



Determination

Applications for authorisation
lodged by
Hunter Resource Recovery
in respect of
the collective tender and contract for recycling services
Authorisation numbers: AA1000647 and AA1000648

Date: 31 January 2024

Commissioners: Keogh
Carver

Summary

The ACCC has decided to grant authorisation to 2 applications:

- (a) AA1000647 to enable Hunter Resource Recovery, its member councils, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council, and each of the regional councils 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, until 31 January 2051; and
- (b) AA1000648 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 procure and contract for kerbside dry recyclate collection in each Council's Local Government Area, until 31 January 2038.

The ACCC previously granted authorisation to Hunter Resource Recovery for similar conduct in 2012.

The ACCC considers that the proposed conduct is likely to result in public benefits in the form of transaction costs savings by reducing or eliminating the administrative and legal costs associated with conducting or responding to individual negotiation, tender processes and contracting arrangements. There are likely benefits from accumulation of the Councils' recyclables volumes enabling Service Providers to realise economies of scale in the delivery of collection, processing and sorting services, resulting in lower charges to rate payers.

The ACCC considers that the proposed conduct is likely to result in environmental benefits, such as reductions in greenhouse gas emissions from transport efficiencies, and increased rates of recycling (or at least reduced contaminated recycling), and less waste going to landfill from more effective recycling education programs helping to increase awareness.

The ACCC considers that the proposed conduct is likely to result in public benefits in the form of increased innovation and competition in the provision of waste processing services in the region and employment (largely from construction of a new processing facility).

The ACCC considers that public detriments are likely to be minimal given the proposed conduct is limited in scope to dry recyclables collection, sorting and disposal. The scope of the proposed joint tendering and contracting arrangements for the maximum of 7 Councils represent a small proportion of the total recyclable material collected and processed in NSW, and no collective boycott is proposed. Further, in relation to the processing application, participation is voluntary for each regional Council, and potential service providers are free to tender for one, or for multiple, regional Councils.

The application for authorisation

- 1.1. On 10 August 2023, Hunter Resource Recovery lodged application for authorisation AA1000647 with the Australian Competition and Consumer Commission (the **ACCC**), on behalf of itself, and to extend to Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council, (its **Member Councils**), and each of Dungog Shire Council, Muswellbrook Shire Council and Upper Hunter Shire Council (**Regional Councils**), to jointly procure and contract for the establishment of a recycling processing and sorting facility. Hunter Resource Recovery seeks authorisation for a period of 27 years.
- 1.2. On 18 August 2023, Hunter Resource Recovery lodged application for authorisation AA1000648 with the ACCC, on behalf of itself and to extend to its Member Councils, to jointly procure and contract for kerbside dry recyclate¹ collection in each Member Council's Local Government Area. Hunter Resource Recovery seeks authorisation for a period of 14 years.
- 1.3. Both applications, being closely related, have been assessed simultaneously by the ACCC in this determination.
- 1.4. Hunter Resource Recovery also sought interim authorisation for the Proposed Conduct. On 7 November 2023, the application for interim authorisation was withdrawn.
- 1.5. These applications for authorisation were 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

- 1.6. 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**). Hunter Resource Recovery provides a domestic recycling service to over 157,500 households across these Local Government Areas.
- 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' Local Government Areas. Hunter Resource Recovery is also a delegate of each of the Member Councils for the purpose of entering into any contract regarding recycling.²
- 1.8. Hunter Resource Recovery operates as the central hub for recycling services for each Member Council in the following manner:

¹ The term recyclate is used to describe a raw material transported to a waste recycling facility or a material recovering plant for processing into a newly formed material or product.

² The delegation is made under section 377 of the Local Government Act 1993.

- providing a centralised customer service call centre which operates as the recycling hotline;
- operating as a conduit between the Member Councils and the tenderer to ensure the highest possible standard of customer service is maintained;
- investigating all service complaints and reporting conclusions to both the Member Councils and the tenderer; and
- overseeing the Work Health and Safety performance of the contractor.

1.9. Hunter Resource Recovery also provides the following functions:

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

1.10. Hunter Resource Recovery is governed by a Board of Directors made up of the General Manager of each of the Member Councils, an elected Councillor from each of the Member Councils, or a Senior Director of each of the Member Councils.

2. Background

Previous authorisation

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 (Previous Authorisation). The Previous Authorisation is set to expire on 4 May 2024.

2.2. The Previous Authorisation was granted for:

- Hunter Resource Recovery to invite tenders on behalf of the Councils for a joint recycling contract for the collection, sorting and disposal of dry recyclable packaging, collected from the Councils' residents and businesses;
- any discussions between the Hunter Resource Recovery and its Member Councils necessary in order to conduct the tender and select the successful tenderer; and
- Hunter Resource Recovery to enter into and manage a contract with the successful tenderer as delegate of the Member Councils and as a trustee for the recycling collection fund.

2.3. Hunter Resource Recovery has advised the ACCC that it is administering a contract with Solo Resource Recovery with respect to collection, processing and distribution of recyclables on a unified basis for its Member Councils (pursuant to the Previous Authorisation) and is due to cease on 30 June 2025.

