



Australian
Competition &
Consumer
Commission

Draft Determination

Application for Authorisation

Lodged by

**Council of Camden, Campbelltown City Council, Liverpool
City Council, Wollondilly Shire Council and Wingecarribee
Shire Council**

In respect of

*collaboratively tendering for the services of qualified contractors, able to process,
market or otherwise dispose of kerbside collected waste materials (excluding bulky
materials)*

Date: 16 June 2004

Commissioners:

Samuel
Sylvan
King
Martin
McNeill
Smith
Willett

Authorisation no. A90886

Public Register no. C2003/1363

Executive Summary

The application

On 16 October 2003, the Australian Competition and Consumer Commission (the Commission) received an application for authorisation (A90886) from the Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Council. (the Councils).

The authorisation process

A key objective of the *Trade Practices Act 1974* (the Act) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The Act, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.

Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The Commission conducts a comprehensive public consultation process before making a final decision to grant or deny authorisation, including inviting interested parties to request a public conference chaired by a Commissioner where submissions on its draft decision can be made.

The proposed arrangements

The Councils seek authorisation to advertise for and subsequently jointly tender for the provision of services of contractors able to process, market or otherwise dispose of three streams of kerbside collected waste materials, namely:

- dry recyclable material;
- organic waste (mainly plant material from gardens);
- and residual waste.

It is proposed that tenders be sought for two separate groups of materials: dry recyclable material; and, all remaining kerbside collected waste materials, excluding bulky wastes (i.e. organic and residual waste). Tenders will be advertised separately but simultaneously. Depending on the submissions received, the councils may enter into agreements with a contractor for the dry recyclable materials waste stream and either: one contractor for organic waste stream and another for residual waste stream; or a contractor for both organic and residual waste streams.

Assessment of the public benefit and anti-competitive detriment

The Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal. Given that competition for the provision of residual waste management services is currently negligible, the Commission considers that the

proposed arrangements will in fact increase competition in this market by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.

With respect to the markets for the provision of dry recyclable material and organic waste management services, any anti-competitive detriment generated by the arrangements is also limited by the current lack of significant competition for the provision of these services. In addition, the combined dry recyclable and organic waste generated by the Councils party to the proposed arrangements is only a small portion of the total amount generated in the Sydney metropolitan area, meaning that existing and potential new providers unsuccessful in the tender process would still be able to compete to provide these services to other councils.

With respect to all three streams of waste, the Commission considers that the proposed arrangements may increase competition as the development of a common centralised system for processing and handling each of the waste streams is likely to generate transportation and materials handling efficiencies. Additionally, the proposed arrangements are likely to result in transaction cost savings to both the Councils and the service providers. Such savings are likely to be reflected in lower domestic waste management charges to ratepayers which the Commission considers to be a public benefit.

In addition, the Commission considers that the proposed collective tender will also produce some, limited, environmental benefits, by assisting to facilitate the development of alternative waste technologies to the current reliance on landfill for waste disposal more immediately than may have otherwise been the case.

Overall, the Commission is satisfied that the public benefit flowing from the proposed arrangements is likely to outweigh any anti-competitive detriment. Therefore, the Commission proposes to **grant** authorisation A90886 as sought by the Councils for the following periods:

- for the period of the collective tender process up to a maximum of nine months from the date the final determination comes into effect; and
- for the term of the contracts entered into under the tender process up to a maximum of 10 years.

The Commission will now seek submissions from interested parties. In addition, the Councils or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the Act.

List of Abbreviations & Glossary of Key Terms

Alternative Waste Technology	Waste processing technologies that provide an alternative to landfill disposal. Automated systems for the separation of mixed solid waste into its components streams, with the objective of producing higher value material and energy products. Alternative waste technology can also refer to technologies that process organic wastes only.
Bioreactor Technology	A fully sealed landfill utilising modern technology to capture landfill gas to be used to power electricity turbines.
Clean-Up Waste	Household domestic waste that is set aside for kerbside collection, for example broken and discarded furniture, appliances and fittings, fence palings and other waste materials excluding chemicals, putrescible matter, trade waste, stones, concrete, motor vehicle bodies or engine blocks, tyres, large quantities of building materials.
Dry Recyclable Material	Paper, cardboard and containers separated from organic and other mixed waste at the kerbside and having some value when processed to market specifications.
Food Waste	Waste generated from the preparation and consumption of food exclusive of grease, oil, fat and meat waste.
Garden Organics or Green Waste	Putrescible garden waste (grass clippings); non-woody garden waste; woody garden organics; trees and limbs; and stumps and rootballs separated from inorganic and non-biodegradable materials at the kerbside.
Residual Waste	Any materials that cannot be separated into the dry recyclable material or garden organic streams or materials mixed together in such a way as to be impractical to separate by residents.
Resource Recovery	Recovery of resources from waste by recycling, composting or generating energy from waste. Alternative waste technology could be defined as a combination of resource recovery systems.
Source Separation	The sorting of waste by material type at the point of generation, for example, the sorting of household recyclables into the kerbside recycling bin.
Transfer Station	The waste handling facility used to transfer waste from collection vehicles to a bulk haul vehicle in order to achieve long-distance transportation efficiency. It may also be used to sort and redirect waste within the potential

to recycle prior to disposal.

**Waste
Materials**

Collective term for all three streams of kerbside collected materials (dry recyclable material, garden organics and residual waste).

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INTRODUCTION

Authorisations

- 1.1 The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The Act, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.
- 1.3 Broadly, the Commission may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The Commission conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.5 The Act requires that the Commission then issue a draft determination in writing proposing to either grant the application (in whole, in part or subject to conditions) or deny the application.
- 1.6 This document is a draft determination in relation to application for authorisation A90886 lodged with the Commission by the Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Council (the Councils).
- 1.7 Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference. If requested, the conference provides interested parties with the opportunity to put oral submissions to the Commission in response to a draft determination. The Commission will also invite interested parties to lodge written submissions on the draft.
- 1.8 The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the Commission may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

The application

- 1.9 On 16 October 2003, the Commission received an application for authorisation (A90886) from the Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Council. The

Councils are all located in the southern and western region of outer metropolitan Sydney.

- 1.10 The application seeks authorisation under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.¹
- 1.11 The Councils seek authorisation to collaboratively tender for the services of qualified contractors, able to process, market or otherwise dispose of kerbside collected waste materials (excluding bulky materials). The result of this tender process will be a small number of contracts, most likely one for dry recyclable material and either one or two for organic and residual waste, entered into by the Councils and the contractor(s).
- 1.12 The application is discussed in further detail in Chapter 3 of this draft determination.

¹ The application has also been considered as an application under the New South Wales *Competition Code*.

BACKGROUND TO THE APPLICATION²

- 2.1 All Local Government councils in New South Wales (NSW) are responsible for the collection and removal of domestic waste within their Local Government area.
- 2.2 Under the proposed arrangements, the Councils will remain responsible for collection and transportation of waste to receiving facilities. Contractors will be responsible for the processing and sale (or disposal) of the waste material delivered to their receiving facility.

Expressions of interest

- 2.3 In September 2001, the Camden, Campbelltown, Wollondilly and Wingecarribee councils, with the assistance of the Macarthur Waste Board, called for expressions of interest for services of qualified contractors for the receipt, processing and sale of dry recyclable material.
- 2.4 Three contractors responded, which resulted in Camden, Campbelltown, Wollondilly and Wingecarribee councils resolving to call for tenders in March 2002. The tender process was suspended in July 2002 while the Councils sought authorisation for the proposed arrangements.

