



Draft Determination & Interim Authorisation

Application for authorisation

lodged by

Hunter Resource Recovery

in respect of

the contract for recycling services with Solo Resource Recovery

Authorisation number: AA1000670

Date: 31 July 2024

Commissioners: Keogh
Carver
Williams

Summary

The ACCC proposes to grant authorisation AA1000670 to enable Hunter Resource Recovery, and its member councils, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council, to jointly enter and give effect to an 18 month-3 year contract for recyclate collection, processing and distribution services with Solo Resource Recovery.

The ACCC proposes to grant authorisation AA1000670 for 3 years.

The ACCC considers that the proposed conduct is likely to result in a small public benefit in the form of transaction cost savings, particularly where passed on to council ratepayers in the form of lower rates or increased services.

The ACCC considers that the proposed conduct will result in minimal, if any, public detriment.

The ACCC considers that the future with and without the proposed conduct will be largely the same, with Solo Resource Recovery providing the recycling services to the Applicants for the next 18 months to 3 years.

Generally, competitive tendering for new waste processing contracts will deliver the most efficient outcome for Councils, and this is reflected in the obligation to do so under the NSW Local Government Act, except in extenuating circumstances. The ACCC acknowledges the significant uncertainty impacting the provision of recyclate processing services at present and that the Applicants consider this to be extenuating circumstances such that delaying the tender process for a short period is in the best interests of their rate payers. However, the ACCC would be concerned if, during the 18 month-3 year Proposed Conduct, if ultimately authorised, Hunter Resource Recovery and its Member Councils did not conduct a competitive tender process for future recyclate collection, processing and distribution services in each Member Council's Local Government Area.

The ACCC has also granted interim authorisation to enable the Applicants to jointly make an 18 month-3 year contract for recyclate collection, processing and distribution services with Solo Resource Recovery. Interim authorisation does not extend to the Applicants giving effect to the contract while the ACCC is considering the substantive application.

Interim authorisation will remain in place until it is revoked or the date the ACCC's final determination comes into effect.

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

The application for authorisation

- 1.1. On 26 April 2024, Hunter Resource Recovery lodged an application for authorisation AA1000670 with the Australian Competition and Consumer Commission (the **ACCC**), on behalf of itself, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council, (its **Member Councils**), to jointly enter into and give effect to an 18 month-3 year contract for recyclate collection, processing and distribution services with Solo Resource Recovery (**Solo**), in each Member Council's Local Government Area. Hunter Resource Recovery sought authorisation for 3 years.

- 1.2. Hunter Resource Recovery is currently administering a contract with Solo Resource Recovery with respect to collection, processing and distribution of recyclables on a unified basis for its Member Councils, which is due to expire on 30 June 2025.
- 1.3. Hunter Resource Recovery also sought urgent interim authorisation for the proposed conduct. On 8 May 2024, the application for 'urgent' interim authorisation was subsequently withdrawn by Hunter Resource Recovery.
- 1.4. The application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).

The Applicant – Hunter Resource Recovery

- 1.5. The Applicant is Hunter Resource Recovery, a not-for-profit company formed in 1996. It is jointly owned by, and operates on behalf of, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council (its **Member Councils**).
- 1.6. Hunter Resource Recovery provides a domestic recycling service to over 157,500 households across these Local Government Areas (**LGAs**), and estimates that it is currently only 35% of the region's market.
- 1.7. Hunter Resource Recovery's main business activity is to (on behalf of the Member Councils) administer the contract in relation to the collection, processing, sorting and distribution of recyclable materials from the Member Councils' LGAs. Hunter Resource Recovery is also a delegate of each of the Member Councils for the purpose of entering into any contract regarding recycling.¹
- 1.8. Hunter Resource Recovery operates as the central hub for recycling services for each Member Council by:
 - a) providing a centralised customer service call centre which operates as the recycling hotline
 - b) operating as a conduit between the Member Councils and the tenderer to ensure the highest possible standard of customer service is maintained
 - c) investigating all service complaints and reporting conclusions to both the Member Councils and the tenderer
 - d) overseeing the Work Health and Safety performance of the contractor.
- 1.9. Hunter Resource Recovery also provides the following functions:

¹ The delegation is made under section 377 of the Local Government Act 1993.

