



Draft Determination

Application for revocation of AA1000428 and the substitution of
authorisation AA1000522
lodged by

Camden Council
Campbelltown City Council
Liverpool City Council
Wingecarribee Shire Council and
Wollondilly Shire Council

to collectively tender and contract for future waste processing services for the
councils' household waste, dry recyclable material, garden organics and clean up
waste, and to continue to give effect to existing waste processing contracts entered
into by four of the five applicant councils.

Date: 20 August 2020

Commissioners: Sims
Keogh
Rickard
Court
Ridgeway

Summary

The ACCC proposes to re-authorise five outer Sydney councils to extend the period of authorisation previously granted to them to collectively tender and contract for the provision of services by one or more qualified contractors to receive, process, market and dispose of (by sale or otherwise) kerbside-collected waste materials.

This conduct has been previously authorised since 14 December 2018 and is not changed by the current application; the only change sought is a longer duration. The Applicants have sought to extend the period of authorisation for a further five years, due to significant changes and uncertainty in relation to regulatory requirements, and waste processors needing longer contracts than expected to underwrite investment in new processing facilities.

The ACCC proposes to grant authorisation until 1 July 2049.

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

1. The application for authorisation revocation and substitution

- 1.1. On 2 July 2020, the Councils of Camden, Campbelltown City, Liverpool City, Wingecarribee Shire and Wollondilly Shire (the **Applicants**) lodged an application to revoke authorisation AA1000428 and substitute authorisation AA1000522 for the one revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants are seeking re-authorisation to:
 - collectively tender and contract for the provision of services by one or more qualified contractors to receive, process, market and dispose of kerbside waste material, and to give effect to these contracts (the **Tendering Conduct**), and
 - allow the councils of Camden, Campbelltown, Wingecarribee and Wollondilly to continue to give effect to contracts entered into under authorisation A90886 (granted in 2004), until 31 May 2024 (the **Existing Contracts Conduct**).(together, the **Conduct**).
- 1.3. The Applicants have requested the ACCC extend authorisation for the Tendering Conduct for a further five years, until 1 July 2049.
- 1.4. On 22 November 2018, the ACCC granted authorisation AA1000428 to the Applicants for the Tendering Conduct until 1 July 2044, and the Existing Contracts Conduct until 31 May 2024. No significant concerns were raised in relation to this previous application.
- 1.5. This application for re-authorisation AA1000502 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.6. The ACCC may grant authorisation to provide businesses with legal protection for arrangements that may otherwise risk breaching the competition law but are not harmful to competition and/or are likely to result in public benefits overall.

2. Background

- 2.1. The Applicants are local government authorities responsible for the collection and processing of household generated waste material. All five councils are located in the southern and western region of the outer Sydney area. Together, the five councils represent around 12 per cent (or 112,380 tonnes) of all waste processed in the Greater Sydney Region.
- 2.2. As at 2017, the combined population of the Applicant councils was approximately 556,000. Table 1 shows the population figures for each council.

Table 1

Council	FY17 population
Camden	80,900
Campbelltown	164,400
Liverpool	214,100
Wingecarribee	47,750
Wollondilly	49,350

- 2.3. The Applicants' kerbside collected waste material consists of four streams:
 - household waste: domestic waste including food waste that cannot generally be separated into streams of Dry Recyclable Material or Garden Organics
 - dry recyclable material: largely comprised of paper products, glass products and plastic products
 - garden organics: organic materials that are compostable
 - clean-up waste: inorganic, bulky waste that cannot be placed into standard garbage or recycling bins.
- 2.4. Each of the Applicants propose to enter into separate but identical contracts with the successful tenderer(s). The Applicants propose that one contractor will be contracted by all of the Applicants in respect of one or more of the four streams of waste material. More than one contractor will not be contracted for each stream.
- 2.5. It is common practice throughout Australia for groups of local councils to collectively tender and contract for waste services. The objective of such collaboration is to reduce transaction costs, pool resources and expertise, and achieve economies of scale.
- 2.6. The ACCC has previously authorised around 30 arrangements of this type, concluding that they were likely to result in net public benefit through improved quality of services at lower cost to the participating councils. Many of these arrangements have involved the procurement of waste processing services.
- 2.7. The collective tender and contracting process that the Applicants were authorised to commence under authorisation AA1000428, which they are seeking to extend in the current application by a period of five years, is similar to a number of those that the ACCC has previously authorised.