Events since expressions of interest

- 2.5 Since July 2002 Camden, Campbelltown, Wollondilly and Wingecarribee councils have reconsidered their approach to regional contracts and commenced discussions with Liverpool City Council, a council bordering both the Campbelltown and Camden Local Government Areas. The five councils are now considering a collaborative tendering process for all kerbside collected waste material (excluding bulky wastes).
- 2.6 Where councils seek to enter into contracts with waste service providers, under the *Local Government Act 1993* and *Local Government (Tendering) Regulation 1999* they are obliged to conduct a tender process in relation to the awarding of the contract.³

The market

- 2.7 The local government areas of Camden, Campbelltown, Liverpool, Wollondilly and Wingecarribee have a regional population of approximately 426,000 and in the financial year 2002/2003 collected over 156,000 tonnes of waste material through kerbside collection services to rate payers (excluding bulky wastes).
- 2.8 This application for authorisation relates to the provision of services for receiving, handling, processing, marketing and disposing (by sale or otherwise)

² The information in this section is sourced primarily from the Councils submission in support of their application for authorisation.

³ This requirement relates to works with values in excess of \$100,000.

of the following separate streams of kerbside collected waste materials, as defined in the glossary of this draft determination:

- dry recyclable material;
- organic waste (mainly plant material from gardens); and
- residual waste.

2.9 These councils account for approximately 9% of the total dry recyclable material, garden organics and residual waste collected by councils in Sydney.

Types of waste materials to be recovered and disposed

2.10 As noted above, there are up to three streams of material collected separately from the kerbside by councils on a weekly or fortnightly basis. They are:

- dry recyclable material;
- organic waste (mainly plant material from gardens); and
- residual waste.

2.11 Approximately 170,000 tonnes of waste material was generated within the five Council Local Government areas during the financial year 2002/2003.⁴

*Quantity of waste collected by waste stream (tonne/yr)*⁵

	Dry Recyclable Material				
	Paper & Cardboard	Containers	Garden Organics	Residual Waste	Total
Camden	2861	2028	5079	10189	20157
Campbelltown	8109	5333	14073	29729	57244
Liverpool ⁶	5106	3858	n/a ⁷	50034	58998
Wollondilly	1062	927	7409	8146	17544
Wingecarribee	2161	1689	7528	5209	16587
Total	19299	13835	34089	103307	170530

Dry recyclable material

2.12 The Councils collect dry recyclable material in two streams:

- fibres (paper and cardboard); and
- containers.

2.13 Dry recyclable material is generally collected from residents at kerbside in mobile garbage bins. However, to reduce glass breakage and increase the value of the recovered resource, Wingecarribee collects its glass in crates (sorting it by colour at the kerbside) and collects all other dry recyclable material in mobile garbage bins.

2.14 Current industry trends are toward fully commingled dry recyclable material collection (one stream collected in one mobile garbage bin at the kerbside). However, the Councils submit that the decision to implement a full commingled collection system will take into consideration the processing and marketing

⁴ The quantity of paper and cardboard collected in Wingecarribee was derived from waste composition data and total quantity of commingled dry recyclable material. All other quantities were measured directly using weighbridges.

⁵ All data sourced from respective councils internal statistics.

⁶ Quantities are for the calendar year 2002.

⁷ Since Liverpool does not operate waste management centres in its Local Government area, there is no data available on the quantity of garden organics generated by its residents.

solutions offered through the proposed tender process the subject of this application.

2.15 The table below describes the different types of dry recyclable material.

Types of dry recyclable material

Paper products	<p>Newsprint, cardboard, other paper generated by households (telephone books, all cardboard boxes, white paper etc)</p> <p>Paper products are sorted into three streams: newspaper; cardboard; and mixed paper.</p> <p>Paper is transported to recycling facilities in bales of 500kg to 750kg each.</p>
Glass products	<p>All glass bottles and jars such as beverage and other food containers of all colours and sizes.</p> <p>Window glass, light bulbs and other non-food containers are not collected.</p> <p>Glass is sorted, according to colour, into three streams, amber, green and flint or clear glass. Other glass colours such as blue and red are mixed in with the three main colour streams in small quantities. Amber and green glass can be contaminated with up to 10% other glass while flint is limited to 1% contamination.</p> <p>Sorted glass is transported in bulk haul vehicles to recycling facilities.</p>
Metal products	<p>Only food and beverage containers made of steel and aluminium are accepted.</p> <p>Metals are sorted into steel and aluminium streams.</p>
Plastic products	<p>All plastic food and beverage containers and other containers (for example, oil, shampoo and laundry products) of polymer types 1, 2, 3 and 5 are collected at present.</p> <p>Polymers 4, 6 and 7 are not supported by market demand and are not currently collected.</p> <p>Plastics are sorted accordingly to polymer type, baled and transported to recycling facilities in bales. PET and HDPE containers are sorted into clear and coloured streams and baled accordingly.</p>
Composite products	<p>The other form of packaging material collected in kerbside recycling programs is called 'liquid-paper-board'. These containers are mainly gable topped milk and juice cartons that consist of cardboard with a polyethylene lining, or aseptic containers (tetra paks) made of aluminium, cardboard and polyethylene lining (for example juice</p>

	<p>containers with drinking straws attached).</p> <p>Liquid-paper-board is either sorted for baling and transporation or mixed with the cardboard stream described above (in very small quantities).</p> <p>Aseptic containers are not recycled at present.</p>
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2.16 The Councils submit that it is likely that populations in their Local Government areas will increase and the pattern of waste generation will change over the duration of the contracts intended to be entered into under the proposed arrangements. While the overall waste generated will increase in line with population growth, the Councils anticipate that further materials will be diverted to the dry recyclable material and garden organics stream as residents recycle more material.

2.17 Three material recycling facilities are currently used by the Councils:

- Camden, Campbelltown and Wollondilly councils use Waste Service NSW's Jack Gully Waste Management Centre which accepts recyclables in two streams, paper/cardboard and containers, and sorts it into individual product streams, which are then compacted and transported to users;
- Liverpool Council uses Visy's Blacktown material recycling facility for sorting and aggregation. Liverpool's paper stream is sent directly to Visy's Smithfield facility where, with a minimal amount of sorting, it is used as a feedstock for the production of new paper and cardboard products; and
- Wingecarribee Council uses the Chullora material recycling facility near Bankstown.

2.18 Transporting glass with other dry recyclable material over long distances results in glass breakage and reduced resource recovery. Consequently, Wingecarribee introduced a separate glass collection which includes kerbside sorting of glass. Glass from Wingecarribee is delivered directly to manufacturers of glass beverage containers.