- a) recycling education services
- b) customer liaison and complaint investigation and resolution
- c) acting as a primary contact point for the recycling service
- d) providing monthly data on collection and other reporting
- e) undertaking roadside bin audits for compliance
- f) providing strategic advice to councils on recycling issues
- g) administration of Public Event recycling services
- h) administration of Councils' electronic waste recycling services
- i) media liaison on recycling services.

1.10. Hunter Resource Recovery is governed by a Board of Directors made up of:

- a) the General Manager of each of the Member Councils
- b) an elected Councillor from each of the Member Councils
- c) a Senior Director of each of the Member Councils.

2. Background

Previous authorisations

- 2.1. On 12 April 2012, the ACCC granted authorisation A91289 to Hunter Resource Recovery and its Member Councils for 12 years to collectively tender and contract for recycling services in the Member Councils' areas. Pursuant to this authorisation, Hunter Resource Recovery is administering a contract with Solo with respect to collection, processing and distribution of recyclables on a unified basis for its Member Councils that is due to cease on 30 June 2025.
- 2.2. Although authorisation A91289 expired on 4 May 2024, the authorisation by the ACCC in 2024 (outlined below) extended protection for Hunter Resource Recovery to continue to give effect to this contract with Solo until 30 June 2025, while it undertook the next tendering process.
- 2.3. On 31 January 2024, the ACCC granted the following authorisations:
 - a) Under application AA1000647, to Hunter Resource Recovery, on behalf of itself, its Member Councils, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council, and each of Dungog Shire Council, Muswellbrook Shire Council and Upper Hunter Shire Council, to jointly procure and contract for the establishment of a recycling processing and sorting facility, for 27 years.
 - b) Under application AA1000648, Hunter Resource Recovery, on behalf of itself and its Member Councils, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council, to jointly procure and contract for kerbside dry recycle collection in each Member Council's LGA, for 14 years.
- 2.4. Hunter Resource Recovery subsequently advised that it will not pursue the joint tendering conduct authorised under AA1000647 and AA1000648, in the short-term future, due to significant changes within the recycling industry, discussed below.

The Proposed Conduct

- 2.5. Hunter Resource Recovery is seeking authorisation on behalf of itself, and each Member Council, to enter into and give effect to a new, short-term 1.5-to-3-year contract with Solo, with respect to collection, processing and distribution of recyclables on a unified basis for its Member Councils.
- 2.6. Hunter Resource Recovery is seeking to:
- a) engage in all necessary discussions between Hunter Resource Recovery and its Member Councils in order to enter into the proposed contract with Solo on the Solo Terms (see below)
 - b) do all things necessary to give effect to any contracting between Hunter Resource Recovery and its Member Councils and Solo with respect to the proposed conduct
 - c) enter into and manage a contract with Solo on the Solo Terms (see below) for a period of 18 months and one extension of up to a further 18 months.
- 2.7. The Solo Terms will include:
- a) Date of commencement of the agreement is 1 July 2025, upon the expiry of the current agreement.
 - b) Term of the agreement is 18 months, with an option to renew for a further period of 18 months. The maximum contract length would be 3 years.
 - c) Services to be provided are the same as covered by the current contract between Hunter Resource Recovery and Solo, being kerbside collection, processing and distribution of recyclate services, as covered by the ACCC's existing authorisation A91289 and covered by new authorisation AA1000647 and AA1000648).
 - d) The commercial terms are still to be negotiated between the parties.
- (Proposed Conduct)**
- 2.8. The Applicants estimate that approximately 30,880 tonnes of recyclables will be collected under this proposed conduct and transported to a central location for processing and distribution.
- 2.9. The Applicants have advised that no significant amendments are intended in relation to terms and conditions between the current Solo contract and the proposed short-term contract with Solo. The main term that is subject to change is with respect to the service fee that is payable as that will reflect the current market compared to the market when the previous contract was entered into. This service fee will cover both collections and processing, is all inclusive and capped to only increase in accordance with CPI. Solo will seek a joint venture partner to undertake primary and secondary processing² on a sub-contract basis.
- 2.10. As a delegate of each Member Council, Hunter Resource Recovery must comply with the tender requirements of the Local Government Act (particularly section 55) and its Regulations and the NSW Department of Local Government – Tendering Guidelines (prescribed under s.23 of the Local Government Act).