Reasons for the current application

- 2.8. The Applicants request an extension of the term of authorisation, due to significant changes in circumstances from when authorisation AA1000428 was granted. The Applicants submit these changes have arisen as a result of a range of unforeseen changes not within the control of the Applicants.
- 2.9. In October 2018, the NSW Environment Protection Agency changed regulations relating to the use of organic outputs derived from mixed waste processing, due to risks associated with chemical and physical contaminants.¹ The Applicants advise this decision effectively ceased the processing of household mixed waste in New South Wales. The Applicants advise they cannot confidently invite tenders until the government's regulatory position on waste is determined. The councils are waiting for the release of the government's 20-Year Waste Strategy document to clearly articulate its direction in relation to this and other issues. Release of the 20 Year Waste Strategy has been delayed and is currently expected in early 2021².
- 2.10. In the previous application, the Applicants requested authorisation until 2044 in accordance with their expectation that an Alternative Waste Treatment (AWT) facility would likely be established under the arrangements. However, the Applicants advise they consider that Waste to Energy (WtE) technology now appears to be the only viable option available. This is as a result of the New South Wales Government's current position and the outcome of the Applicants' process of market engagement, which revealed a preference for WtE technology and separate collection of organic materials - due to diminished landfill disposal capacity, the uncertainty of regulations surrounding the future of mixed waste processing, and the government's preference for household food organics and garden organics collection systems.
- 2.11. WtE facilities have a longer establishment period than AWT, and a higher establishment cost (which then requires a longer contract term in order to provide sufficient opportunity for adequate return on investment).

3. Consultation

- 3.1. Given the minor nature of the changes between the existing and new applications, and the uncontentious nature of the previous authorisations, the ACCC has not sought the views of interested parties prior to the preparation of this draft determination.
- 3.2. The ACCC will seek the views of interested parties in response to this draft determination and consider any views prior to preparation of its final determination.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. Consistent with subsection 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

¹ <https://www.epa.nsw.gov.au/your-environment/recycling-and-reuse/resource-recovery-framework/mixed-waste-organic-material>

² <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.nswdpiе-yoursay.files/7015/8630/3412/19p2036-cleaning-up-our-act-20yr-waste-strategy.pdf>

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 assessing the Conduct, the ACCC considers that:

- the relevant areas of competition likely to be affected by the Conduct are those for the supply of services for receiving and processing household waste, dry recyclables, garden organics and clean-up waste, in the Greater Sydney Region, and
- in the likely future without the Conduct, each council would likely separately tender for the provision of waste processing services, and Camden, Campbelltown City, Wingecarribee Shire and Wollondilly Shire Councils may have to cease their current contractual arrangements before the end of the contracted period in 2024. Each of the four councils would need to individually source waste processing services for any gap between the cessation of these contracts and the commencement of any future collectively acquired 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 the term should be given its widest possible meaning, and includes:

*...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.*³

4.5. The ACCC has considered the following public benefits:

- transaction cost savings
- cost efficiencies
- increased competition, and
- environmental benefits.

Transaction cost savings

4.6. The Applicants submit that the Conduct is likely to reduce costs by allowing administration to be streamlined for both the Applicants and the service providers.

4.7. The ACCC considers that the Tendering Conduct is likely to provide transaction cost savings for both the Applicants and the service provider(s). Without such an arrangement, each Applicant would separately tender, negotiate and enter into contracts with individual service providers, resulting in more time, effort and resources being expended. Additionally, the Proposed Tendering Conduct is likely to result in transaction cost savings for the waste processing services providers who engage in the tender process. The providers will only be required to participate in a single tender process per waste stream, which may reduce their administrative burden.

³ 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.

- 4.8. Regarding the Existing Contracts Conduct, the ACCC considers that allowing Camden, Campbelltown City, Wingecarribee Shire and Wollondilly Shire Councils to continue to give effect to the contracts entered into following authorisation A90886 will avoid transaction costs associated with re-negotiating individual contracts with service providers to cover the period from 6 July 2021 to 31 May 2024.
- 4.9. Therefore, compared to a future without the Conduct, the ACCC considers that the Conduct is likely to result in transaction cost savings.