Organic waste

2.19 Material placed in the organics stream must be compostable (biodegradable through aerobic decay). Acceptable material is usually termed 'garden organics' and consists of:

- grass clippings;
- non-woody garden organics;
- woody garden organics;
- trees and limbs; and

- stumps and rootballs.
- 2.20 Although plastics are organic they are not compatible with composting systems and are defined as a contaminant when found in the organic waste stream. Other common contaminants include treated timber, garden hoses, garden pots (from pot plants) and bags of mixed waste. Overall contamination is approximately 5% in material collected from the kerbside and less than 1% in material dropped-off at supervised waste management centres.
- 2.21 Camden and Campbelltown Councils currently provide a mobile garbage bin for their residents to dispose of garden organics. Campbelltown also allows residents to drop-off garden organics at their Lynwood Road waste management facility. The remaining three Councils provide facilities for residents to drop-off garden organics or direct their residents to waste management centres provided by Waste Service NSW. However, residents in Liverpool, Wollondilly and Wingecarribee Local Government areas tend to use their garbage bin (collected weekly), at least for smaller branches, leaves and grass clippings. This means that organic and residual waste streams in these Local Government areas are generally mixed.
- 2.22 The Councils submit that the two rural councils, Wollondilly and Wingecarribee, are unlikely to adopt a kerbside collection service for garden organics due to travel distances and resident satisfaction with current drop-off facilities. When sufficient material has been stockpiled a contractor is employed by these councils to size reduce (chip) the garden organics collected. Each council then allows their residents to pick up this material, sometimes at a cost, and use it as a low quality mulch on their own properties. They may also use some of this material on their own parks and gardens.
- 2.23 However, the Councils indicate that Liverpool will consider the introduction of a mobile garbage bin based kerbside garden organics collection under the proposed contract, particularly as a strategy to reduce residual waste generation.
- 2.24 Garden organics processing infrastructure varies from mobile size reduction units provided by small contractors (these generally come to the residents property) right through to large scale windrow composting facilities (where the organics must be delivered to a central location).
- 2.25 Given the scale and nature of the proposed contract, the Councils anticipate that it will be the large scale processing facilities that compete for processing of kerbside collected garden organics. There are three large scale processing facilities within the combined boundary of the Councils:
- Camden Soil Mix;
 - M Collins & Sons; and
 - Australian Native Landscapes. Australian National Landscapes is contracted by Waste Service NSW to process the large quantities of garden organics delivered to Waste Service NSW landfills and transfer stations throughout the Sydney metropolitan area.

Residual waste

- 2.26 Residual waste consists of any material that cannot be separated into the dry recyclable material or garden organic streams. It generally includes any materials which are mixed together in such a way as to be impractical to separate by residents.
- 2.27 Residual waste is generally collected from residents at kerbside in mobile garbage bins. Currently, most residual waste collected by the Councils is disposed of through landfill.
- 2.28 Residual waste generation rates typically depend upon a number of variables:
- properties housing young families produce significantly more waste materials than those housing an old couple or housing that acts as a weekend holiday home;
 - conscientious recyclers will divert around 20% of material they generate to the recycling stream;
 - home composting and worm farming will also reduce waste generation at the kerbside; and
 - the size and number of bins provided for waste disposal appears to make a large difference to waste generation. Smaller garbage bins tend to reduce the waste collected through kerbside collection. There is potential for this 'avoided waste' to either contaminate the recycling and garden organics bins or to be dumped illegally.
- 2.29 The Councils are experiencing growing populations as Sydney expands into the south and west. Consequently, the Councils anticipate an increase in the overall quantity of residual waste produced by its residents.
- 2.30 Waste Service NSW owns all residual waste landfilling infrastructure in the Sydney metropolitan area.
- 2.31 The Councils note that in 2002 Waste Service NSW entered into an agreement with Global Renewables Limited (GRL) to construct their UR-3R plant at the Waste Service NSW, Eastern Creek waste management centre. This facility will employ a mechanical biological treatment system to separate and process (mixed) solid waste. The plant will contain a mix of technologies never used together on this scale. GRL claim that this plant will be able to achieve an 80% resource recovery rate from kerbside collected solid waste. Waste Service NSW plan to commission the plant in mid-2004.
- 2.32 The most significant private disposal infrastructure (not owned by Waste Service NSW) with the capacity to take significant amounts of Sydney's residual waste has been developed by Collex at Woodlawn, south east of Goulburn. The Woodlawn facility utilises wet bioreactor technology to accelerate degradation of the organic material in the waste, re-circulate leachate and capture the gas generated. Although Collex have successfully obtained approval for their

bioreactor technology, they have yet to secure significant long term supply of waste, and the inter-modal facility required to transport waste to the facility is currently in the process of seeking planning approval.

- 2.33 The map at Attachment A details the residual waste transfer stations and landfill sites available in the Sydney market.

Waste sale and ownership arrangements

Change of ownership

- 2.34 Councils deliver material to a waste management facility which consists of a landfill, transfer station, composting facility, material recycling facility or other waste processing plant. In general, each collection vehicle is weighed on arrival and departure to determine the net weight of each load and councils are then issued an invoice for payment of a 'gate fee' to the owners of the facility to cover costs associated with the handling, sorting and process (or disposal). The gate fee is based on a cost per tonne (\$/t). Where waste is disposed to landfill, the operator of the facility must pay a levy to the state government based on the number of tonnes received at the gate.
- 2.35 When material is delivered to a waste management facility ownership changes at the point of delivery to the owner/operator, usually at the time the load is weighed at the gate. Where recyclable material is delivered direct to the recycled products industry from kerbside, ownership changes to the receiver of the material, for example Amcor, Visy or ACI.
- 2.36 Councils that process garden organics at their own facility own the material prior to returning it to residents in the form of low quality mulch.

Resource recovery

- 2.37 In the case of dry recyclable material, the material is sorted in a material recycling facility and sold to end users at a price per tonne(\$/t) which is determined by the material type, quality of the produce, reliability of supply and other features.
- 2.38 Composted garden organics are generally screened and mixed with other recycled or mined raw materials like sand to produce a soil product designed for a variety of customers and uses. The soil product is predominantly sold in bulk (\$/t), however it may be bagged and sold as specialty potting mix or mulch through outlets like nurseries.
- 2.39 The cost to recover resources from the waste stream is generally greater than their value, therefore Councils pay the processor and marketer rather than receiving payment for the waste material delivered.
- 2.40 Residual waste may either be landfilled or fed into some form of alternative waste technology. In the first case, the landfilled waste continues to be owned by the owner/operator of the receiving facility, as does the liability for the ongoing maintenance and rehabilitation of the landfill. In the second case, the recovered

resources are sold, in a similar way to dry recyclable material and composted organics, to end users at a price per tonne (\$/t).

Renewable energy

- 2.41 Organic material recovered through alternative waste technology may be composted for use in a soil product, or used to create a fuel to generate energy. Composts from existing alternative waste technology in NSW are of such poor quality that they are generally used as alternative daily cover in landfills. In future, improved processing technology may allow these composts to be used in soil products and sold in the same way as composted garden organics. When organic material is used to generate energy, this energy may be sold as electricity for export to an electricity grid or used internally by the waste management facility. Government environmental agencies often consider energy derived from waste as a 'green' energy source.

