



Draft determination and interim authorisation

Application for revocation of AA1000596 and the substitution of authorisation AA1000612

lodged by

Albury City Council & Ors

in respect of

collectively tendering and contracting for waste and recycling collection, transport, sorting, and processing services.

Authorisation number: AA1000612

Date: 15 June 2022

Commissioners: Keogh
Brakey

Summary

The ACCC proposes to grant re-authorisation to Albury City Council, Wodonga City Council, Indigo Shire Council, Greater Hume Council, Federation Council, Leeton Shire Council, Berrigan Shire Council and Edward River Council (the Participating Councils) to enable them to collectively tender and contract for waste and recycling collection, transport, sorting, and processing services (the various services).

The ACCC granted authorisation to enable the Participating Councils to conduct a collective tender process on 14 April 2022 until 6 May 2032. However, the Participating Councils are seeking re-authorisation for the same conduct until 30 June 2034 to enable the tender process and a 10-year contract proposed to commence on 1 July 2024.

The ACCC considers that the likely public benefits and detriments from the collective tender arrangement are unchanged from its recent previous assessment. In particular, the ACCC considers there are likely public benefits in the form of environmental benefits, increased efficiency, increased competition, and transaction cost savings.

The ACCC considers that the collective tender arrangement is likely to result in limited public detriment because:

- the tender process will be competitive and transparent
- participation is voluntary for the Participating Councils and for potential suppliers of the various services
- suppliers of the various services are able to bid to supply a single Council or groups of Councils which will facilitate participation by various smaller local waste service providers, as well as larger ones, and
- each Participating Council will independently decide which supply option best suits its needs, either from the options available through the joint tender process or through separately contracting with a supplier.

The ACCC is satisfied that the joint tender arrangement is likely to result in a public benefit that would outweigh the limited public detriment.

In recognition of the long-term contracts the Participating Councils expect to enter following the tender process, the ACCC proposes to grant re-authorisation until 30 June 2034.

The ACCC has also decided to suspend authorisation AA1000596 and grant interim authorisation to allow the Participating Councils to progress the procurement process including issuing a Request for Tender while the ACCC is considering the substantive application. Interim authorisation does not extend to the Participating Councils entering into contracts with waste and recycling service suppliers.

The ACCC invites submissions in relation to this draft determination by 22 June 2022 before making its final decision.

1. The application for revocation and substitution

- 1.1. On 16 May 2022, Albury City Council, Wodonga City Council, Indigo Shire Council, Greater Hume Council, Federation Council, Leeton Shire Council, Berrigan Shire Council and Edward River Council (the **Participating Councils**) lodged an application

with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation AA1000596 and substitute authorisation AA1000612 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000612 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

- 1.2. The Participating Councils were recently granted authorisation AA1000596 until 6 May 2032. However, the Participating Councils subsequently advised the ACCC that they require authorisation for a longer period in order to provide protection for both the procurement process which will run until 2024 and a 10-year contract period which is proposed to commence on 1 July 2024 following the finalisation of the tender process. As a result, the Participating Councils seek re-authorisation for the same conduct but for a longer period until 30 June 2034.
- 1.3. On 20 May 2022, the Participating Councils requested interim authorisation to engage in the Conduct to enable them to proceed with advertising a Request for Tender in June 2022. The request for interim authorisation is discussed in section 6.
- 1.4. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.

The Participating Councils

- 1.5. The 8 local councils are:
 - Albury City Council
 - Wodonga City Council
 - Indigo Shire Council
 - Greater Hume Council
 - Federation Council
 - Leeton Shire Council
 - Berrigan Shire Council, and
 - Edward River Council.

The Conduct

- 1.6. Re-authorisation is sought to enable the Participating Councils to jointly procure through a tender process, and contract for, regional kerbside collection services, including:
 - a) domestic kerbside residual waste, recyclables acceptance and transport
 - b) domestic kerbside recyclables acceptance sorting
 - c) domestic kerbside organic waste (including food organics and/or green waste) acceptance and processing
 - d) residual waste disposal
 - e) Resource Recovery Centre (**RRC**) domestic residual waste recyclables collection and transport
 - f) supply of mobile kerbside bins, and

- g) supply of organics kitchen caddies and liners.