The Proposed Conduct

Processing Conduct

- 2.4. Under application AA1000647, Hunter Resource Recovery, on behalf of itself, and to extend to its Member Councils, and the Regional Councils, seeks authorisation to jointly procure and contract for the establishment of a recycling processing and sorting facility (**Recycling Facility**), for a period of 27 years (**Processing Conduct**).
- 2.5. Hunter Resource Recovery also seeks authorisation on behalf of itself, each Member Council, and each Regional Council:
 - a) to do all things necessary to give effect to the processing contract between Hunter Resource Recovery and Solo Resource Recovery that was entered into as a result of the Previous Authorisation;
 - b) to do all things necessary to give effect to any contracting between Hunter Resource Recovery and its Member Councils and the Regional Councils with respect to the proposed conduct;
 - c) to invite and evaluate tenders with respect to the processing and sorting of recyclables within each Member Council's and Regional Council's Local Government Area, including the establishment of a Recycling Facility;
 - d) to engage in all necessary discussions between the Member Councils and Regional Councils in order to conduct the tender and select the successful tenderer;
 - e) to enter into and manage a contract between Hunter Resource Recovery (and its Member Councils) with the successful tenderer for a period of 15 years and 2 potential extensions of 5 years each; and
 - f) for each Regional Council to be authorised to enter into and manage individual contracts for the Regional Solution (ie. 3 separate contracts) should they so choose to proceed.
- 2.6. A Recycling Facility is a specialised facility that receives, separates and prepares recyclable materials for marketing to end-user manufacturers. The Recycling Facility must be capable of providing recycling commodities to a ready to use standard for remanufacture and or reuse in value-added production.
- 2.7. In carrying out the Proposed Conduct, Hunter Resource Recovery and the Regional Councils will jointly prepare (through a third-party consultant) and advertise a request for tender to invite tenders from suitably qualified and experienced companies to contract to undertake the establishment of sorting, processing and distribution of dry recyclate collected via the recycling service. Each of Hunter Resource Recovery, the Member Councils, and the Regional Councils, have a strong preference for a single provider to be appointed to service all participating Councils in the interests of achieving value for money and economies of scale.
- 2.8. Under the Proposed Conduct, each of the Member Councils, and the Regional Councils would enter into 4 separate contracts with that third party provider being: one contract for Member Councils, and 3 individual contracts for each of the 3 Regional Councils (noting that the MOU is non-binding, and any one of the 3 Regional Councils may choose not to proceed to contract following the tender process).
- 2.9. Each Regional Council operates individually and each currently separately contracts with a third-party provider with respect to the sorting and processing of its recyclate.

Collection Conduct

- 2.10. Under application AA1000648, Hunter Resource Recovery, on behalf of itself and to extend to its Member Councils, seeks authorisation to jointly procure and contract for kerbside dry recyclate collection in each Member Council's Local Government Areas, for a period of 14 years (**Collection Conduct**).
- 2.11. Hunter Resource Recovery also seeks authorisation on behalf of itself and each Member Council to:
- a) do all things necessary to give effect to the collection contract between Hunter Resource Recovery and Solo Resource Recovery that was entered into as a result of the Previous Authorisation;
 - b) do all things necessary to give effect to any contracting between Hunter Resource Recovery and its Member Councils with respect to the proposed conduct;
 - c) invite and evaluate tenders on behalf of the Member Councils for a joint recycling contract for the collection of recyclables collected from the Member Councils' residents and businesses;
 - d) engage in all necessary discussions between Hunter Resource Recovery and its Member Councils in order to conduct the tender and select the successful tenderer; and
 - e) enter into and manage a contract with the successful tenderer for a period of 10 years and 2 extensions of 1 year each.
- 2.12. Under the Collection Conduct, Hunter Resource Recovery (acting on behalf of the Member Councils by way of a delegation of authority) is to jointly procure (through a tender process) and contract for kerbside dry recyclate collection in each Member Council's Local Government Area.
- 2.13. In carrying out the Proposed Conduct, Hunter Resource Recovery will prepare and advertise a request for tender to invite tenders from suitably qualified and experienced companies to contract to undertake the collection of dry recyclate from the kerbside of residents within each Member Council's Local Government Area. The Member Councils have a strong preference for a single provider to be appointed to service all Member Councils in the interests of achieving value for money and economies of scale.
- 2.14. Under the terms of the proposed contract, a performance management committee will be established consisting of a Hunter Resource Recovery Board representative and the tenderer. The role of the committee is to review the tenderer's performance and explore opportunities for continued service improvements.
- 2.15. Together, the Processing Conduct and Collection Conduct are defined as the **Proposed Conduct**.
- 2.16. The Member Councils and Regional Councils, together, represent 7 of the 9 local councils comprising the Hunter Region of New South Wales and in total represent 63% of the population of the Hunter Region. City of Newcastle Council and Port Stephens Council are the remaining Councils in the Hunter Region.
- 2.17. It is estimated that approximately 30,880 tonnes of recyclables will be collected from households and transported to a central location for processing and distribution. The same or different contractors may tender for both collection and sorting and processing.

- 2.18. The contract with respect to the Processing Conduct is proposed to be open for tender and have the contract signed first, so that the location of the Recycling Facility can be determined and communicated to potential tenderers for the collections contract.
- 2.19. Section 377 of the *Local Government Act* 1993 prohibits local councils from delegating their powers to “accept tenders”. Therefore, before Hunter Resource Recovery may enter into a recycling contract on behalf of its Member Councils, the Member Councils must themselves accept the successful tenderer. 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).
- 2.20. In response to these Guidelines, Hunter Resource Recovery will establish a tender review committee for all tenders. It will be represented by a member of each participating Council who will assess the tender returns against their score matrix under the scrutiny of Hunter Resource Recovery's legal representatives, independent probity officer and industry professional consultancy team. Hunter Resource Recovery will be a non-voting member of this committee but will provide oversight (probity) and guidance to the committee.