Previous applications for authorisation (A30204 and A30205)

- 2.42 The Commission has previously considered applications for authorisation relating to similar arrangements in the Sydney region waste transfer and processing industry.
- 2.43 On 6 June 2002, the Commission issued a final determination granting authorisation to an application for authorisation lodged by Resource New South Wales (A30204) and an application for authorisation jointly lodged by Ashfield Council, Auburn Council, Burwood Council, City of Sydney, Canada Bay Council, Leichhardt Municipal Council and Strathfield Municipal Council (A30205).
- 2.44 Authorisation A30204 related to a proposal by 11 local councils in the southern Sydney region to collectively negotiate with material recycling facility operators with a view to appointing one to sort and dispose of their dry recyclable material for 10 years. The successful tenderer was required to construct a material recycling facility in the southern Sydney region. Authorisation A30204 was granted for the period of the collective tender process up to a maximum of nine months and for the term of the contract up to a maximum of 10 years.⁸
- 2.45 Authorisation A30205 related to a proposal by seven local councils in the inner Sydney region to negotiate collectively with material recycling facility operators with a view to appointing one to sort and dispose of their dry recyclable material for seven years. Unless the successful tenderer already operated a material recycling facility in or near the inner Sydney region, it was required to construct one. Authorisation A30205 was granted by the Commission on 6 June 2002 for

⁸ Authorisation A30204 was later varied (through a minor variation) to remove the condition that the successful tenderer be required to construct a material recycling facility in the southern Sydney region. In addition, on 12 February 2003, the Commission revoked authorisation A30204 and granted a substitute authorisation (A90861) identical to A30204 (with the minor variation), except that the period of authorisation for the tender process commenced from 12 February 2003 rather than 28 June 2002 as originally authorised.

the period of the collective tender process up to a maximum of nine months and for the term of the contract up to a maximum of five years.⁹

- 2.46 In respect of these applications for authorisation, the Commission considered that both sets of arrangements would result in a small public benefit primarily arising from improved efficiency (eg from reduced transport costs) and from improved environmental outcomes.
- 2.47 The Commission considered that public detriment could arise from allowing councils to collectively negotiate with material recycling facilities if it were to lead to an increase in the price of products created from dry recyclable material. However, the Commission considered that, in practice, minimal public detriment would result from the two proposals, particularly because of the existence of downstream processors which appeared to have sufficient market power to resist significant price increases by material recycling facilities and because the councils in the inner and southern Sydney regions were small suppliers of dry recyclable material.
- 2.48 The scope of the collaborative tendering process proposed by the Councils in this application is wider than that in the two applications mentioned above. In addition to tendering for the processing and marketing of dry recyclable material it is proposed that a separate but simultaneous tender be called for processing both organic and residual waste. These additional waste material streams increase the size of the tender significantly as they represent a much larger quantity of material at a higher cost per tonne to produce.

Current similar authorisation application (A30231)

- 2.49 On 11 December 2003, the Commission received an application for authorisation (A30231) from Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove Council, North Sydney Council, the City of Ryde, Willoughby City Council, Mosman Municipal Council and Warringah Council (the Northern Sydney Region of Councils).
- 2.50 The Northern Sydney Region of Councils seek authorisation to advertise for and subsequently jointly tender for the services of qualified contractors to provide waste transfer, processing and disposal services (waste disposal services) to their respective Local Government areas. The tender will be in the form of a joint tender, where it is proposed that dependent upon the tender evaluation:
- individual councils may decide to independently commission a contractor to service their Local Government area under a separate contract;
 - a number of councils may agree to combine their services under the one contract; or

⁹ Authorisation A30205 was revoked on 6 November 2002 and a substitute authorisation A90856 was granted identical to A30205 except as regards the term of the tender contract, which was extended from five years to ten years.

- all councils may decide to enter into the one contract.
- 2.51 The scope of the collective tendering process proposed by the Northern Sydney Region of Councils differs from this application in that this application relates to the provision of services for waste transfer as well as processing and disposal. Further, the Northern Sydney Region of Councils application is limited to putrescible waste, green waste, cleanup waste, and food waste, while this application also includes processing, marketing and disposing of the dry recyclable materials waste stream.
- 2.52 Concurrent with the release of this draft determination, the Commission has released a draft determination proposing to grant authorisation to the Northern Sydney Region of Councils application.

THE APPLICATION

The arrangements

- 3.1 The Councils seek authorisation to collectively tender for the services of qualified contractors, able to process, market or otherwise dispose of kerbside collected waste materials. It is intended that individual councils will continue to remain responsible for the collection and transportation of waste materials to the receiving facilities of the successful tender(s).
- 3.2 It is proposed that tenders be sought for two separate groups of materials: dry recyclable material; and, all remaining kerbside collected waste materials, excluding bulky wastes (i.e. organic and residual waste). Tenders will be advertised separately but simultaneously. Depending on the submissions received, the councils may enter into agreements with a contractor for the dry recyclable materials waste stream and either: one contractor for organic waste stream and another for residual waste stream; or a contractor for both organic and residual waste streams.
- 3.3 The contractor(s) will be responsible for the processing and sale (or disposal) of the waste material delivered to their receiving facility.
- 3.4 In the event that any council chooses not to participate in the contract, the remaining councils may seek a second round offer from the contractors based on those councils which have agreed to accept the tender bid. In this event contractors will be able to either:
 - offer a revised schedule of rates for services; or
 - withdraw from the tender.
- 3.5 A representative from each of the councils will deal with the contractor on matters specific to the respective councils. A committee will work with the contractor on contractual issues that apply to the entire region.
- 3.6 Transfer from existing contracts will be phased to occur as existing arrangements permit.
- 3.7 Tenders will be assessed based on price and the reported performance (in achieving the objectives of the tender) of the processing and marketing solutions offered. The applicants submit that this approach allows the councils to make key decisions when fully informed by the tenders submitted, rather than when preparing the tender documents. These decisions include:
 - how should the materials be collected and streamed?
 - should the gate fee for accepting waste materials vary with level of contamination?
 - if so, how should the level of contamination be measured?

- how many receiving points are required and where will they be located?
 - what combination of processing technologies are most appropriate to the councils needs?
 - what products can or should be created from the waste materials collected by the councils?
- 3.8 Each council's waste management plan is subject to the Waste Avoidance and Resource Recovery Strategy (2003) which aims to reduce per capita waste generated over the period of any contract entered into.
- 3.9 Further, in accordance with the NSW State Government's waste reduction and procurement policy for Local Government, the waste service provider must endeavour to have a strategy for the return of unwanted packaging material and the use of recycled materials.
- 3.10 The waste service provider must also comply with the *Protection of the Environment Operations Act 1997* at all times with respect to pollution from noise, air, water, land and waste sources.
- 3.11 The Councils submit that the aim of the arrangements is for the parties to agree that they will work together under the contract to achieve the greatest possible diversion of material from landfill by converting it into a viable resource input for the economy.
- 3.12 The Councils state that the objectives of the proposed collective arrangements are to ensure that:
- the principles of Ecologically Sustainable Developments are applied;
 - maximum avoidance, reduction and diversion of waste materials from landfill is achieved;
 - the greatest quantity of recoverable material and/or energy is obtained from waste materials collected at kerbside;
 - the materials recovered are recycled or reused at their highest resource value;
 - there is transparency of information relating to the gross and net through-puts of waste materials;
 - overall transportation and materials handling efficiencies are improved (to provide improved long-term economic and environmental outcomes);
 - reliable markets for recovered materials are supported and the Councils are not exposed to price variations in the market place during the contract period;
 - residents are fully and regularly informed about how to source separate waste materials, what to source separate and the outcome of their resource recovery efforts; and

- value for money is obtained.
- 3.13 The Councils consider it likely that some of these objectives will need to be balanced against others when designing the optimum processing and marketing solution for kerbside collected waste materials.
- 3.14 Under contracts entered into as a result of the tender process, it is proposed that all material supplied by the Councils to the successful contractors will become the property of those contractors and with respect to waste able to be recycled, available to the contractor to on sell.
- 3.15 The contractors will enter into an agreement with each Council for the receipt of waste materials based upon a range of factors, including:
- the system of collection used by each council;
 - material streams presented to the contractor for processing;
 - quantity of waste material supplied; and
 - quality of waste material supplied.
- 3.16 The success of the tender process will be measured, in part, by the capability of proponents to demonstrate that Councils will benefit financially under the collective arrangement. This may mean that, in relation to the supply of material, Councils would either benefit with an improved rate in \$/tonne or reduced transport distances from point of kerbside pickup to receipt facilities.