² Primary processing is the process of turning one thing into more of the same thing. Secondary processing means turning something into other things made of the same material.

Solo Resource Recovery

- 2.11. Solo Resource Recovery (**Solo**) provides kerbside waste collections for councils across most regions in Australia. It currently sub-contracts the processing and distribution of recycling products to ReGroup, the second-largest processor of recyclables in Australia. This arrangement replaced Solo's previous sub-contractor, Polytrade Limited, which was acquired by ReGroup in June 2022.
- 2.12. The Applicants submit that Solo is progressing toward reestablishing a local sorting facility at Gateshead, NSW. ReGroup is investing in secondary sorting capabilities for paper and cardboard at this Gateshead facility, proposed to be operational in late 2024.
- 2.13. Further, Solo and ReGroup are planning to establish a PET³ and HDPE⁴ plastics secondary sorting and flaking facility on the NSW Central Coast, which is anticipated to become operational in late 2024, pending necessary approvals.

Industry changes and rationale for Proposed Conduct

- 2.14. Hunter Resource Recovery submits that the rationale for the Proposed Conduct is to allow time for the industry and market to stabilise, and in the interim, provide an efficient and cost-effective waste management service in its LGAs.
- 2.15. Hunter Resource Recovery submits that the recycling industry is currently facing multiple challenges including low commodity prices, high operational costs, post-pandemic labour shortages, supply chain interruptions and fluctuating end-markets. Impacts of the China Sword policy, Commonwealth Government material export bans on plastics and fibre, fragmented national policy direction, and the associated lack of onshore processing facilities have all led to substantial cost increases for recyclers and reduced public trust in recycling practices.
- 2.16. IQ Renew has also submitted that several significant events have materially changed market conditions recently, including:
 - a) From 2012 a significant shift occurred in the gate fees charged to councils to process recyclables as a result of declining markets for offtakes. Processing gate fees around Australia were forced to lift (up to 1,000% in some cases).
 - b) Commencement of NSW's container deposit scheme in December 2017, which provided a new income stream for processors of recyclable material.
 - c) Significant impacts of China's "Green Sword" Policy from January 2018, which decimated the market price of recyclable materials in Australia.
 - d) Increased secondary processing capacity now exists as a result of processors' investing capital (and state government grant funding) to develop secondary processing infrastructure to facilitate the transition to a more circular economy.
 - e) Commencement of an export ban in July 2022 of waste plastics that are not sorted into single resin/polymer type or processed into engineered fuel. This ban also caused the price of recycled plastic in Australia to drop materially.

³ PET is polyethylene terephthalate, a type of clear, durable and versatile plastic.

⁴ HDPE is High Density Polyethylene, a thermoplastic manufactured from petroleum byproducts.

- f) Introduction of new regulations on the export of wastepaper and cardboard that are due to commence in July 2024.⁵
- 2.17. Hunter Resource Recovery has undertaken a review through a working group of Council representatives and has determined that there is a high risk around tendering and entering into a new long-term contract during the period July 2025 to June 2028 (as authorised by the ACCC in January 2024). Hunter Resource Recovery submits that tendering now is likely to result in an inflated cost to ratepayers and the extended timeframe (up to 3 years) required for NSW Government planning and environmental licensing approvals for new waste management facilities further limits the competitive outcomes of tendering now.
- 2.18. Hunter Resource Recovery proposes to delay tendering the long-term contracts until the impacts of the Federal legislation governing exports, low demand for recycled products, and stockpile issues are better understood, and corrective policy actions are implemented. It may take up to 36 months to attain the necessary clarity and confidence regarding the future of kerbside recycling, market conditions, and stabilising commodity values.

