



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of authorisation A91019
and its substitution with authorisation A91530

lodged by

Hurstville City Council, Kogarah Municipal Council
and Rockdale City Council

to

continue to jointly contract
for the provision of
waste and recycling collection services

Date: 1 June 2016

Authorisation number: A91530

Commissioners:
Sims
Schaper
Court
Featherston

Summary

The ACCC proposes to authorise Hurstville City Council, Kogarah Municipal Council and Rockdale City Council to continue to jointly contract for the provision of waste and recycling collection services in their respective local government areas until 2 February 2023.

Next steps

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

The application for authorisation

1. On 2 March 2016 Hurstville City Council, Kogarah Municipal Council and Rockdale City Council (the **Applicants**¹) applied for the revocation of authorisation A91019, and the substitution of authorisation A91530.
2. Authorisation A91019 was granted on 21 March 2007 for the Applicants to jointly tender and contract for the provision of all waste and recycling services in their respective local government areas. Authorisation A91019 was granted until 30 June 2018 (**existing authorisation**).
3. The Applicants wish to invoke clauses in their waste and recycling collection contracts with the successful tenderer (SUEZ Recycling & Recovery Pty Ltd) to extend those contracts by five years. In order to facilitate this, the Applicants seek authorisation to continue to jointly contract for the provision of all waste and recycling services in their respective local government areas until 2 February 2023 (the **Conduct**).
4. The Applicants have not sought authorisation for any further joint tendering processes.

Background

5. The Applicants are all councils for the purposes of the *Local Government Act 1993* (NSW). The local government areas administered by the Applicants are located in inner Sydney, south of the central business district, and have a combined area of approximately 74 square kilometres.²
6. The Applicants submit that the NSW Waste Avoidance and Resource Recovery Strategy 2014-21 (NSW EPA, 2014) has a strong emphasis on using regional solutions to achieve waste management objectives and resource recovery targets. Additionally, that the NSW State Government's current amalgamation proposal indicates strong support for regional solutions.³

¹ Also referred to as the St George Region of Councils or SGROC.

² Further background and demographic information about the council areas was presented in the ACCC's final determination regarding authorisation A91019, 21 March 2007, section 2.

³ Applicant submission, Attachment C, p.3.

7. The ACCC has authorised a number of other groups of councils to jointly tender and contract for waste management services in Sydney, NSW and around Australia. However, the ACCC notes that the St George Region of Councils is currently the only group which is authorised to jointly tender and contract for waste and recycling collection services in the Sydney metropolitan area.⁴

Consultation

Interested parties

8. The ACCC invited submissions from a wide range of potentially interested parties seeking comment on the application for authorisation. One submission was received from JJ Richards & Sons Pty Ltd (JJ Richards).
9. JJ Richards did not comment specifically on whether the contract extensions were likely to result in public benefits or detriments in this instance, but expressed concern about the growing number of applications from local government authorities for joint waste collection tender processes. JJ Richards submits that a reduction in the number of waste tender processes will also reduce competition, stifle innovation and the introduction of new technology which would otherwise result in improved efficiency, reduced cost, better quality of service and a positive impact on the environment.
10. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

The applicants

11. The Applicants consider that the arrangements currently authorised have resulted in public benefits which will continue if the existing collection contracts are extended. In support of this, they submit the following:
 - cost savings of around \$46 million have been made over the initial term of the contracts based on the difference between the current collection contract prices and the prices in the previous contracts.⁵ These cost savings have been passed on to rate payers through various means including subsidising the increasing cost of waste disposal and processing; direct rebates to rate payers; and reduction in rates;⁶
 - cost savings for rate payers will result from granting a five year contract extension. The Applicants provided the ACCC with confidential information estimating these likely future cost savings;
 - the cost of preparing tender documents, inclusive of initial investigations, writing tender documents, administering the tendering process and evaluating tenders is significant. The Applicants also submit that allowing

⁴ Four separate groups of councils in regional NSW are currently authorised by the ACCC to jointly tender and contract for waste and recycling collection services (authorisations A91483, A91387, A91361 and A91289). Seven separate groups of councils in the Sydney metropolitan area are currently authorised by the ACCC to jointly tender and contract for waste management services other than waste collection (authorisations A91409, A91401, A9135, A91180, A91143/A91167, A91096 and A90988).