Submission from the Applicant

- 3.17 The Councils provided a supporting submission with the application for authorisation.
- 3.18 A copy of the submission was placed on the Commission's public register.

Market definition

- 3.19 The Councils submit that there are three separate markets for kerbside collected waste materials, one for each stream commonly collected at the kerbside (dry recyclable material, garden organics and residual waste). In all cases the 'service' is the provision of receiving, handling, processing and disposal (by sale or otherwise) of waste material.
- 3.20 The Councils consider that the markets for kerbside collected waste materials are currently in transition. Historically there were no competitive markets for disposal of waste to landfill. In most cases local government was given the responsibility for collecting and disposal of waste to minimise impact on public health. In Sydney, a state government organisation was established to manage the numerous landfills accepting Sydney's waste. This organisation eventually became Waste Service NSW, now a wholly owned state government corporation.

Dry recyclable material

- 3.21 During the 1990's all metropolitan councils and many other councils in Australia introduced kerbside collections for dry recyclable material. In NSW the development of a market for dry recyclable material was initially subsidised by the state government to encourage councils to set up recycling services. Material recycling facilities were constructed by Waste Service NSW and by several private sector waste companies. It was soon realised that the value of sorted product (without government subsidy) would not cover the entire cost of sorting. However, many contracts had been signed allowing councils to deliver dry recyclable material free of charge. The result was that a number of organisations lost money, closed or went out of business. Those with more flexible contracts started charging councils a gate fee to receive dry recyclable material.
- 3.22 For councils, the cost of collecting dry recyclable material separately, coupled with the gate fee at the material recycling facility, is usually greater than sending all waste material to landfill (although this is slowly changing with the increased cost of landfilling and the landfill levy paid to the state government). In theory, after the initial market failure caused by the subsidy (discussed above), landfill disposal of dry recyclable material should have out-competed resource recovery using a material recycling facility. In practice, a community desire to recycle had been created, and indeed heavily supported by councils, through a decade of kerbside recycling and environmental education. In addition, the NSW government set a series of municipal waste diversion targets, culminating in 2003 with a target of 66% resource recovery by 2014.
- 3.23 Essentially, the Councils submit that disposal of dry recyclable material to landfill is not now an option for councils with established dry recyclable material collections. For this reason, the applicants believe that it is more realistic to consider the market for dry recyclable material as totally independent of the market for residual waste and garden organic material.

Residual waste

- 3.24 Historically, in Sydney, a state government organisation managed the numerous landfills accepting Sydney's waste. This organisation eventually became Waste Service NSW which is now a wholly owned state government corporation. The Councils note that Waste Service NSW controls all Class 1 landfills receiving residual waste in the Sydney metropolitan area. All of these landfills are nearing their licensed capacity (most will reach capacity within approximately 10 years).
- 3.25 Since the corporatisation of Waste Service NSW and changes to laws licensing landfills, the Councils note that the market for the disposal of municipal residual waste has been opened up to the private sector. As the capacity of landfills servicing the Sydney metropolitan area has dwindled there have been repeated efforts by the large market players to develop 'mega' tips outside the Sydney metropolitan area, but within a reasonable transport distance from Sydney.
- 3.26 Competition has further increased since waste treatment technologies capable of recovering resources from the residual waste streams (alternative waste technology) became a cost effective option to landfill. The Councils submit that

Waste Service NSW, and all of its competitors, are moving away from traditional (dry tomb) landfill and are proposing the development of large scale alternative waste technology, usually adjacent to existing landfills. Councils are now presented with a 'market' for residual waste disposal rather than a public service provided by government. Given the right conditions there is potential for waste disposal service providers to compete for guaranteed supply of residual waste from Councils.

- 3.27 The Councils submit that although there is potential for a competitive market for provision of residual waste disposal services, Waste Service NSW still has a monopoly in the Sydney metropolitan area. It is only some regional areas, where the waste disposed is managed by councils rather than Waste Service NSW, that have provided an entry point for Waste Service NSW competitors. These competitors have entered the market by responding to council tenders with proposal for alternative waste technology, which have then been accepted by councils eager to divert waste from landfills and avoid construction of new landfills in their Local Government area. Two examples of this market trend in NSW are Bedminster at Raymond Terrace (Port Stephens Council) and the solid waste to energy recovery facility at Kembla Grange (Wollongong City Council).

Garden organics

- 3.28 The Councils note that the market for processing of kerbside collected garden organics, like the market for dry recyclable material, has grown out of the need to divert waste from landfill and recover useful resources. Not all councils provide a kerbside collection service, some preferring to offer drop-off services to residents either at their own waste management facilities or at Waste Service NSW landfills. Some councils encourage residents to maintain their own compost heaps or buy specially designed home composting kits rather than introduce a mobile garbage bin based collection system.
- 3.29 Councils that choose to offer a kerbside collection service for garden organics collect it in such large quantities that the use of a contractor specialising in composting and marketing the organic product becomes viable and even desirable. Unless the material is composting under carefully controlled conditions there is a risk that the organic product will spread plant pathogens and active weed seeds wherever it is used. This creates a potential liability for any council that distributes chipped, mulched and/or poorly composted organic materials.
- 3.30 The Councils state that Waste Service NSW receives the kerbside collected garden organic material from 14 of the 27 councils in the Sydney metropolitan area that provide such a service. A further 7 councils deliver their material to Kimbriki, a privately owned waste management facility in the northern suburb of Sydney. Both Waste Service NSW and Kimbriki pass on (under contract) kerbside collected material and garden organics dropped off at their waste management centres to Australian Native Landscapes. Camden Soil Mix, who accept organic waste from Camden and Campbelltown Councils, is the next largest processor of municipal garden organics in the Sydney metropolitan area.

Separation of markets

- 3.31 Established and proposed alternative waste technologies are capable of processing a mixed residual and garden organics stream. In some cases, alternative waste technologies prefer garden organics to be mixed with residual wastes, because of the reduced cost of processing both streams together and because the technologies are designed to be used for the combined waste stream.
- 3.32 The Councils submit that where garden organics are being processed through an alternative waste technology, residual waste products compete with garden organic waste products as an input into the end product produced. In the same way, the applicants submit that enclosed composting facilities can receive a mixed garden organics and food organics (a component of the residual waste) stream, which provides competition with residual waste products.

Geographical boundaries

- 3.33 The Councils state that the geographic boundaries of the relevant markets are defined mainly by limitations on transport distance. Processing infrastructure outside the Sydney metropolitan area and Illawarra cannot compete for dry recyclable material and garden organics from the Councils because these materials are too bulky to transport over long distances in an unprocessed form. The same is largely true for residual waste. A notable exception is Collex's wet bioreactor facility at Woodlawn, which has been located to take advantage of rail infrastructure. However, inter-modal facilities (transfer from truck to train) would need to be developed to take advantage of such distant infrastructure.