(the **Conduct**)

The procurement process

- 1.7. In carrying out the Conduct, the Participating Councils will jointly prepare and advertise a Request For Tender (**RFT**) to invite tenders from suitably qualified organisations.
- 1.8. Whilst the Participating Councils seek to advertise a single RFT, each Council will make an independent decision and enter into an individual contract with the successful Tenderer.
- 1.9. The assessment of the responses to the RFT will be undertaken by a selection panel comprising of representatives from each of the Participating Councils (**Regional Kerbside Contract Working Group**). The Regional Kerbside Contract Working Group will prepare and report in the assessment of the responses and make a recommendation in the preferred Tenderer. That report and recommendation will be referred to each Participating Council for individual resolution on the acceptance of the successful Tenderer prior to any appointment and execution of individual contracts.
- 1.10. The Participating Councils are not bound by the Regional Kerbside Contract Working Group recommendation and may elect to conduct an individual assessment or call for additional information from tenderers.
- 1.11. The RFT will permit the tenders to:
 - a) submit individual prices for each Participating Council, and
 - b) elect to submit a price for all Participating Councils, or any combination of Participating Councils, subject to a minimum requirement that the tenderer must submit a collective response for both Albury City and City of Wodonga.

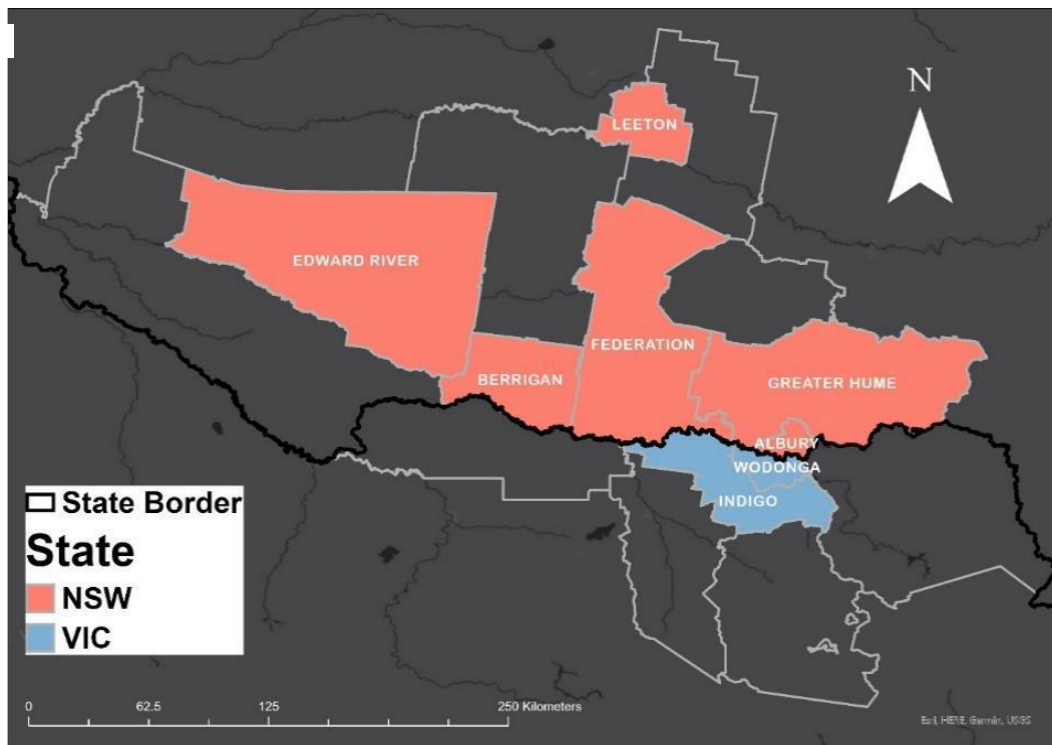
Rationale for the Conduct

- 1.12. The Participating Councils submit the Conduct will:
 - a) allow the Participating Councils to carry out the procurement process with the highest level of efficiency
 - b) increase the likelihood of saving in the contract itself with tenders offering services at a cheaper rate
 - c) increase the likelihood of higher quality and more diverse bids, which may result in improved environmental outcomes, and
 - d) provide benefits to smaller Participating Councils who may not attract competition for their waste services contract if tendered on an individual basis.