⁵ Applicant submission, Attachment C, p.4.

⁶ Applicant submission, Attachment C, p.6.

the costs of the tender process to be amortised over 15 years rather than 10 years would provide even more benefit to the Applicants and their communities. The Applicants provided the ACCC with confidential information estimating these costs and the cost savings from a joint tender process;

- the existing authorisation has led to the establishment of a year-round e-waste drop off and recycling service – located in Hurstville but available to residents in all three council areas;⁷
- the Applicants have worked cooperatively to reduce illegal dumping through the “Dumping. It’s Dumb” campaign as well as setting up the Regional Illegal Dumping Squad;⁸
- the Applicants share ideas and knowledge in order to provide the best education solutions for the community by using consistent educational material through the three municipalities.⁹ Also, several joint education programs have also resulted since the commencement of the contracts;
- the existing authorisation has contributed to reducing the use of landfill in a variety of ways including:
- using the cost savings to invest in alternative waste processing technologies to divert residual waste from landfill;
 - i. introduction of new collection systems to divert garden organics from landfill;
 - ii. education initiatives to increase recycling; and
 - iii. joint recovery initiatives such as the e-waste drop off; and¹⁰
- the joint collection arrangement has resulted in the revision of collection routes so that collections are only performed in Rockdale two days a week, in Hurstville two days a week and in Kogarah once a week. The Applicants submit that by concentrating the vehicles in one local government area each day, traffic disruptions and traffic related noise has been reduced.¹¹

12. The Applicants consider that authorisation of the Conduct will not deliver any anti-competitive detriments and note the following.

- Since the Applicants conducted their joint tender process in 2007, the ACCC has authorised at least two joint council waste collection arrangements involving contract periods of 15 years or more, and at least three joint council waste processing arrangements involving contract periods of 15 years.
- Contract extension terms are common practice in waste collection contracts and allow councils to maximise the length and value of a contract that has proven to be successful and beneficial, as is the case with the current collection contracts.

⁷ Applicant submission, Attachment C, p.5.

⁸ Applicant submission, Attachment C, p.5.

⁹ Applicant submission, Attachment C, p.5.

¹⁰ Applicant submission, Attachment C, p.6.

¹¹ Applicant submission, Attachment C, p.7.

- The ACCC granted authorisation A91019 for 10 years but took the view that ‘authorisation for longer than 10 years will not necessarily enhance efficiency gains, as the need to replace expensive equipment will eventually arise’. In response to this, the Applicants state that the equipment to be provided as part of the waste collection contract includes collection vehicles and bins. The Applicants submit that tenderers take into account the potential costs and benefits of contract extensions and will have made provisions to ensure that collection vehicles and bins are maintained in good working condition, not only for the original contract term, but also any optional extension periods,¹²
- In authorisation A91019, the ACCC also noted in relation to the length of authorisation that ‘NSW councils have been encouraged to limit the terms of their waste contracts in order to maintain maximum flexibility in responding to new and emerging technologies’. In response to this, the Applicants submit that most of the changes in technology over the contract term relate to waste processing and technologies relating to waste collection have not changed since the commencement of the existing waste collection contracts.¹³ Furthermore, the Applicants submit that they have included a clause in their contracts for ‘variations and better performance.’ Under this clause, the contractor is encouraged to propose innovative arrangements for the provision of services, which then may be included as a variation to the contract.¹⁴

ACCC assessment

13. The ACCC’s assessment of the Conduct is in accordance with the relevant net public benefits tests¹⁵ contained in the *Competition and Consumer Act 2010* (the **CCA**).

14. In its assessment of the application the ACCC has taken into account:

- the application and submissions received from the applicant and an interested party;¹⁶
- other relevant information available to the ACCC, including information from consideration of previous matters;¹⁷
- the likely future without the Conduct that is the subject of the authorisation.¹⁸ In particular, the ACCC considers that, absent the Conduct, the existing authorisation would continue to run until 30 June 2018 and the Applicants would then either seek a new authorisation to conduct a joint tender for the provision of waste and recycling collection services or, the Applicants would run individual tender processes;

¹² Applicant submission, Attachment C, p.7.

¹³ Applicant submission, Attachment C, p.8.

¹⁴ Applicant submission, Attachment C, p.8.

¹⁵ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

¹⁶ Please see the ACCC’s Public Register for more details, including a list of parties consulted.

¹⁷ The ACCC has previously considered many applications for joint tendering in relation to waste collection and/or waste processing. Previous applicants have included groups of councils in Brisbane (e.g. Redland City Council & Brisbane City Council), Sydney (e.g. the Southern Sydney Regional Organisation of Councils and the Northern Sydney Regional Organisation of Councils), metropolitan Melbourne (e.g. matters involving the Metropolitan Waste Management Group), and groups of councils in regional NSW and Queensland.

¹⁸ For more discussion see paragraphs 5.20-5.23 of the ACCC’s Authorisation Guidelines.

- the relevant areas of competition likely to be affected by the Conduct. The ACCC does not consider it is necessary to precisely identify the relevant areas of competition in assessing the application for authorisation. The ACCC considers that the relevant area of competition likely to be affected is the provision of waste collection services in the Sydney metropolitan area; and
- the period of authorisation requested, to 2 February 2023.

Public benefits

15. In granting the existing authorisation, the ACCC considered that the proposed arrangements were likely to produce efficiencies in relation to the collection of waste and recycling, which would result in cost savings for the municipalities and their rate payers. In particular, the ACCC was satisfied that the proposed arrangements would produce the following public benefits:

- increased efficiency and cost reductions;
- improved service delivery, including better adaptation to particular needs;
- environmental benefits; and
- better education, which will add to the service delivery, efficiency and environmental benefits.

16. Based on the information before it, the ACCC is satisfied that the arrangements which are currently authorised have resulted in public benefit in the form of transaction cost savings. In particular, the ACCC considers that the combined tendering and contracting process for the supply of waste and recycling collection services has resulted in cost savings (including the removal of duplicated administrative costs) for the Applicants. The Applicants have provided the ACCC with confidential information quantifying these cost savings.

17. The ACCC considers that the Conduct is also likely to result in public benefit in the form of transaction cost savings compared to the likely future without the Conduct. In particular, extending the existing contracts by five years will defer the expense associated with an additional tender process (or processes if the Applicants were to run them individually).

18. Additionally, compared to the likely future where the Applicants either jointly or individually enter into new collection contracts following the expiry of the existing authorisation in 2018, the ACCC considers that the Conduct is likely to continue to result in cost savings which have been achieved under the existing collection contracts. The Applicants have provided the ACCC with confidential information estimating these likely future cost savings.

Public detriments

19. In granting the existing authorisation, the ACCC noted that the proposed arrangements would foreclose the opportunity for competition regarding collection services in the St George Region for a significant period of time. However, the ACCC considered that there were a number of mitigating factors:

- the proposed arrangements conformed to industry practice, where contracts operate for seven to 10 years
- a further tender process would be conducted in 2018

- the proposed arrangements apply to only three out of 38 councils in the Sydney metropolitan area and therefore, did not remove a significant number of opportunities for waste collection service providers to bid for contracts; and
- any anti-competitive detriments (eg increased prices or lower quality services) would ultimately be borne by the Applicants and their ratepayers.