Claimed public benefits

- 3.34 In their supporting submission, the Councils state that the proposed contract(s) will bring about numerous benefits to the general public. In summary they are:
- increased competition in markets currently dominated by one company;
 - improved coordination of recycling services between the Councils, leading to an:
 - increased efficiency of service provision and minimisation of costs to the Council and therefore to the community through a reduced domestic waste management charge;
 - improved resource recovery infrastructure available for both domestic and commercially generated waste materials;
 - increased transportation and materials handling efficiencies; and
 - increased resource recovery; leading to environmental benefits.

Increased competition

- 3.35 The Councils submit that Waste Service NSW currently dominates the dry recyclable material and garden organics markets. It also has a monopoly on the residual waste disposal market within the Sydney metropolitan area.

- 3.36 The Councils argue that the proposed arrangements, by providing the critical mass of supply necessary to encourage new market entrants, will allow the waste management industry to move toward an open and competitive market where councils and private waste generators can seek the most efficient solution from a range of potential service providers.
- 3.37 The Councils submit that a supply of 50,000 tonnes per year is considered the minimum to justify construction of the alternative waste technology available at this time. In many cases it is not until a facility can obtain greater than 100,000 tonnes per year over a ten or more year period that it can offer a gate fee comparable with today's landfill gate fee.
- 3.38 The Councils submit that without a critical mass of material, individual councils must seek residual waste disposal services from service providers with established alternative waste technology or landfills. The only two possible service providers in this position are Waste Service NSW and Collex. Collex has yet to confirm their transport arrangements from Sydney to Woodlawn and therefore cannot yet process waste from the Sydney metropolitan area at its bioreactor.
- 3.39 The Councils also note that supplying a critical mass of material is also an issue for the dry recyclable material and garden organics streams. In both cases the processing infrastructure is less costly for these partially sorted waste streams, making establishment costs lower and reducing the critical mass of material required. However, there is also less of this material generated per resident (and therefore per council). For example, a council with a population of 100,000 will only produce around 10,000 tonnes per year of each of these waste streams.
- 3.40 The Councils state that highly automated sorting for fully commingled dry recyclable material would require a minimum of 25,000 tonnes per year over ten years in order to be viable. Processing of garden organics into quality composts suitable for sale becomes progressively cheaper on a per tonne basis up to a scale where major equipment (screens and windrow turners) are fully utilised. This is also around the 20,000 to 25,000 tonnes per year level in an open windrow facility.
- 3.41 The Councils submit that less infrastructure-intensive solutions are possible but they deliver lower quality and quantity of recovered resources (for the same processing cost per tonne) or rely on greater separation of material at the source (at kerbside).
- 3.42 The Councils argue that without a critical mass of material, individual councils can only attract service providers with established facilities to process their kerbside collected dry recyclable material. In addition, the best price for processing and marketing dry recyclable material and garden organics cannot be obtained with the supply from a single council. With sufficient quantities of material processors can invest in more efficient equipment and amortise that equipment over greater quantities of material (translating to less \$/tonne gate fee).

Efficient service delivery

- 3.43 The Councils contend that the proposed contract(s) will provide a formal mechanism for coordination between five councils and up to three processors and marketers of waste materials. Without such an agreement between the parties individual councils would establish and maintain individual contracts with each service provider, each one of them constructed and managed in different ways. The Councils argue that there is potential for improved coordination of the collection and disposal services across the five councils and that there is an advantage of having only one contract to write, agree upon and manage.
- 3.44 For example, consistency in the type of dry recyclable material collection bin means a consistent mix of dry recyclable material is delivered to a sorting facility, requiring only one configuration of sorters and equipment. Consistent messages to the public using the same promotional material can also assist in reducing contamination and increasing dry recyclable material yield. Such consistency can reduce the necessary infrastructure and therefore increase the processing efficiency.
- 3.45 Further, the Councils argue that centralised processing and handling of materials in bulk is likely to increase transportation and materials handling efficiencies. Fully utilising key infrastructure and equipment allows service providers to charge a lower gate fee per tonne of material delivered. The Councils consider this to be particularly advantageous for the smaller councils who, on an individual basis, either have to be satisfied with less efficient infrastructure or must transport their material in an unprocessed form over long distances.

Appropriate infrastructure

- 3.46 The Councils submit that the proposed arrangements may result in the development of more appropriate infrastructure to service the waste disposal and processing needs of the Councils.

Residual waste stream

- 3.47 The Councils submit that it is extremely unlikely that any potential new service provider will be able to dispose of residual waste to a new or expanded landfill within or nearby the Local Government area of the Councils. This is mainly due to the difficulty in gaining planning approval for construction of landfills within the Hunter, Sydney metropolitan area and Illawarra. The Councils submit that Collex may be able to provide residual waste disposal services at their Woodlawn bioreactor, however this would require at least one rail head and inter-modal facility be constructed within the Local Government area of the Councils.
- 3.48 Given this, the Councils consider that the three most likely options for the disposal of residual waste are:
- construction of an alternative waste technology within the Council's Local Government areas;
 - aggregation and transfer to Collex's Woodlawn Bioreactor; or

- aggregation and transfer to an alternative waste technology located in another part of the Sydney metropolitan area or the Illawarra.
- 3.49 The Councils note that Waste Service NSW intend to construct an alternative waste technology on the existing Jacks Gully landfill site. However, the Councils consider that more appropriate, efficient and cost-effective infrastructure options may exist as alternatives to the construction of this alternative waste technology.
- 3.50 The Councils note that, should the proposed tender process proceed, Waste Service NSW will be required to compete for the waste material it currently receives. The Councils submit that in the event that another service provider wins the contract, Waste Service NSW may reconsider the construction of an alternative waste technology at Jacks Gully due to the decrease in waste it will receive.

Dry recyclable material stream

- 3.51 The Councils note that Waste Service NSW also owns the only existing infrastructure for processing of dry recyclable in the region – the Jacks Gully material recycling facility. This facility is designed to accept up to 30,000 tonnes per annum of dry recyclable material in two material streams, paper/cardboard and containers. However, the Councils submit that significant changes will be required to this facility before it can process a fully commingled recycling stream.
- 3.52 The Councils note that there is currently no material recycling facility to service the south of the region and limited capacity throughout the region for processing additional mixed recyclables from domestic or commercial sources. The Councils submit that the proposed arrangements will increase public and commercial access to recycling infrastructure throughout the region, and increase the convenience of recycling services to the public by allowing the introduction of fully commingled recycling services by the Councils. The Councils consider that this may result in an increase in resource recovery.
- 3.53 The Councils state that Wingecarribee Shire Council has adopted a commingled system of recyclables collection (with glass separately collected) in anticipation of a regional processing facility being established. In the interim Wingecarribee is paying an additional cost to transport material approximately 100 kilometres to a material recycling facility at Chullora (just north of Bankstown). The Councils submit that the proposed arrangement will ensure an appropriate receipt point for Wingecarribee and Wollondilly Councils. This may be a material recycling facility, however it is more likely to be a purpose designed dry recyclable material transfer station.

Garden organics stream

- 3.54 The Councils state that garden organics generated in Camden, Campbelltown and Liverpool are likely to be collected on a source separated basis. The Councils submit that it is likely that future processing of organic waste in the region will require enclosed composting systems, and therefore higher levels of investment.

However, an alternative would be to include garden organics in the residual waste bin and recover the resources through an alternative waste technology.

- 3.55 The Councils consider that prospective processors of garden organics will require longer contracts and greater quantities of material to justify investment in enclosed composting systems. They submit that collaborative tendering is an effective mechanism for gathering sufficient material to justify the required infrastructure.