Rationale for Proposed Conduct

- 2.21. Hunter Resource Recovery submits that the rationale for the Proposed Conduct is to provide an efficient and cost-effective process for the rate payers in each of the Member Council and Regional Councils' Local Government Areas regarding the processing, sorting and collection of their recyclables, and to reduce the amount of waste going to landfill. The objective is to meet community expectations around sustainable waste management practices.
- 2.22. In relation to the Processing Conduct, Hunter Resource Recovery submits that in 2019, the Recycling Facility at Gateshead, which sorted and processed all of the recyclables collected by Hunter Resource Recovery, closed. This was the only sorting and processing facility in the Hunter, meaning that all of Hunter Resource Recovery's stock (as well as the stock for the Regional Councils) is currently bulk hauled to Enfield Recycling Facility in Sydney for processing. The closing of the Gateshead Recycling Facility resulted in additional transportation costs of \$2.8 million per annum, which was then passed on to residents via the recycling charge.
- 2.23. Hunter Resource Recovery submits that as a result of this closure, the current contractor, Solo Resource Recovery, also had to invest and build secondary sorting facilities in the Sydney region in order to secure end markets. This practice is not financially or environmentally sustainable, so Hunter Resource Recovery and the Regional Councils have joined together to devise an alternative plan and facilitate the establishment of a new Recycling Facility in the Hunter region.
- 2.24. Hunter Resource Recovery submits that since 2016, there have been several international and national changes in law, regulations and industry challenges that have all been a threat to the viability and security of recycling. Most Victorian, and many NSW, Councils either lost their recycling provider or had to renegotiate terms in order to maintain community confidence in recycling processing by way of providing financial support to service providers in order to maintain security of service.³

³ Hunter Resource Recovery response to City of Newcastle, 14 November 2023, page 1.

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.

Prior to draft determination

- 3.2. The ACCC received a submission from the City of Newcastle, 1 of the 9 Councils in the Hunter Region of NSW, and the second largest local government area outside of Greater Sydney, with a population of around 170,000.⁴
- 3.3. City of Newcastle supports the application for authorisation, and provided the following information based on its own recent experience:
- a) It can take 18 - 24 months to procure collections services, based on the current supply chain, and labour constraints in the market.
 - b) It can take 3+ years to procure a new large scale recycling facility, based on development approvals and licensing complexities as well as extended construction timeframes due to materials supply chain and labour constraints in the market.
 - c) A new 60,000 tpa Recycling Facility will cost +\$60 million. This price includes the cost of planning, procurement, approvals, licensing, services compliance as well as design, construction and commissioning. There are significant construction as well as plant and equipment cost escalations that need to be accounted for given the long procurement and delivery timeframes.
 - d) The bulk of the recovered commodity streams from a Hunter Region based Recycling Facility will require transport to Sydney for further recovery or export. There is limited competition for these streams given the limited availability of outlets in the Australian market.
- 3.4. City of Newcastle submits that the costs associated with waste management and resource recovery have significantly increased since Covid-19. Each Hunter Region Council is now faced with affordability challenges associated with the required investment in new landfill, resource recovery, logistics and collections.
- 3.5. City of Newcastle submits that since 2018 the costs associated with the collections and processing of City of Newcastle recyclables waste have increased by 152 per cent. Based on City of Newcastle's experience the incumbent recyclable waste collectors and processors have leveraged market complexities for financial gain from the Hunter Region Councils.
- 3.6. City of Newcastle submits that it is in the final stages of a Development Approval application to construct and operate a Recycling Facility at its Summerhill Waste Management Centre. It submits that this new facility would provide for a best value for money outcome to all parties, i.e. having 2 smaller scale recycling Facilities within the Hunter Region would cost the respective communities more.
- 3.7. Hunter Resource Recovery, on behalf of the Applicants, has responded to the City of Newcastle submission, and has provided the following information:
- a) Whilst Hunter Resource Recovery acknowledges the challenges faced in the industry, it submits that Member Councils experienced no increase in collection

⁴ City of Newcastle submission, 20 October 2023.

costs and saw a comparatively small 74% increase in processing costs since 2018. It does not feel that their incumbent processor has leveraged the market complexities for financial gain for the Hunter Region Councils (and their respective rate-payers). Hunter Resource Recovery is assured that its Member Councils and rate payers continue to receive a high standard of service at an affordable cost.

- b) Hunter Resource Recovery submits that it has commissioned an independent expert analysis of its proposal and the estimated cost, which has then been considered by all participating Councils in the Working Group.⁵ The analysis has indicated that a new Recycling Facility capable of processing 100,000 tonne per annum and located within the collection area would cost between \$30 to \$35 million. Hunter Resource Recovery is comfortable with the estimate provided by its own advisors.
- c) Hunter Resource Recovery agrees that a Regional Recycling Facility would greatly benefit all Hunter Councils. Hunter Resource Recovery's independent transport analysis concluded however that without City of Newcastle participating in the regional project, the optimum location was within the Cessnock Local Government Area and not at Summerhill.
- d) Hunter Resource Recovery submits that it undertook an Expression of Interest (EOI) to determine whether there would be a competitive market for the establishment of a new sorting facility that would benefit all Councils whilst ensuring the development of a local circular economy. A total of 10 individual potential contractors expressed an interest in participating in a future tender. Each EOI return was assessed by the representatives of each participating Council based on a score matrix system ranking the EOI returns from 1 to 10. The City of Newcastle EOI return did not feature in the top 5 EOIs after this review. Hunter Resource Recovery felt that the City of Newcastle proposal would not offer the best value for money for all participating councils and would only benefit City of Newcastle as a commercially operated facility.
- e) Hunter Resource Recovery submits it appears that City of Newcastle's Summerhill sorting facility proposal will be a commercially operated venture and that all other Councils who wish to utilise the facility would be customers.
- f) Hunter Resource Recovery submits that as this project has a potential \$300 million expenditure well above the Local Government Act \$150,000 limit, it will be tendered on an open tender basis. This tender shall ensure that there will be no claim that Councils have a preferential arrangement with a single supplier. Hunter Resource Recovery shall conduct the tender in good faith and provide assurance of openness and accountability, build anticorruption capacity and achieve the best quality, environmental and cost outcomes for all 7 Councils represented under 4 intended contracts.