2. Background

- 2.1. The Participating Councils are statutory local government authorities in regional New South Wales and Victoria and are responsible for, among other things, the provision of mobile kerbside bins, the collection, processing, recovery and transport of residual, recyclable, and organic waste.
- 2.2. A map of the Albury region showing the location of the Participating Councils is below.

Figure 1: Map of Participating Councils¹



- 2.3. The Participating Councils cover a region of approximately 25 800 square kilometres in northeast Victoria and southwest New South Wales, ranging from rural areas along the Murray River and southern New South Wales border.
- 2.4. The combined population of the Participating Councils is approximately 177 000. The Albury City Council represents the highest population of approximately 54 400 residents, and Berrigan Shire Council the smallest with just under 9 000 residents.
- 2.5. The Participating Councils have implemented a governance structure, procurement process and project plan to identify all roles and responsibilities, decision making processes and milestone tasks along with probity management.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.

¹ [Participating Councils response to submission by JJ. Richards & Sons Pty Ltd](#) – page 5

- 3.2. The ACCC invited submissions from a range of potentially interested parties including relevant waste and recycling service providers, industry associations or peak bodies, government, and relevant regulatory bodies.² The ACCC received no submissions in relation to this application for re-authorisation.

4. ACCC assessment

- 4.1. The Participating Councils have sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.
- 4.2. The ACCC must not make a determination revoking an authorisation and substituting another authorisation unless it is satisfied that it would not be prevented under subsection 90(7) from making a determination granting the substituted authorisation, if it were a new authorisation sought under section 88 of the Act³. Consistent with subsections 90(7) and 90(8) of the Act, 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 would outweigh the detriment to the public that would be likely to result (**authorisation test**).
- 4.3. In making its assessment of the Conduct, the ACCC has considered:
- the relevant areas of competition likely to be affected by the Conduct, particularly competition to acquire and supply the various waste and resource recovery services (listed at paragraph 1.6) in the northeast Victorian border region and adjacent southwest New South Wales border region, and
 - the likely future without the Conduct that is the subject of the re-authorisation. In particular, the ACCC considers that the Participating Councils would consider individually procuring and administering their respective contracts for the acquisition and supply the various waste and resource recovery services.

Public benefits

- 4.4. The Act 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 in considering public benefits:

...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.⁴

- 4.5. The Participating Councils submit that the Conduct is likely to result in the following public benefits:
- environmental benefits
 - increased efficiency
 - increased competition, and

² A list of the parties consulted, and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister

³ Section 91C(7) of the Act.

⁴ 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.

- transaction cost savings.

Environmental benefits

4.6. The Participating Councils submit there will be a reduction in greenhouse gases from streamlining processes, truck movements and encouragement in advanced waste processing facilities. The application includes state based legislative targets,⁵ for example:

- diversion of 80% of municipal solid waste from 2010 levels by 2030
- the standard 3 bin system will be applied across all services by 2030, and
- diversion of all organic waste streams from landfill by 2025.

4.7. The ACCC considers that to the extent the joint procurement results in more efficient, newer and/or improved collection, and incentivises more innovative processing methods or facilities, then the Conduct is likely to result in environmental benefits, including helping to avoid the use of landfill and reducing environmental impacts associated with poor and contaminated processing.

Increased efficiency

4.8. The Participating Councils submit that by jointly procuring the various waste and resource recovery services, providers will be able to realise economies of scope and scale. Additionally, it is likely to increase the incentive for suppliers of the various services to invest in new technologies and services streams as they are given the opportunity to service several Participating Councils at once.