Resource recovery and environmental benefits

- 3.56 The Councils submit that the stated aim of the proposed arrangements is to divert waste materials from landfill and convert them, at a cost, into a resource of some economic value. The Councils state that this aim is partially driven by the lack of landfill space in the Sydney metropolitan area and the difficulty in siting new landfills. State Government resource recovery targets, the latest municipal sector target being 66%, have also provided an incentive. However, a key motivation for the Councils is resource recovery leading to reduced resource use and lower environmental impact.
- 3.57 The Councils submit that they diverted 44.5% of the waste material they collect away from landfill in 2002/2003. To reach the 66% resource recovery target within the next 5 years, systems and technologies that divert the majority of putrescible organic waste from landfill will be required. The Councils submit that proposed arrangements are a key mechanism for achieving this resource recovery target.
- 3.58 The Councils consider that the infrastructure that will be developed under the proposed arrangement will replace or improve upon landfilling, an inherently environmentally damaging activity. Landfills produce greenhouse gases, offensive odours and leachate with the potential to pollute surface and groundwater. Increasing the recovery of dry recyclable material and organic material and converting it into a resource input to the economy reduces the need to extract virgin materials and returns valuable nutrients to public parks and gardens and intensive agriculture. The Councils note that developed countries world-wide have recognised the public benefit of recycling and, more recently, have moved towards technologies for recovering resources (including energy) from mixed solid waste.
- 3.59 The Councils believe that it is likely that alternative waste technology will be introduced whether or not the Councils collaboratively tender. The Councils note that Waste Service NSW is under pressure to discontinue landfilling at Jacks Gully in order to reduce local environmental impacts and therefore must move to alternative waste technology if they are to continue their business in the area.
- 3.60 However, the Councils submit that the proposed tender is likely to result in a waste management solution more focused on resource recovery and environmental responsibility than the current arrangements.

Anti-competitive detriment

- 3.61 The Councils argue that the proposed arrangements do not have the purpose of lessening competition. The Councils submit that the likely effect of the proposed collective tendering process will be an increase in competition relative to existing market arrangements.
- 3.62 The Councils submit that the effect of the proposed arrangements on the markets for the supply of waste management services and downstream markets for recycled waste materials will be negligible.

Effect on supply of waste management service providers

- 3.63 The Councils submit that represent only a small proportion of the overall supply of dry recyclable material, garden organics and residual waste.¹⁰
- 3.64 The Councils submit that in addition to kerbside collected material there are also many private generators (and therefore suppliers) of waste and recycled materials. The Councils submit that their waste material represents only 2.2% of the 7.2 million tonnes processed and disposed within the combined Sydney resource recovery and disposal markets.
- 3.65 The Councils state that whether they tender individually or collectively, it is likely that, at least in terms of supply, the same result will be achieved. The need for critical mass of material guaranteed over an extended period forces service providers to obtain supply from multiple Councils over extended contracts. Service providers must therefore attract regional groups of councils, preferably from the same geographical area, rather than individual councils. In either case, the Councils submit that this means that kerbside collected waste materials from the Sydney metropolitan area will be supplied to somewhere between five and 10 major waste processing facilities.

Competition in downstream markets

- 3.66 The Councils submit that the downstream markets for recovered inert materials, soil products and energy are all substitutable with virgin supplies of the same or similar material and therefore compete with those materials. Markets for recovered dry recyclable material are well established but are dominated by a limited number of buyers, often specialising in a particular market type. Markets for composts include a much larger range of buyers and depend greatly on supply of quality products designed to the specific needs of customers. The Councils submit that anecdotal evidence indicates that this market, particularly for low quality mulches or contaminated organics, is over-supplied at this time. In particular, they submit that there are no markets for the low grade compost materials produced from alternative waste technology processing residual waste (mixed solid waste).

¹⁰ The Councils are five Local Governments amongst the 44 councils in the Sydney metropolitan area and Illawarra.

- 3.67 The Councils consider the market for energy to be very large relative to the potential supply from an alternative waste technology processing the Councils' waste. Further, they submit that an energy product produced from waste is entirely substitutable with energy from traditional sources such as coal.
- 3.68 The Councils submit that the successful processor(s) and marketer(s) of waste materials from the Councils will have insufficient market power to negatively influence any of the downstream markets. The only possible exemption is the market for soil products, which may be influenced by the increased diversion of garden organics predicted under the contract.

Term of authorisation

- 3.69 The Councils seek authorisation for the period of the collective tender process, which they estimate will take up to nine months, and for the proposed 10 year term of contracts to be entered into as a result of the tender process.

SUBMISSIONS FROM INTERESTED PARTIES

- 4.1 The Commission sought submissions from a wide range of interested parties in relation to the application for authorisation and the public benefit and public detriment claims made by the Councils.
- 4.2 The Commission received seven submissions from interested parties. Three of the submissions were made by councils who are parties to the application.

Campbelltown City Council (Campbelltown)

- 4.3 Campbelltown agrees that the proposed collective tendering arrangements will result in public benefits through increased efficiencies, improved infrastructure and increased competition. As a single government provider mainly dominates the existing market, Campbelltown submits that a collective tender will offer economies of scale to attract private providers to offer improved services and competition in the market.
- 4.4 Campbelltown states that it is facing a number of challenges in determining its future waste management direction, including the making of urgent decisions on future waste management arrangements and the selection of an appropriate waste management technology that will facilitate maximum resource recovery and reuse of waste materials. Landfill space in Sydney has very limited capacity and the State Government is advocating the development of new waste management technologies that encourage resource recovery. Campbelltown submits that acting individually it cannot attract a number of waste service providers who could offer different technologies for resource recovery as these technologies are extremely capital intensive and have high operating costs and need guaranteed minimum quantities of waste materials for processing to be viable.
- 4.5 Campbelltown submits that the joint proposal from the Councils will:
- offer the market a proposal of sufficient scale and financial viability to attract private providers to tender for the provision of services; and
 - provide Campbelltown residents with cost effective and sustainable waste management outcomes.
- 4.6 Having regard to the above issues, Campbelltown considers that its residents are likely to achieve more environmentally and economically sustainable waste management and resource recovery opportunities through the provision of a collective regional tender rather than councils pursuing their options independently.

Camden Council (Camden)

- 4.7 Camden supports the application for authorisation.
- 4.8 Camden believes that the tender process will provide options for the disposal of its wastes that are both cost effective and sustainable. Camden states that

landfilling waste is seen as old technology and that there is little likelihood of any new sites being approved for the disposal of wastes. It is the express intention of the participating councils to encourage the development of new technology that will offer the highest use of resources and the treatment of residuals in an environmentally acceptable manner.

- 4.9 Camden suggests that to achieve this shift in technology, a large financial commitment by the successful company is required and therefore there is a need to ensure that a long term, reliable volume of waste is provided. Camden submits that the proposed arrangements provide the critical mass of waste to make such a venture viable. Further, it submits that should each council tender individually, no one company will have the confidence that their financial commitment will be met and the outcome would undoubtedly be that each community will pay a premium for the disposal of their waste.