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties, including waste recycling service providers including the current contract provider and waste industry associations.
- 3.2. The ACCC received 1 submission from iQ Renew (a waste management company on the NSW central coast) which is opposing authorisation.
- 3.3. IQ Renew acknowledges that there have been several significant events that have materially changed market conditions since the contract for these services provided to Hunter Resource Recovery was last subject to a competitive process in 2012. However, it is concerned that there hasn't been a competitive tender process since 2012 to deliver true competition and deliver the best outcomes for the community.
- 3.4. IQ Renew is concerned that the cumulative effect of this application, and the potential for Solo Resource Recovery to win the Newcastle City Council tender process currently being run for processing up to 15,000 tonnes per annum of recyclable material, would be a significant volume of the Hunter Region's recyclable material, thereby excluding companies like iQ Renew and other competitors from effectively competing, potentially impacting long-term viability and competition in the region.
- 3.5. IQ Renew submits that with more than a year remaining on the current Solo Resource Recovery contract, there is sufficient time to conduct a public tender process.
- 3.6. IQ Renew also submits that pursuant to section 55 of the NSW Local Government Act Hunter Resource Recovery (in the absence of authorisation from the ACCC) would

⁵ From 1 July 2024, exports of mixed or unsorted paper and cardboard will be regulated under the [Recycling and Waste Reduction Act 2020](#) and [Recycling and Waste Reduction \(Export—Waste Paper and Cardboard\) Rules 2024](#). Similar export rules are already in place for waste glass, plastics and tyres. From 1 October 2024, to export waste paper and cardboard you will need a waste paper and cardboard export licence, and to declare each consignment to us before you declare to the Australian Border Force's Integrated Cargo System. <https://www.dcceew.gov.au/environment/protection/waste/exports/paper-cardboard>

have a statutory obligation to invite tenders before entering into a contract of this nature.

- 3.7. The Applicants submit in response that they have considered section 55 of the Local Government Act and consider that it does not apply to this proposed contract pursuant to the exemption in clause 55(3)(i). The Applicants submit that under section 55(3)(i), section 55 does not apply to a contract where due to extenuating circumstances [which the Applicants believe the risks of contracting in the current unstable market constitutes] a council decides by resolution that a satisfactory result would not be achieved by inviting tenders. Member Councils, via a formal Council meeting, unanimously resolved to enter into a short-term contract for collection and processing with Solo until 30 June 2028.
- 3.8. The Applicants submit that the only competitor to Solo who could supply the recycle services that are the subject of the Proposed Contract is iQ Renew. However, they would still need to subcontract for collection services. IQ Renew's processing facilities are located on the NSW Central Coast well outside Hunter Resource Recovery's collection areas.
- 3.9. The Applicants submit that there are no significant amendments intended in relation to the terms and conditions between the present contract and a new short-term contract under the Proposed Conduct.
- 3.10. These submissions are discussed further in the ACCC's assessment below.

4. ACCC assessment

- 4.1. Hunter Resource Recovery sought authorisation for the Proposed 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. 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.

Relevant areas of Competition

- 4.2. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.3. Hunter Resource Recovery submits that each of the Member Councils operate independently from one another within the boundaries of their respective LGA, and each Member Council provides the standard products and services of a Council.
- 4.4. Hunter Resource Recovery submits that once dry recycle is collected via a recycling service, it is transported to a Recycling Facility, sorted at the Recycling Facility, and potentially undergoes a secondary sort by product types at the Recycling Facility. Once the materials are all sorted by product classifications, they are purchased by manufactures for their own processing/use. In relation to each of Hunter Resource Recovery and the Regional Councils, at present all recycle collected from the respective LGAs is bulk hauled to the Enfield Recycling Facility.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be the supply and acquisition of services for:
 - a) the collection sorting and processing of kerbside recyclables
 - b) the haulage of bulked recyclables to processing facilities for recycling

- c) the sale of the recycled material.
- 4.6. For the purpose of assessing this application, the ACCC has considered the effects of the Proposed Conduct upon competition on the above services in the Hunter Valley and to a lesser extent, the greater Sydney region.