Cost efficiencies

- 4.10. The Applicants submit that there are likely to be efficiencies resulting from the Conduct including from centralised processing and handling of waste materials, and from a higher rate of resource recovery resulting from higher waste material. The Applicants submit these efficiencies will most likely be reflected in lower fees paid by householders for domestic waste charges.
- 4.11. The ACCC considers that the Tendering Conduct is likely to result in public benefit through improved cost efficiencies. Specifically, aggregation of waste volumes is likely to result in service providers offering the Applicants lower prices for processing, and there may be some efficiencies in transport and handling of waste across the municipal areas. The ACCC also considers that the Tendering Conduct is likely to allow for ongoing contract management efficiencies wherein the suite of contracts is managed centrally, as opposed to a situation in which each council manages its contract separately.
- 4.12. Regarding the Existing Contracts Conduct, the ACCC considers that allowing Camden, Campbelltown City, Wingecarribee Shire and Wollondilly Shire Councils to continue to give effect to the contracts entered into following authorisation A90886 will avoid the additional administrative burden and additional service costs that may be incurred by the councils should they be required to revert to individual contracts for the period between 2021 and 2024.
- 4.13. The ACCC concludes that the Conduct is likely to result in public benefit in the form of increased efficiencies.

Increased competition

- 4.14. The Applicants submit the Conduct may attract new entrants into the market who would not otherwise participate but for the guaranteed greater volume of waste material which may overcome the high costs of entry into the market (particularly in relation to investment in facilities and infrastructure). The Applicants also hope the longer tender period sought may afford potential service providers with the opportunity to research and utilise new technology, thus stimulating greater participation from a range of service providers.
- 4.15. The ACCC considers that the Tendering Conduct may increase competition by offering prospective tenderers a substantial volume of waste for processing. The combined waste volumes from the five applicant councils will present service providers with a more attractive amount of waste supply than would be the case if the Applicants tendered for processing services separately. As such, the ACCC would expect that existing services providers, and potential new entrants, will compete more vigorously for waste processing contracts on offer.
- 4.16. Additionally, the ACCC considers that long lead times built into the Tendering Conduct including an establishment time within the contract of 5-7 years for the construction of

a WtE facility, may better facilitate the entry of new participants. The potential for new entrants to compete to service the Applicants is likely to further increase competition.

Environmental benefits

- 4.17. The Applicants submit that the Conduct is likely to result in environmental benefits as a result of an increased level of resource recovery, increased efficiency of transportation and waste processing operations, and potential for waste technologies which may reduce the level of residual waste that goes to landfill.
- 4.18. The ACCC considers that the Tendering Conduct is likely to facilitate the councils achieving their environmental goals faster or at lower cost. The Conduct is also likely to result in public benefit in the form of improved environmental outcomes in the form of diverting waste from landfill.

Public detriments

- 4.19. 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.⁴

- 4.20. The Applicants submit that the Conduct will result in minimal, if any, public detriment, noting that there has been an increase in competition in the relevant markets in recent years.
- 4.21. The ACCC considers that public detriments may arise as a result of arrangements such as these where the joint procurement group comprises a substantial portion of the market that it reduces competition for providers of the relevant services.
- 4.22. Consistent with its consideration of the previous authorisation A1000428, the ACCC considers that the Conduct likely to result in minimal public detriment, due to the significant volume of waste material collected by other councils in the Greater Sydney Region which will not be subject to the proposed arrangements and will therefore remain available to unsuccessful tender applicants and other market participants.

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 a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

- 4.24. The Act allows the ACCC to grant authorisation for a limited period of time.⁵ 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 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁵ Subsection 91(1)

4.25. In this instance, the Applicants seek re-authorisation until 1 July 2049, to permit contracts of 20 years with a five year extension to commence in June 2024.

4.26. The ACCC considers that authorisation of the Tender Conduct until 1 July 2049 is appropriate in the context of:

- the likely need for substantial capital investment in establishing an appropriate waste management facility, and
- regulatory change and continuing uncertainty.

5. Draft determination

The application

5.1. On 2 July 2020 the Applicants lodged an application to revoke authorisation AA1000428 and substitute authorisation AA1000522 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000522 was made under subsection 91C(1) of the Act.

5.2. The Applicants seek authorisation for the Conduct defined at paragraph 1.2.

5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

5.4. 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.

5.5. 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.

5.6. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to re-authorise

5.7. The ACCC proposes to revoke authorisation AA1000428 and grant authorisation AA1000522 in substitution to:

- enable the Applicants to collectively tender and contract for the provision of services by one or more qualified contractors to receive, process, market and dispose of kerbside waste material, and to give effect to these contracts (the **Tendering Conduct**), and
- allow the councils of Camden, Campbelltown, Wingecarribee and Wollondilly to continue to give effect to contracts entered into following authorisation A90886 (the **Existing Contracts Conduct**).

- 5.8. 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.
- 5.9. The ACCC proposes to grant authorisation AA1000522 to the Tendering Conduct until 1 July 2049, and to the Existing Contracts Conduct until 31 May 2024.
- 5.10. This draft determination is made on 20 August 2020.

6. Next steps

- 6.1. The ACCC invites submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination.