NSROC and the Councils are seeking authorisation until 31 December 2030. It intends to start a tender process as soon as possible and conclude it within 18 months of its start date. It then intends to award contracts for up to 15 years (10 years plus a five-year option), concluding not later than 31 December 2030.

39. NSROC says it intends to offer a 10-year contract (and an option for a five-year extension), to maximise the likelihood that industry will invest in the transfer facilities and / or processing plant at existing or new sites that are needed to meet the councils' long-term goals for increasing resource recovery from waste and reducing reliance on landfills. Matters such as approval risks and high capital costs inhibit augmenting existing processing capacity. To offset such risks, service providers seek long-term security of supply and volume.

40. NSROC says the tender would seek for processing (and thus diversion from landfill) to increase over the contract term. The five-year extension option may be exercisable if the provider can guarantee further significant diversion from landfill.

### ACCC consideration

41. The ACCC has granted authorisation to similar previous applications for terms ranging from seven to 20 years.

42. The ACCC proposes to grant authorisation in this matter until the date requested, 31 December 2030, on the basis that bidders are likely to want a considerable period of commercial certainty to make longer-term investments in facilities.

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<sup>9</sup> The test at subsection 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>10</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

<sup>11</sup> Subsection 91(1).

# Draft determination

## The application

43. On 16 December 2013, NSROC, on behalf of participating member councils, lodged application for revocation and substitution A91401 with the ACCC. Application A91401 was made using Form FC Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsections 91C (1) of the Act to tender and contract jointly for waste transfer, processing and disposal services.
44. Subsection 90A (1) requires that, before determining an application for authorisation, the ACCC shall prepare a draft determination.

## The net public benefit test

45. For the reasons outlined in this draft determination, the ACCC is satisfied pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the Act<sup>12</sup>, that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
46. The ACCC therefore **proposes to grant** authorisation to application A91401.

## Conduct for which the ACCC proposes to grant authorisation

47. The ACCC proposes to grant authorisation to NSROC and participating member councils to tender and contract jointly for waste transfer, processing and disposal services, until 31 December 2030.
48. This draft determination is made on **26 February 2014**.

## Interim authorisation

49. At the time of lodging the application, the Councils requested interim authorisation to commence work on the joint tenders. Participating councils' existing contracts for waste disposal and processing services conclude or may be terminated throughout 2014 and 2015 and, if councils could not issue a tender soon, there would be a risk that new contracts might not be in place before the end dates of some existing contracts.
50. NSROC has also stated that it will not enter into any contracts until after the ACCC makes its final determination.
51. When considering interim authorisation, the ACCC considers a range of factors, including harm to the applicant and other parties if interim authorisation is or is not granted, possible benefit and detriment to the public, the urgency of the matter and

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<sup>12</sup> See **Attachment A**.

whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.

52. The ACCC **grants** interim authorisation under section 91(2) of the Act to enable NSROC and its member councils to commence a joint tender for contracts to provide waste transfer, processing and disposal services for participating councils. In reaching this decision the ACCC has had regard to the following issues:
- Interim authorisation is limited to commencing the tender process and will enable the Councils to invite tenders prior to the expiry of existing contracts. The Councils will not enter into contracts until the ACCC issues its final determination.
  - Interested parties did not raise any objections with the ACCC.
53. The ACCC grants interim authorisation on the basis that NSROC and its member councils can accept and assess bids under the tender but will not conclude any joint contracts until the ACCC's final determination is made.
54. Interim authorisation will commence on **26 February 2014** and remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## **Further submissions**

55. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

## Attachment A - Summary of relevant statutory tests

**Subsections 90(5A) and 90(5B)** provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Subsections 90(6) and 90(7)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

**Section 91** allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.