Future with and without the Proposed Conduct

- 4.7. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the application for authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.8. Hunter Resource Recovery submits that the Proposed Conduct will mean that Hunter Resource Recovery and its Member Councils will delay offering the next long-term processing contract until after the industry uncertainty, including impacts of the Commonwealth Government export bans, low demand for recycled products, and stockpile issues, is better understood, and corrective Federal and State policy actions are implemented.
- 4.9. Hunter Resource Recovery submits that pursuant to the Proposed Conduct, a new open tender is projected to be released, in early to mid-2026, thereby ensuring more favourable market conditions and certainty for prospective tenderers reflected in more competitive pricing for the communities its member councils serve.
- 4.10. Hunter Resource Recovery submits that without the Proposed Conduct, the Applicants have 2 options:

a) *Member Councils each individually contract with Solo.*

Hunter Resource Recovery submits that preliminary enquiries with the Member Councils and the Hunter Resource Recovery Board suggest that this option would prove very difficult and is unlikely to be a viable option, due to the following considerations.

Member Councils will shortly be entering caretaker mode in light of the Local Government elections in September 2024, which would greatly limit the Member Councils' powers with respect to decisions that can be made during that period. Following those elections, there would likely be a further delay while the new councillors are onboarded.

Member Councils are not set up to manage such recycling contracts, and each Member Council would need to set up the infrastructure internally to facilitate this (a difficult and costly exercise which would be difficult to justify for potentially only 18 months), or for each Council to separately contract with Hunter Resource Recovery to provide those services (which is likely not possible due to Hunter Resource Recovery being a joint venture and at risk of breaching its constitution and declaration of trust).

The short-term contract proposed to be entered into is based on the current contract with Solo of which Hunter Resource Recovery is the principal. In light of this, the contract would need to be re-written to cover 4 individual Principals which would cause delay and see additional expense for each of the Member Councils, which would be borne by their respective ratepayers.

Lastly, due to Hunter Resource Recovery having secured a degree of compensation from Solo (via a lower gate fee) in recognition for the past financial support given to them by the Member Councils, there would be no guarantee that lower gate fees would be available to each individual Member Council should they

individually contract. Again, this could see significant additional cost incurred by each Member Council, making the proposal unviable.

- b) *Hunter Resource Recovery to tender for the conduct anticipated by authorisations AA1000647 and AA1000648.*

Hunter Resource Recovery submits that it has spent the past 2 years producing a tender package (including Contract) with such document in final, draft form and ready to call tenders should the ACCC not consent to the short-term contract anticipated by this current application.

Hunter Resource Recovery submits, however, that there is a problem with this strategy.

Businesses will have to tender in a very volatile environment, making it extremely difficult for them to accurately cost their services and thus setting up businesses to potentially fail; and further, the Applicants would be unable to tender for collections until a final sorting facility site is known as the collection contractor shall base their costs on location and the means to ship product to this site in an economic and sustainable manner.

Due to the current contract with Solo set to end in less than 12 months' time, and that beyond that date there is no contract for either collections or processing in the Member Councils' local government areas, it would be virtually impossible to finalise and circulate both the collections and processing tenders, have interested parties lodge their tenders, assess the tenders, award the tenders, and contract with the tenderers in that period. That would also provide insufficient time for a business to establish a processing facility meaning that the only businesses able to tender would be those who already have all of the facilities up and running now, which doesn't allow a new business to enter the market. As such, this greatly reduces competition in the market, and with such a monopoly, risks those businesses being able to charge higher rates due to that lack of competition.

- 4.11. IQ Renew submits that in the absence of authorisation from the ACCC, and pursuant to the NSW Local Government Act (Section 55), Hunter Resource Recovery would have a statutory obligation to invite tenders before entering into a contract of this nature. The Applicants do not accept that section 55 of the Local Government Act requires them to go to tender for the proposed short-term contract with Solo due to extenuating circumstances (discussed above). The ACCC notes that if it was to grant authorisation for the Proposed Conduct, it would not alter any obligations the Applicants have under the Local Government Act.
- 4.12. The ACCC considers that, in the absence of the Proposed Conduct, Hunter Resource Recovery (on behalf of its Member Councils), or the Member Councils individually, are nonetheless likely to try to overcome some of the difficulties outlined above in order to enter a short-term contract with the incumbent supplier, Solo, and maintain collection and processing of kerbside recycling material in the Member Councils' areas.
- 4.13. The ACCC considers that the Applicants could seek to contract with Solo by running a joint tender process for a short-term contract for recycling services pursuant to ACCC authorisations AA1000647 and AA1000648, or each Member Council contracting with Solo individually.
- 4.14. This would in effect maintain an arrangement very similar to the status quo (and the Proposed Conduct) and would maintain collection and processing services for rate payers following the current contract ending in June 2025, and while the tender process for the longer-term service contract is undertaken during 2025.

4.15. The Applicants submit that only Solo is in a position to provide the services required in the short term. The ACCC notes the submission by iQ Renew that it and possibly other waste services providers would bid to supply short-term services. However, the ACCC considers that Solo is most likely to be awarded a contract by the Applicants, given Solo is likely to be the only entity with the infrastructure to economically be able to provide the services in the short term. Further, the processing facilities Solo uses are located close to the Member Councils' catchment areas (which is desirable to them), and Solo is most likely to provide the best rate for the Member Councils and their ratepayers due to the significant degree of compensation Hunter Resource Recovery has secured with Solo (via lower gate fees), discussed above.

Public benefits

4.16. 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.⁶

4.17. Hunter Resource Recovery submits that the Proposed Conduct will enhance regional waste management resilience, boost local economies, reduce financial risks to councils and ratepayers, and will contribute to the sustainable future of recycling in the Hunter region.

Transaction cost savings

4.18. Generally, Hunter Resource Recovery submits that joint contractual processes will allow each of the Member Councils to share resources (including financial and personnel) thus reducing duplication of time and costs associated with multiple tenders or contracts for the same subject matter.

4.19. Hunter Resource Recovery submits that any reductions in costs will benefit the ratepayer in that additional costs will not be passed down to them through an increase in charges.

ACCC view

4.20. The ACCC notes that in the likely future without the Proposed Conduct, the Applicants would be likely to award a short-term contract to the incumbent supplier, Solo, for recycling services. This outcome would be similar in effect to the Proposed Conduct.

4.21. As a result, the ACCC accepts that the Proposed Conduct is likely to result in public benefit in the form of transaction cost savings for Hunter Resource Recovery, Member Councils and Solo. There is likely to be a reduction in administrative and legal costs by jointly entering and giving effect to an 18 month-3 year contract for recycle services, when compared to the future without the Proposed Conduct which could include joint tendering or individual Member Council contracts, as outlined above.

⁶ 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.

4.22. The ACCC considers the savings from reduced transaction costs are likely to be small, however will constitute a public benefit, particularly where passed on to council ratepayers in the form of lower rates or increased services.

Public detriments

4.23. 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.⁷

Foreclosure of the market for recycle collection, sorting and processing

4.24. Hunter Resource Recovery acknowledges that a public detriment may arise as joint procurement by the Member Councils would effectively see one provider retained to collect and process recyclables within the relevant LGAs, until the expiration of the potential 3-year contract (mid-2028).

4.25. However, Hunter Resource Recovery submits that the detriment will be minimal, considering the following:

- a) Once the short-term contract has ended, there would be a fair opportunity for all the various service providers to participate in a tender process and to submit a competitive price on a level playing field with other service providers to provide collection and/or processing services.
- b) The proposed contract is only with a maximum of 4 out of the 128 Councils in NSW so there are many other opportunities for those contractors to provide their services to other Councils in NSW.
- c) The proposed conduct is only with regards to council-issued recycling bins, and that commercial waste services in the region will remain available to be provided by various service providers. Such providers can also contract with non- Hunter Resource Recovery Councils in the area (i.e. Newcastle, Port Stephens, Central Coast, Dungog, Upper Hunter and Muswellbrook) with respect to council-issued recycling bins. General waste collections are independent with a mix of councils and contractors providing services. Green waste is contracted under separate contracts.
- d) The prices under the proposed contract with Solo would be fixed; however, will be subject to adjustment for CPI and any key changes to the law. No other restriction on Solo is proposed to apply and Solo would be free to provide their services to other non-Member Councils should they so wish.
- e) Solo is not a processor and they will seek out a joint venture partner to undertake primary processing and secondary processing on a sub-contract basis. This leaves an opportunity for others to make competitive representations to Solo Resource Recovery and thereby reduce processing costs.
- f) Solo would be encouraged to be innovative over the life of the contract, including through utilising collection trucks using alternative fuels such as electricity,

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

hydrogen gas or Euro 7 standards, and by modifying collection zones to improve service delivery.

Interested parties

- 4.26. IQ Renew submits that fair and effective tender processes are crucial to ensuring true competition and delivering the best outcomes for the community. Since the services provided by Solo to Hunter Resource Recovery under the current contract have not been subject to a competitive process since 2012, iQ Renew submits that extending this contract without competition contradicts Hunter Resource Recovery's stated objective of promoting competition.
- 4.27. Further iQ Renew submits that Newcastle City Council is currently considering tender submissions for processing up to 15,000 tonnes per annum of recyclable material. Solo participated in this process and submitted a proposal. Solo already handles a significant volume of the Hunter Region's recyclable material through its current contract with Hunter Resource Recovery. If Solo were to be awarded the Newcastle City Council contract along with a 3-year extension to the Hunter Resource Recovery contract without a competitive bid process, it would effectively control a substantial majority of the region's recyclable material. Furthermore, should Solo secure the Newcastle City Council contract and the Hunter Resource Recovery volume in an uncontested manner, this will exclude companies like IQ Renew and other competitors from effectively competing, potentially impacting long-term viability and competition in the region.
- 4.28. Hunter Resource Recovery has submitted in response that there is only one competitor to Solo who could supply the recycle services that are the subject of the proposed contract, being iQ Renew, however they would still need to subcontract for collection services. IQ Renew's processing facilities are located on the NSW Central Coast well outside Hunter Resource Recovery collection areas.
- 4.29. Hunter Resource Recovery submits that in 2022, it called for a non-binding expression of interest (EOI) for the future provision of sorting and distribution of recycle, for which it received 10 responses. Hunter Resource Recovery wrote to all respondents in April 2024 and advised each of its intention to defer calling tenders at this time due to the poor state of the Australian recycling industry. Several major providers responded to Hunter Resource Recovery, saying they understood the reasons to defer the tender.

ACCC view

- 4.30. The ACCC acknowledges that the Proposed Conduct is:
- a) limited in scope to dry recyclables collection, sorting and disposal, and a number of associated services. The scope of the contracting arrangement is for the maximum of 4 Councils which represent a small proportion of recyclable collected and processed in NSW
 - b) voluntary for each Member Council, and each may choose not to proceed to contract with Solo if it is not in its commercial interests
 - c) not subject to any collective boycott.
- 4.31. The ACCC notes that the Proposed Conduct could be seen to potentially foreclose competition for the collection, sorting and processing of kerbside recyclables in the Member Councils' LGA's for the period of the Proposed Conduct. However, in the likely future without the Proposed Conduct, a contract is also likely to be awarded to the incumbent supplier, Solo, until a tender process for the longer-term contract can be undertaken by the Applicants in early 2025, for a commencement date in mid-2028.

- 4.32. For these reasons, the ACCC considers that the Proposed Conduct, largely reflecting the likely future without the Proposed Conduct, is likely to result in minimal, if any, public detriment.
- 4.33. The ACCC considers that generally, competitive tendering for new waste processing contracts is likely to deliver the most efficient outcome for Councils, and notes that this is reflected in the obligation to do so under the NSW Local Government Act except in extenuating circumstances. The ACCC acknowledges the significant uncertainty impacting the provision of recycle processing services at present and that the Applicants consider this to be extenuating circumstances such that delaying the tender process for a short period is in the best interests of their rate payers. However, the ACCC would be concerned if during the 18 month-3 year Proposed Conduct, if authorised by the ACCC, Hunter Resource Recovery and its Member Councils did not conduct a competitive tender process (as authorised under AA1000647 & AA1000648) for future recycle collection, processing and distribution services in each Member Council's Local Government Area.

Balance of public benefit and detriment

- 4.34. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

5. Draft determination

The application

- 5.1. On 26 April 2024, Hunter Resource Recovery lodged an application for authorisation AA1000670 with the Australian Competition and Consumer Commission (the ACCC), on behalf of itself, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council, (its Member Councils), to jointly enter and give effect to an 18 month-3 year contract for recycle collection, processing and distribution services with Solo Resource Recovery (Solo), in each Member Council's Local Government Area. Hunter Resource Recovery sought authorisation for 3 years.
- 5.2. The Applicants seek authorisation for the Proposed Conduct. 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 Proposed Conduct would or 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 Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed 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 Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000670 to Hunter Resource Recovery and each Member Council, to enter and give effect to a new, short-term 1.5 to 3 year contract with Solo, with respect to collection, processing and distribution of recyclables on a unified basis for its Member Councils.
- 5.7. Hunter Resource Recovery has sought authorisation to:
- a) engage in all necessary discussions between Hunter Resource Recovery and its Member Councils in order to enter into the proposed contract with Solo on the Solo Terms (see below)
 - b) do all things necessary to give effect to any contracting between Hunter Resource Recovery and its Member Councils and Solo with respect to the proposed conduct
 - c) enter into and manage a contract with Solo on the Solo Terms (see below) for a period of 18 months and one extension of up to a further 18 months.
- 5.8. The Solo Terms will include:
- a) Date of commencement of the agreement is 1 July 2025, upon the expiry of the current agreement.
 - b) Term of the agreement is 18 months, with an option to renew for a further period of 18 months. The maximum contract length would be 3 years.
 - c) Services to be provided are the same as covered by the current contract between Hunter Resource Recovery and Solo, being kerbside collection, processing and distribution of recyclate services, as covered by the ACCC's existing authorisation A91289 and covered by new authorisation AA1000647 and AA1000648).
 - d) The commercial terms are still to be negotiated between the parties.

“Proposed Conduct”

- 5.9. The Proposed 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 and 47 of the Act.
- 5.10. The ACCC proposes to grant authorisation for the Proposed Conduct under AA1000647 for 3 years.
- 5.11. This draft determination is made on 31 July 2024.

6. Interim authorisation

- 6.1. At the time of lodging the application, the Applicants requested interim authorisation to engage in the Proposed Conduct.
- 6.2. The ACCC has decided to grant interim authorisation to the Applicants to allow the Applicants to jointly negotiate and make an 18 month-3 year contract for recyclate collection, processing and distribution services with Solo.
- 6.3. Given the current contract with Solo runs until June 2025, interim authorisation does not extend to the Applicants giving effect to the contract with Solo with respect to this Proposed Conduct, while the ACCC completes its consideration of the substantive application.

- 6.4. 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 authorisation is withdrawn.

7. Next steps

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