4.9. The ACCC has previously recognised that the aggregation of waste volumes through joint procurement of waste and recycling services by local councils can result in public benefits by facilitating service providers' realisation of operational efficiencies, making services financially viable, and/or reducing the risks associated with investment in upgraded or new facilities and technologies. This is particularly relevant for waste and recycling service providers that operate in regional locations such the Albury Region where individual councils may not be able to offer sufficient waste volumes individually to support service provision or investment, population density is lower and transport costs are typically higher.

4.10. The ACCC considers that to the extent aggregated waste volumes and longer-term contracts allow service providers to improve operational efficiencies, or underpin investment in new services or facilities, the Conduct is likely to result in public benefit in the form of increased efficiencies.

Increased competition

4.11. The Participating Councils submit that as providers of the various waste and resource recovery services are given the opportunity to deliver services to multiple Councils, it is anticipated that higher quality bids will be received as there is greater incentive to be the successful tenderer than where you are bidding for one council at a time. Further, the Participating Councils consider it likely the joint procurement process will attract interest from service providers who have not previously tendered or otherwise would not have.

⁵ Full list available on pages 7-9 of the application.

- 4.12. The Participating Councils submit that the risk of not receiving an appropriate tender is significantly greater if the Participating Councils were to tender individually. Furthermore, the Participating Councils claim that the cost to the tenderers, and resultant service price to the Councils would be greater under individual tenders.
- 4.13. The ACCC considers the Conduct is likely to increase competition by offering prospective tenderers a more substantial volume of waste for collection and/or processing. This is likely to result in existing or new service providers competing more vigorously to win service contracts, which is a public benefit. Further, it is likely to provide greater long-term certainty for potential suppliers of the services.

Transaction cost savings

- 4.14. The Participating Councils submit that transaction cost savings will occur for the smaller regional based Councils via implementation the Regional Kerbside Contract Working Group. All tender responses received will be assessed by a single panel rather than in the circumstance of individual tender processes and will assist the smaller Councils due to their lack of expertise in consultation and the preparation of tenders.
- 4.15. The ACCC accepts that the Conduct is likely to provide transaction cost savings, including by reducing or eliminating the duplication of administrative, legal and evaluation costs associated with each Council conducting separate tenders.
- 4.16. The ACCC also considers the Conduct is likely to deliver transaction cost savings to the potential various waste and resource recovery service suppliers, including by reducing or eliminating the administrative burden of dealing with the procurement processes of multiple Councils.

Public detriments

- 4.17. The Act 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:

...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.⁶

- 4.18. The Participating Councils acknowledge that a public detriment may arise as the joint procurement by the Participating Councils comprises a substantial portion of the market to acquire and supply the various waste and resource recovery services (listed at paragraph 2.4) in the northeast Victorian border region and adjacent southwest New South Wales border region, and therefore it may operate to reduce competition and cause some providers to exit the market. However, the Participating Councils note there is a fair opportunity for all of the various waste and resource recovery service providers to participate in the tender process and submit a competitive price on a level playing field with other service providers.
- 4.19. Further, the Participating Councils note that the Conduct is predominately focused on residential services. Commercial waste services in the region will remain available for various service providers.

⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.20. The Participating Councils submit that it is intended that the tender process will be tailored to enable smaller waste companies to compete for individual council's services, while larger waste companies may elect to tender for all grouped councils.
- 4.21. The ACCC notes that the Participating Councils may be considered to compete for the acquisition of waste and recycling collection, transport, sorting, and processing services. By conducting their procurement jointly rather than individually, the Participating Councils are agreeing to no longer compete and in turn this may reduce the opportunities for waste and recycling service providers to provide services to the Participating Councils.
- 4.22. However, the ACCC considers that the detriment resulting from the Conduct is likely to be limited because:
- the tender process will be competitive and transparent
 - participation in the Conduct is voluntary for the Councils and for potential suppliers of waste and recycling services
 - the opportunity for waste and recycling service suppliers to bid for single a Council or groups of Councils will facilitate participation by smaller local waste services providers, as well as larger ones
 - the tender process will offer more lucrative contracts for waste service providers, and which may therefore drive increased competition for those contracts than would otherwise be the case, and
 - each Participating Council will independently decide which supply option best suits its needs, either from the options available through the joint tender process or through separately contracting with a supplier.