Following the draft determination

- 3.8. On 6 December 2023, the ACCC issued a draft determination proposing to grant authorisation to Hunter Resource Recovery for its Processing Conduct for a period of 23 years, and proposing to grant authorisation to Hunter Resource Recovery for its Collection Conduct for a period of 12 years. A pre-decision conference was not

⁵ Hunter Resource Recovery, Member Councils and Regional Councils formed a Regional Recycling Solution Working Group (Working Group) and have been working co-operatively since 2020 to develop the best recycling processing solution to the benefit of all Councils.

requested following the draft determination and the ACCC did not receive any submissions.

4. ACCC assessment

- 4.1. Hunter Resource Recovery has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and/or may have the purpose, effect or likely effect of substantially lessening 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 Local Government Area, and each Member Council provides the standard products and services of a Council.
- 4.4. Hunter Resource Recovery submits that once dry recyclate 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 manufacturers for their own processing/use. In relation to each of Hunter Resource Recovery and the Regional Councils, at present, as described above, all recyclate collected from the respective Local Government Areas is currently 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 the bulked recyclables to processing facilities for recycling; and
 - c) The sale of the processed recyclate material.
- 4.6. For the purpose of assessing these applications, the ACCC has considered the likely effects of the Proposed Conduct on competition for the supply and acquisition of 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 with the Proposed Conduct, Hunter Resource Recovery (on behalf of its Member Councils) and the Regional Councils, can continue to manage the increase in costs to rate-payers and minimise such cost as much as possible. If authorisation is not granted to engage in the Proposed Conduct, rate-payers will be forced to pay significantly higher fees for the collection, sorting and processing of recycling, which may, in turn, see an increase in the amount of recyclables going to landfill.

- 4.9. Hunter Resource Recovery submits that without authorisation of the Processing Conduct, each of the Member Councils and Regional Councils and their ratepayers will have to find their own processors and continue to pay very high costs for processing.
- 4.10. Hunter Resource Recovery submits that due to the individual sizes of each of the Councils (particularly the Regional Councils) should they be required to contract individually, they are highly unlikely to attract service providers and, even if they did, they would not be able to be competitive and the price per tonne would be prohibitive.
- 4.11. In addition, Hunter Resource Recovery submits that without authorisation of the Processing Conduct, each of the Member Councils and Regional Councils will be placed at risk of not having a local sorting facility as tenderers would seek to continue using Sydney-based facilities and bulk haul unsorted product to Sydney via transfer stations. This would mean that ratepayers within each of the relevant councils' Local Government Areas would not benefit from reduced costs, (estimated to be a 40% to 50% reduction) and would also see a loss of local employment opportunities not only from having a local Recycling Facility but also from being able to use additional service providers who may establish new manufacturing facilities locally utilising sorted recycle produced within the Hunter Region.
- 4.12. Hunter Resource Recovery submits that if authorisation is granted to engage in the Proposed Conduct, its education program will continue to achieve greater public awareness, by providing one message continuously (rather than separate messages from each of the Member Councils). Should authorisation not be granted, it submits that several service providers may deliver mixed messages and result in less funding being channelled into education. This would increase the risk of inconsistent messaging regarding recycling, which can, in turn, lead to reduced recycling and an increase in contaminated recycling.
- 4.13. The ACCC considers that, in the future without the Proposed Conduct, each Member Council, and the Regional Council would likely carry out separate tender processes, and contract separately for recycling collection and processing services.

Public benefits

- 4.14. 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

- 4.15. Hunter Resource Recovery and the Regional Councils strongly believe that its proposed joint tendering processes will have significant public benefits within each of the participating councils' Local Government Areas.
- 4.16. The ACCC considers that the potential public benefits relevant to its application of the authorisation test are:
- transaction cost savings and economies of scale

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.

- environmental benefits
- increased innovation, competition and employment in the Hunter region.

Transaction cost savings and economies of scale

- 4.17. Hunter Resource Recovery submits that the proposed joint tendering processes under both applications for authorisation will allow each of the participating Councils to share resources (including financial and personnel) thus reducing a duplication of time and costs associated with multiple separate tenders for the same subject matter.
- 4.18. Hunter Resource Recovery submits that the demand for recycling processing and disposal services is determined by the quantity of recycling produced. Hunter Resource Recovery produces 27,380 tonnes of recyclate each year, while the Regional Councils produce just 3,500 collectively. The increased recycling volumes available through a shared service under a joint tendering arrangement, such as under these applications, are likely to deliver several regional benefits and reduce the gate fee⁷ for all participating Councils. It submits that the economy of scale will particularly benefit the smaller Councils and their communities through a reduction in waste services costs.
- 4.19. Hunter Resource Recovery submits that this was demonstrated when Singleton Council joined Hunter Resource Recovery in 2014 and quickly saw its recycling costs drop by 46%. This was due to the fact that because of their size, Singleton Council's recyclate alone was not enough to enable bargaining power for a reduced fee; however, such bargaining power was possible when they acted in combination with the other Hunter Resource Recovery Member Councils. For example, Hunter Resource Recovery is aware of other Councils paying almost \$50 per tonne more for recyclate sorting compared to those who have been able to jointly tender.