20. In granting the existing authorisation, the ACCC concluded that the proposed arrangements were likely to result in minimal public detriment and granted authorisation for 10 years. In terms of the length of authorisation the ACCC noted that:

- given the significant capital outlays required to perform a contract for municipal waste and recycling collection, a 10 year contract is likely to encourage competition by making the tender attractive to a larger pool of industry participants than if authorisation was granted for a shorter period of time;
- a 10 year contract will lead to efficiency gains, but authorisation for a longer term will not necessarily enhance those efficiency gains, as the need to replace expensive equipment will eventually arise; and
- councils in NSW have been encouraged to limit the terms of their waste contracts in order to maintain maximum flexibility in responding to new and emerging technologies for recovering waste. Therefore, a term longer than 10 years may inhibit such flexibility.

21. The ACCC acknowledges that the current application for authorisation involves conduct that will remove the opportunity for waste collection service providers to compete to provide waste collection services in the Applicants' local government areas for a further five years. However, the ACCC considers that the anticompetitive detriment is mitigated by the following:

- the Conduct continues to apply to only three out of 38 councils in the Sydney metropolitan area.
- the Conduct does not remove a significant number of opportunities to bid for waste and recycling collection contracts.
- it is still the case that any anti-competitive detriments, such as increased prices or lower quality services, would ultimately be borne by the Applicants and their ratepayers. Therefore the ACCC considers it unlikely that the Applicants would seek to enter into arrangements that would diminish the welfare of their residents and local businesses.

22. In relation to its previous concerns about authorising the arrangements for longer than 10 years, the ACCC accepts the Applicants' submissions that:

- the age of bins is not relevant to the length of the contract as there will be a variety of bin ages at the end of the initial contract term and the contractor is required to repair and replace bins as required, at their cost, for the duration of the contract and extension of the contract term
- the contractor is required to provide and maintain sufficient collection vehicles to carry out the services for the contract term (including any extension) at their cost, and would have allowed for the potential five

year extension when planning their vehicle provision throughout the contract and incorporated this into their contract prices

- the Conduct is unlikely to limit flexibility in responding to new technologies in waste collection given the inclusion of a clause in the contracts allowing for variations to accommodate new or innovative arrangements.

23. The ACCC acknowledges the submission by JJ Richards and notes that there are a number of groups of councils around Australia which have been authorised to jointly tender and contract for waste management services. In assessing the public benefits and detriments of joint arrangements between local government authorities, the ACCC will have regard to any existing authorisations in the relevant areas of competition, as well as factors including the effect of the arrangements on competition, innovation and the introduction of new technology.
24. Taking all of the above factors into account, the ACCC considers that the Conduct is likely to result in minimal public detriment

Balance of public benefit and detriment

25. The ACCC considers that the Conduct is likely to result in public benefit in the form of transaction cost savings, including deferring the expense associated with an additional tender process and the continuation of cost savings which have been achieved under the existing collection contracts. The ACCC considers that the Conduct is likely to result in minimal public detriment.
26. For the reasons outlined in this draft determination the ACCC is satisfied that the Conduct is likely result in a public benefit that would outweigh the likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
27. Accordingly, the ACCC proposes to grant authorisation for the Conduct.

Draft determination

The application

28. Application A91530 was made using a Form FC, under subsection 91C(1) of the CCA. Authorisation is sought for the Applicants to continue to jointly contract for the provision of waste and recycling collection services in their respective local government areas until 2 February 2023.
29. Authorisation is sought as the Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
30. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.¹⁹

¹⁹ For an application of revocation and substitution of a new authorisation, section 91C(5) of the CCA requires the ACCC to comply with the requirements of section 90A prior to making a determination.

The net public benefit test

31. 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 CCA, that in all the circumstances the Conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the Conduct.

Conduct which the ACCC proposes to authorise

32. The ACCC proposes to revoke authorisation A91019 and grant authorisation A91530 in substitution. The substitute authorisation is to Hurstville City Council, Kogarah Municipal Council and Rockdale City Council to continue to jointly contract for the provision of waste and recycling collection services in their respective local government areas until 2 February 2023.
33. This draft determination is made on 1 June 2016.

Next steps

34. The ACCC now seeks submissions on the draft determination. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.