Balance of public benefit and detriment

- 4.23. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in public benefit that would outweigh any likely public detriment from the Conduct.
- 4.24. The ACCC considers the extension of duration does not affect the net public benefit and public detriment assessment.

Length of authorisation

- 4.25. The Act allows the ACCC to grant authorisation for a limited time.⁷ This enables 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.
- 4.26. In this instance, the Participating Councils seek authorisation until 30 June 2034. This enables them to undertake the preliminary steps in the tender process in advance of a proposed 10-year contract commencing on 1 July 2024. The Participating Councils submit that 10-year contract terms are typical for waste and resource recovery services, and are intended to facilitate a competitive tender process, as well as allow service providers to realise returns on any capital investment. Further, without the ability to jointly procure services, small regional Local Government Areas (**LGAs**) will

⁷ Subsection 91(1)

struggle to attract competitive bids, and even larger LGAs will struggle to attract investment in waste and resource recovery infrastructure.

- 4.27. The ACCC recognises that long term contracts are commonly required to support the level of investment necessary to upscale processing services and enhanced transportation, whilst providing certainty to the Councils and relevant parties. Therefore, the ACCC considers the proposed term of authorisation is likely to be necessary for the Conduct to achieve this outcome and the associated public benefits.
- 4.28. The ACCC proposes to grant authorisation until 30 June 2034.

5. Draft determination

The application

- 5.1. On 16 May 2022, Albury City Council, Wodonga City Council, Indigo Shire Council, Greater Hume Council, Federation council, Leeton Shire Council, Berrigan Shire Council and Edward River Council (the **Participating Councils**) lodged an application to revoke authorisation AA1000596 and substitute authorisation AA1000612 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000612 was made under subsection 91C(1) of the Act. The Participating Councils seek authorisation for the Conduct defined at paragraph 1.6.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the 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 Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisation AA1000596 and grant authorisation AA1000612 in substitution. The ACCC proposes to grant authorisation AA1000612 to enable the Participating Councils (as defined in paragraph 1.5) to engage in the Conduct described in paragraph 1.6 to collectively tender and contract for waste and recycling collection, transport, sorting, and processing services.
- 5.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant re-authorisation until 30 June 2034.
- 5.9. This draft determination is made on 15 June 2022.

6. Interim authorisation

- 6.1. On 20 May 2022, the Participating Councils requested interim authorisation to engage in the Conduct to enable them to proceed with advertising a Request for Tender in June 2022.
- 6.2. The Participating Councils consider it necessary to progress the procurement process as soon as possible to allow the time that is likely to be required to progress the overall tender process. Delays in the procurement process may jeopardise the potential tenderers who require significant lead time prior to the commencement of the proposed contracts.
- 6.3. The ACCC has decided to suspend the operation of Authorisation AA1000596 and grant interim authorisation for the following reasons:
 - There is a need for the Participating Councils to progress a joint tender process in order to minimise the risk of interruption of service, or having to enter into short-term supply arrangements, if long-term arrangements for the services are not in place when the Participating Councils' existing contracts expire.
 - The relevant areas of competition are unlikely to be permanently altered if interim authorisation is granted to proceed with the tender process but not to enter into contracts.
 - Based on the ACCC's assessment to date, the Conduct is likely to result in public benefits and is unlikely to result in significant public detriments.
- 6.4. Interim authorisation is granted to the Participating Councils to engage in the Conduct described in paragraph 1.6 to enable them to progress the procurement process including issuing a Request for Tender. Interim authorisation does not extend to the Participating Councils entering into contracts with waste and recycling service suppliers.
- 6.5. Interim authorisation commences immediately and remains in place until it is revoked, or the date the ACCC's final determination comes into effect, or when the application for re-authorisation is withdrawn.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by **22 June 2022**. In addition, consistent with section 90A of the Act, the Participating Councils or an interested party may request that the ACCC hold a conference to discuss the draft determination.