Processing Conduct

- 4.20. Hunter Resource Recovery submits that current assessments indicate that if each of the participating Councils were to separately tender for this conduct, then they would need to expend a minimum of \$75,000 each. Under this Application for authorisation, the cost incurred by each council is based on a percentage contribution based on a number of services. As Hunter Resource Recovery is responsible for 92% of the recycling services within the combined Local Government Areas, then Hunter Resource Recovery will fund the vast majority of the costs of the tendering process. This will save each of the Regional Councils significant costs.
- 4.21. Hunter Resource Recovery submits that such a reduction in costs will benefit the ratepayer in that costs will not be passed down to them through an increase in charges, and the funds saved can be utilised for other projects benefiting the community.
- 4.22. Further, Hunter Resource Recovery submits that the very low volumes of product currently collected from each of the Regional Councils under their 3 separate contracts means that each of those Councils pays a premium for sorting and transportation to a sorting facility due to their remoteness from industry infrastructure. Further the Regional Councils' service provider does not currently have a sorting facility so they must negotiate with a sorting agent to accept and process collected stock.
- 4.23. Hunter Resource Recovery submits that studies it has commissioned show that a local Recycling Facility established with an initial 15-year contract period will not only

⁷ A gate fee is payment treatment facilities charge waste disposers to accept their waste.

provide service security, it is also likely to reduce costs up to \$6 million per annum, equating to \$150 million over the life of the contract, plus CPI. It submits that, assuming an annual CPI of a modest 2%, a total financial saving of \$140 million is very possible across a period of 15 years.

- 4.24. Hunter Resource Recovery submits that it would not be financially viable for any contractor to establish a Recycling Facility in each Local Government Area, and with modern Recycling Facilities costing in excess of \$30 million to establish, it would not be realistic or sustainable for each of the Member Councils and Regional Councils to undertake such a venture in isolation. It submits that it is highly unlikely that any company would establish a sorting facility for 7 different contracts. In light of this, each of the relevant Councils therefore has no other option than to utilise a facility located within the Hunter catchment and to negotiate a gate fee for processing. Given the lack of Recycling Facilities within the Hunter Region, each of the relevant Councils (particularly the Regional Councils) are in a vulnerable position in that they can either pay an inflated gate rate for processing or risk losing their recycling service completely (which would be a terrible outcome for ratepayers).
- 4.25. The City of Newcastle has submitted that its new Summerhill Recycling Facility would provide for a best value for money outcome to all parties, and that having 2 smaller scale recycling Facilities within the Hunter Region would cost the respective communities more.
- 4.26. Hunter Resource Recovery acknowledges that the City of Newcastle is building a commercial Recycling Facility which will have the capacity to service the Hunter Region. Hunter Resource Recovery submits that there is a real risk of this becoming the only sorting facility in the Hunter Region which will thereby pose a significant financial risk upon Member Councils and Regional Councils due to the lack of regional competition. Two local Recycling Facilities would ensure competition and drive down costs to ratepayers. Otherwise, this would allow a Recycling Facility operator to dictate what products they will accept, thereby restricting the amount of recycle processed resulting in increased landfill.
- 4.27. Hunter Resource Recovery submits that in a recent EOI process, assessed by the representatives of each participating Council, the City of Newcastle EOI did not feature in the top 5 EOIs. It was assessed that the City of Newcastle proposal within that EOI would not offer the best value for money for all participating Councils and would only benefit City of Newcastle as a commercially operated facility.

Collection Conduct

- 4.28. Hunter Resource Recovery also submits that under the Collection Conduct, each Member Council will need to replace the current recycling bins as most are 27 years old and well beyond their shelf life of 12 years. A bulk order for 163,700 units would allow the successful tenderer to negotiate a more affordable supply cost. These savings are then passed onto the rate payer via a reduced service charge.

ACCC view

- 4.29. The ACCC accepts that the Proposed Conduct is likely to result in public benefits from transaction cost savings for Hunter Resource Recovery, Councils and potential Service Providers, including by reducing or eliminating the administrative and legal costs associated with conducting or responding to individual negotiation, tender processes and contracting arrangements. The ACCC considers that any transaction cost savings to Hunter Resource Recovery and Councils will be partially offset by any additional costs they may incur in the coordination and administration of their service agreements, including attending the Representative Committee, made up of a

representative from Hunter Resource Recovery and each of the Member Councils, over the life of the contracts.

- 4.30. The ACCC considers the savings from reduced transaction costs, and associated operational efficiencies, are likely to constitute a public benefit, particularly where passed on to council ratepayers in the form of lower rates or increased services.
- 4.31. The ACCC accepts that under the Proposed Conduct, the accumulation of the Councils' recycle volume would likely enable Service Providers to realise economies of scale in the supply of collection, processing and sorting services. This may facilitate lower average costs for each of the Councils to the extent they are passed onto Councils by the Service Provider(s), which could lead to lower costs for rate payers.
- 4.32. In relation to the Processing Conduct, the ACCC notes the City of Newcastle's submission that its new Summerhill Recycling Facility could be a viable option within the Hunter region, however the ACCC notes the Applicant's response that after its own assessment and that of independent experts, the optimum location for a new Recycling Facility for the participating Councils was within the Cessnock Local Government Area and not at Summerhill. The ACCC notes that the City of Newcastle will be open to participate in the public commercial tender process for the intended new Recycling Facility.

Environmental benefits

- 4.33. Hunter Resource Recovery submits that sharing resources, as discussed above, and including reducing the use of stationery, power and other resources, will be environmentally beneficial as a result of being undertaken by a central hub rather than by each of the 7 separate councils.

Processing Conduct

- 4.34. Recyclables in the Hunter area are currently being transported to Sydney for sorting, which Hunter Resource Recovery submits is expensive and increases carbon emissions due to the additional truck movements required. By constructing a Recycling Facility in a centrally located area for all participating councils to use, this would reduce both the transport costs and the emissions caused by unnecessary travel.
- 4.35. Further, Hunter Resource Recovery submits that its education programs support both the recycling services and the Councils' programs, and this information will be shared with the Regional Councils thus spreading a uniform, united message. Studies show that consistent messaging around recycling greatly increases the success of people recycling which, in turn, has a positive environmental impact.

Collection Conduct

- 4.36. Hunter Resource Recovery submits that the collection of recyclables will be designed to optimise the capacity of the collection vehicles by servicing nearby suburbs, towns and villages in those adjoining Local Government Areas, and that this will greatly reduce heavy vehicle traffic movements and reduce greenhouse gas emissions.
- 4.37. Hunter Resource Recovery submits that the Proposed Conduct will provide a stable collections service, and by maximising the recovery of recyclables and minimising non-recyclables in the recycling bin, this will provide significant environmental benefits.
- 4.38. Hunter Resource Recovery submits that the Member Councils' high yield of recyclables and very low residual waste rates are a result of the community's awareness of what can be recycled courtesy of the education program overseen by Hunter Resource Recovery. By providing one consistent message Hunter Resource Recovery has been able to achieve greater public awareness regarding recycling. If

authorisation is not granted, Hunter Resource Recovery submits that this will increase the risk of inconsistent messaging by service providers regarding recycling, which can, in turn, lead to reduced recycling and an increase in contaminated recycling.

ACCC view

- 4.39. The ACCC accepts that the Proposed Conduct is likely to result in some reductions in greenhouse gas emissions in respect of transport efficiencies, especially due to the construction of a centrally localised Recycling Facility under the Processing Conduct.
- 4.40. The ACCC also accepts that the level of education administered across the regions would be higher with the Proposed Conduct, and Hunter Resource Recovery providing its recycling education programs to a broader audience may help to increase awareness and increase recycling amounts (or at least reduce contaminated recycling amounts), and a reduction in landfill, which is likely to constitute a public benefit.
- 4.41. An increase in recycling due to more consistent education of residents under the Proposed Conduct may lead to a decrease in costs of waste collection and disposal, and would be likely to be passed on to ratepayers in the form of lower rates or increased services, however, it is unclear to the ACCC the extent of such savings.

Increased innovation, competition and employment

Processing Conduct

- 4.42. Hunter Resource Recovery submits that the Proposed Conduct will see a \$30 million capital investment in the establishment of a regional Recycling Facility and this will facilitate the creation of employment opportunities for skilled and unskilled staff and sub-contractors, local trades and suppliers, both through the construction of the Recycling Facility and on an ongoing basis for the processing and sorting of materials (estimated to be the creation of 15 new regional jobs directly, and even more in associated transport and support industries).
- 4.43. Hunter Resource Recovery submits that by increasing the size of the market for dry recyclables, Member Councils combined with the Regional Councils will likely increase competition between tenderers, offering more efficient services, increased frequency of collection and increased recovery rates for recyclables.
- 4.44. Hunter Resource Recovery submits that the tenderer will be able to access wider markets for the sale of the recyclables as they are able to supply greater volumes of recyclables on a continual supply basis. By entering a more competitive market, the tenderer can achieve maximum financial return which, in turn, will reduce the tenderer's operating costs, making the service more affordable to the rate payer.
- 4.45. Hunter Resource Recovery also submits that a local circular economy could be achieved by providing refined end product in volume which may encourage new reprocessing and manufacturing facilities within the Hunter Region providing security for the recycling services that are enhancing the local environment.

Collection Conduct

- 4.46. Hunter Resource Recovery submits that it works closely with the Member Councils to conduct research and development as well as trialling new services and recycling programs that have a direct benefit to the community. Hunter Resource Recovery will continue to do this under the Proposed Conduct. This ensures that the service delivery is the best it can be for the ratepayer and also further grows and develops the recycling industry generally, which benefits all. The Performance Management Committee (Hunter Resource Recovery Board representative and the tenderer) will

also review the tenderer's performance and explore opportunities for continued service improvements, to ensure best service delivery for ratepayers.

ACCC view

- 4.47. The ACCC considers that the Proposed Conduct is likely to offer potential tenderers a larger volume of waste for collection, processing and sorting, and therefore a higher value contract, which may result in Service Providers competing more vigorously to win the service contract, resulting in public benefit from lower costs to Councils, and savings passed to ratepayers. The joint tendering process is likely to attract interest from a greater number of Service Providers, including potentially new entrants.
- 4.48. The ACCC accepts that the Proposed Conduct, including higher contract values, may incentivise innovation by Service Providers and Councils, potentially leading to public benefit. However, the amount of innovation likely and consequent benefit is unclear, so the ACCC has given little weight to it.
- 4.49. In relation to the Processing Conduct, Hunter Resource Recovery submits that without authorisation, individual Councils are likely to enter individual contracts for these waste services, where tenderers would seek to continue using Sydney-based facilities and bulk haul unsorted product to Sydney via transfer stations. The ACCC therefore considers that the construction of a new Recycling Facility would create additional employment opportunities in various trade industries and is likely to result in public benefit. The Proposed Conduct is likely to also result in ongoing processing and sorting job opportunities at the new Recycling Facility, however these new jobs are likely to largely come at the expense of a reduction in jobs at facilities where this waste is currently being processed and therefore any public benefit would be minimal.

Public detriments

- 4.50. 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.⁸*
- 4.51. Hunter Resource Recovery submits that the Proposed Conduct may operate to reduce competition as it would effectively see one provider retained to collect recyclables, and another to sort and process recyclables, and the relevant Local Government Areas comprise a substantial proportion of the market.
- 4.52. However, Hunter Resource Recovery submits the following:
- a) There will be fair opportunity for all the various service providers to participate in the tender process and to submit a competitive price on a level playing field with other service providers.
 - b) The proposed contract is only with a maximum of 7 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 contract allows for the tenderer to engage sub-contractors for the provision of some services under the proposed contract. It is possible that the

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

tenderer may seek competitive quotes for these services which may allow smaller operators an opportunity to participate in the services.

- d) The splitting of the previous contract into 2 separate contracts (one for collections and the other for processing and distribution) also enables increased competition as contractors previously could not tender if they did not have the ability to both collect and process and distribute the products. As such, the parties to each authorisation may end up contracting to 2 separate providers for each service, rather than only being able to contract with one.
- e) In relation to the Processing Conduct, the Recycling Facility is also not for the exclusive use of the Member Councils and Regional Councils with other councils able to utilise the service should a commercial waste collection company so wish (depending on the Recycling Facility operator).
- f) In relation to the Collection Conduct, the 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 (ie Newcastle, Port Stephens) with respect to council-issued recycling bins. General waste collections are independent with a mix of councils and contractors providing services, and green waste is contracted under separate contracts.

ACCC view

4.53. The ACCC considers that public detriments may arise from joint procurement processes where the group of councils (who would otherwise compete independently to acquire the relevant services) comprises a substantial portion of the market and the joint procurement reduces competition for service providers.

4.54. The ACCC considers that the Proposed Conduct potentially forecloses competition for the collection, sorting and processing of kerbside recyclables in the Member Councils and Regional Councils for a significant period of time. However, the ACCC considers that the Proposed Conduct is likely to result in limited public detriment, because:

- a) It is limited in scope to dry recyclables collection, sorting and disposal, and a number of associated services. The scope of the proposed joint tendering and contracting arrangements for the maximum of 7 Councils represents a small proportion of recyclable material collected and processed in NSW.
- b) No collective boycott is proposed.

4.55. In relation to the Processing Conduct:

- a) Participation is voluntary for each Regional Council, any one of the 3 Regional Councils may choose not to proceed to contract with a particular service provider following the tender process.
- b) Potential service providers are free to tender for one, or for multiple Regional Councils.
- c) The ACCC also considers that the commercial certainty provided by the long-term contract and the existence of other potential users of the recycling facility limit the potential for public detriment.

Balance of public benefit and detriment

4.56. For the reasons outlined in this determination, the ACCC considers that, in all the circumstances, 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.

Length of authorisation

- 4.57. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ 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.
- 4.58. Hunter Resource Recovery submits that Local Government elections are occurring in September 2024, which will see local Councils entering a caretaker phase from approximately May 2024, followed by a training period for the new Council, which will hold up decision making for a considerable number of months.
- 4.59. Hunter Resource Recovery also provided further information following the ACCC's draft determination in support of the longer periods of authorisation sought.

Processing Conduct

- 4.60. Hunter Resource Recovery is seeking authorisation (on behalf of each of the Member Councils and Regional Councils) to jointly procure and contract for the establishment of a recycling processing and sorting facility for a period of 27 years.
- 4.61. Hunter Resource Recovery submits that the successful tenderer will require sufficient time to acquire an operations site within the service area, seek development consent from the relevant council to build a sorting facility, design and purchase sorting equipment, acquire appropriate EPA approvals, train staff, implement education programs for the residents and supply new recycling bins.
- 4.62. A contract will be awarded to construct a suitable facility or facilities capable of meeting the councils' recycling demands for at least 15 years (with 2 potential extensions of 5 years each) commencing 1 July 2025. The reason for this length of contract is to seek commitment through investment for the establishment of a high-tech recycling sorting facility located within the service catchment area. Estimated costs could exceed \$30 million to establish such a facility.
- 4.63. City of Newcastle submits that it can take 3+ years to procure a new large scale Recycling Facility, based on development approvals and licensing complexities as well as extended construction timeframes due to materials supply chain and labour constraints in the market.

Collection Conduct

- 4.64. Hunter Resource Recovery is seeking authorisation for a period of 14 years, to cover the Proposed Conduct, including a 10-year contract term with the option of 2 x 1-year extensions.
- 4.65. Hunter Resource Recovery submits that given the outlay required to perform a contract for local government recycling services, it is Hunter Resource Recovery's rationale that a 10-year contract will make the contract more attractive to tenderers and may enable efficiency gains and development of effective educational and environmental programs. Retendering of the contract at the end of this term (including

⁹ Subsection 91(1) of the Act.

option period) will allow other service providers in the market to submit their competitive tenders.

- 4.66. Hunter Resource Recovery submits that the duration sought will cover the replacement of all recycling bins, should a new contractor be retained, the development of new collection trucks (including hydrogen powered ones) and the establishment of a new depot, with EPA approvals.
- 4.67. City of Newcastle submits that it can take 18 – 24 months to procure collections services, based on the current collection vehicle and body supply chain, and labour constraints in the market.

ACCC view

- 4.68. The ACCC notes that long-term contracts are common in joint council tendering, due to the need for a competitive tender process and tenderers to realise returns on any investments made.
- 4.69. The ACCC notes the Tendering Guidelines under the Local Government Act, discussed above, where the tender assessment will be conducted by a Representative Committee made up of a representative from Hunter Resource Recovery and each of the Councils. Hunter Resource Recovery will be a non-voting member of this committee.
- 4.70. The ACCC notes that under the Processing Conduct, there is significant capital investment required to establish a Recycling Facility and that the length of the proposed contract reflects the investment required on the part of the successful tenderer. In light of the City of Newcastle submission, and similar waste collection authorisations granted by the ACCC, the ACCC is granting authorisation for a period of 27 years, to provide for up to a 20-year contract term, a procurement period, and to take account of the existing contract having some time still to run.
- 4.71. In relation to the Collection Conduct, the ACCC is granting authorisation for a period of 14 years, to provide for up to a 10-year contract term with 2 short options to extend, which is consistent with other similar waste collection authorisations granted by the ACCC, and a 2-year procurement period.

5. Determination

The applications

- 5.1. On 10 August 2023, Hunter Resource Recovery lodged an application for authorisation AA1000647 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**), and each of Dungog Shire Council, Muswellbrook Shire Council and Upper Hunter Shire Council (**Regional Councils**), to jointly procure and contract for the establishment of a recycling processing and sorting facility (**Processing Conduct**). Hunter Resource Recovery sought authorisation for a period of 27 years.
- 5.2. On 18 August 2023, Hunter Resource Recovery, lodged an application for authorisation AA1000648 with the ACCC, on behalf of itself and its Member Councils, to jointly procure and contract for kerbside dry recyclate collection in each Member Council's Local Government Area (**Collection Conduct**). Hunter Resource Recovery sought authorisation for a period of 14 years.

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 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 has decided to grant authorisation.

Conduct authorised

Processing Conduct

- 5.6. The ACCC has decided to grant authorisation AA1000647 for Hunter Resource Recovery, its Member Councils, Cessnock City Council, Lake Macquarie City Council, Maitland City Council and Singleton Shire Council (**Member Councils**), and each of Dungog Shire Council, Muswellbrook Shire Council and Upper Hunter Shire Council (**Regional Councils**) to jointly procure and contract for the establishment of a recycling processing and sorting facility (**Recycling Facility**).
- 5.7. The ACCC grants authorisation until 31 January 2051 to:
 - a) Hunter Resource Recovery, each Member Council, and each Regional Council to:
 - (1) do all things necessary to give effect to the contract between Hunter Resource Recovery and Solo Resource Recovery that was entered into as a result of authorisation A91289;
 - (2) do all things necessary to give effect to any contracting between Hunter Resource Recovery and its Member Councils and the Regional Councils with respect to the proposed conduct;
 - (3) invite and evaluate tenders with respect to the processing and sorting of recyclables within each Member Council's and Regional Council's Local Government Area, including the establishment of a Recycling Facility;
 - (4) engage in all necessary discussions between the Member Councils and Regional Councils in order to conduct the tender and select the successful tenderer;
 - (5) enter into and manage a contract between Hunter Resource Recovery (and its Member Councils) with the successful tenderer for a period of fifteen years and two potential extensions of five years each; and
 - b) each Regional Council to enter into and manage individual contracts for the Regional Solution (ie. 3 separate contracts) should they so choose to proceed.

Collection Conduct

- 5.8. The ACCC has decided to grant authorisation AA1000648 for Hunter Resource Recovery, and its Member Councils to jointly procure and contract for kerbside dry recycle collection in each Member Council's Local Government Area.

- 5.9. The ACCC grants authorisation until 31 January 2038 to Hunter Resource Recovery and each Member Council to:
- a) do all things necessary to give effect to the contract between Hunter Resource Recovery and Solo Resource Recovery that was entered into as a result of authorisation A91289;
 - b) do all things necessary to give effect to any contracting between Hunter Resource Recovery and its Member Councils with respect to the proposed conduct;
 - c) invite and evaluate tenders on behalf of the Member Councils for a joint recycling contract for the collection of recyclables collected from the Member Councils' residents and businesses;
 - d) engage in all necessary discussions between Hunter Resource Recovery and its Member Councils in order to conduct the tender and select the successful tenderer; and
 - e) enter into and manage a contract with the successful tenderer for a period of up to ten years.
- 5.10. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act and/or may have the purpose, effect or likely effect of substantially lessening competition within the meaning of section 45 and 47 of the Act.

Date authorisation comes into effect

- 5.11. This determination is made on 31 January 2024. If no application for review of the determination is made to the Australia Competition Tribunal, it will come into force on 22 February 2024.