Wollondilly Shire Council (Wollondilly)

- 4.10 Wollondilly supports the application for authorisation.
- 4.11 Wollondilly submits that Waste Service NSW has had a monopoly for many years. Wollondilly submits that it has had no alternative processing or disposal facility available to it and has been forced to use the Waste Service NSW operations at Jacks Gully. It contends that the regional tender will allow Wollondilly and its community to examine alternative services that may be provided and operated on a competitive basis by Waste Service NSW and other contractors. The aim is to provide the Wollondilly community with a more competitive, economic and environmentally sustainable waste management option.
- 4.12 Wollondilly suggests that the regional tender will also allow contractors who have previously been excluded to participate in a competitive tendering process. Wollondilly submits that no community or industry interests would be disadvantaged in this process.
- 4.13 Wollondilly states that the application will give it an opportunity to provide a more efficient processing arrangement. It is also anticipated that this cooperative arrangement will give Wollondilly and its community an economic advantage which will lessen the future financial impact of increased fees and charges on the community.

NSW Department of Environment and Conservation (The Department)

- 4.14 The Department supports the application for authorisation and views the arrangements as integral to achieving some of the targets identified in the New South Wales Waste Avoidance and Resource Recovery Strategy.
- 4.15 The Department agrees that the outcomes of the regional processing arrangements will provide increased public benefit and is committed to working with the local councils to achieve sustainable resource recovery and waste management, improved environmental outcomes and increased public benefit. The Department considers that proposed regional arrangements for the processing

and disposal of the waste and resources collected by these councils is a step toward this goal.

Amcor Australasia (Amcor)

- 4.16 While Amcor does not consider that these particular arrangements will adversely impact on competition or the public interest, it does submit that the proposed arrangements may result in a less competitive environment by encouraging the use of capital intensive systems which are controlled by fewer, larger organisations with access to collection, sorting, processing, selling and re-manufacturing of waste materials, rather than many small to medium enterprises currently operating in the dry recyclable material market.
- 4.17 Notwithstanding the above, in this instance, Amcor has no objection to the application.

Waste Service NSW

- 4.18 Waste Service NSW states that it is the current service provider for the waste disposal needs of each of the Councils. However, it contends that while it is the dominant player in the market, it holds only approximately 25% share in the dry recyclable material market and less than 50% of the garden organics market.
- 4.19 Waste Service NSW generally agrees that there could be a benefit to the public from the increased competition in the waste receipt/processing/disposal industry as a result of the proposed arrangements.
- 4.20 Waste Service NSW agrees that there will be a likely public benefit associated with construction of enhanced resource recovery infrastructure in the region. As a result of a residential development proposed within 500 metres of its current landfill site (Jacks Gully Waste Management Centre) Waste Service NSW plans to construct an alternative waste technology processing facility to replace putrescible landfilling operations by 2007.¹¹
- 4.21 Waste Service NSW agrees that the proposed arrangements may lead to improved environmental outcomes if it facilitates the development of alternative waste technologies.
- 4.22 However, Waste Service NSW does not believe that there would be any impact on or change to the service efficiencies as a result of the proposed arrangements. The Councils operate collection arrangements to suit local conditions and community preferences. Waste Service NSW questions how that situation would be improved or altered by a regional arrangement.

¹¹ Waste Service NSW notes that the current landfill site has at least 15 years operating life and that it intends to continue its operation.

- 4.23 Waste Service NSW states that the assumption that long-term contracts will deliver superior value to councils needs to be examined on a case-by-case basis. Waste Service NSW considers that true competition would exist if councils were able to decide on a day-to-day basis where to take their waste if there were a number of players in the market. However, that this would need to be balanced against whether market players are prepared to take infrastructure development risks as well as logistic and approvals issues.
- 4.24 With respect to likely public detriment arising from the proposed arrangements, Waste Service NSW submits that:
- pricing for alternative waste technology is likely to be higher than landfill;
 - Visy currently holds 48% of the dry recyclable material market. Should Visy be successful with this regional tender in the dry recyclable material component, their market share will increase to 53%;
 - garden organics outcomes may be constrained by the need to move into enclosed composting processing to effectively manage odour issues;
 - long terms contracts move obsolescence risk of facilities from the contractor to the council; and
 - a contractor with a long term contract will have much more market power in the region than the application seems to ascribe to Waste Service NSW incumbency.
- 4.25 Waste Service NSW believes that, on balance, there would be benefits to the councils in the Macarthur region, however, this does not hold true uniformly across Sydney (i.e. introducing similar arrangements in other areas may not produce such benefits).

Waste Contractors and Recyclers Association of NSW (WCRA)

- 4.26 WCRA considers that the following public benefits may arise from the proposed arrangements:
- there is potential for reduced dry recyclable material charges being imposed on Councils if there is complete uniformity in collection systems, recyclable types and contract periods.¹²
 - if uniformity is achieved, it will more than likely result in increased efficiencies in material handling/transfer/processing and transportation, which may result in more dry recyclable material being recycled.

¹² This uniformity can be achieved by the use of one common recycling system across all five Council areas. WCRA contend that any such system must as a minimum utilise the same style of bins, be based on the same education program to all residents in the areas, utilise the same style of collection equipment/vehicles and have common contractual timeframes.

- if a single company (who can address the issue of identifying a sustainable re-use system for all of the garden organic material generated in this area) will provide the garden organic processing service, the arrangements may result in a greater diversion of this material from waste streams to landfill.
 - if uniformity is achieved by the use of one common garden organics system, the likelihood that more material will be diverted away from landfill is increased.¹³
 - the potential entry into the market for residual waste of Collex (or another commercial operator of a waste transfer facility) which could result in increased competition between Collex/another competitor and Waste Service NSW.
- 4.27 WCRA submits that large contracts such as that proposed by the five Councils can only be performed by large operators with the capital and financial capability to be able to bid for these contracts, precluding many small to medium waste and recycling operators from bidding for this work. However WCRA submits that provided that the sufficient timeframes are allowed for potential service providers to prepare a tender, sign the contract and develop the necessary infrastructure there are several companies within the industry that are capable of undertaking this project.
- 4.28 However, WCRA states that if only one service provider expresses an interest in the proposed arrangements in any of the three waste streams (dry recyclable material, garden organics and residual waste) then it will reinforce that one player's monopoly position.
- 4.29 While WCRA submits that the collective tender process may result in increased competition if sufficient time periods are provided to facilitate entry into the markets by new service providers, WCRA does not consider that the proposed arrangements or the contracts themselves are likely to result in increased competition in relevant waste stream markets for the following reasons:
- the Councils currently have options to dispose of dry recyclable material at Jacks Gully, Chullora and Milperra. These facilities are operated by Waste Service NSW, Thiess and Visy Recycling. The Councils are therefore currently well served by dry recyclable material processing facilities. WCRA is concerned that a collective tender has the potential to result in market domination by one company because all of the dry recyclable material generated by the five councils could potentially then be diverted to the one processing facility. This could result in the demise of one or more of the existing facilities.
 - the Council areas are well served with a number of competing garden organics processing facilities. The WCRA is concerned that a collective

¹³ WCRA contend that such a system must as a minimum be based on the same education program to all residents in all five areas, utilise the same style of collection equipment/vehicles and have common contractual timeframes.

tender for the processing of garden organics may result in market domination by one company. This could result in the demise of several existing facilities including those currently operated by Wollondilly and Wingecarribee Councils where shredded green waste is currently given away to residents for free for beneficial reuse on their properties.

- Collex and Waste Service NSW are currently the only potential bidders to provide a landfill disposal service to the Councils in respect of residual waste. There are major barriers to entry that would prevent another provider from entering this segment of the market.¹⁴ If Collex does not obtain the approvals required, or if Waste Service NSW is the successful tender bidder, the proposed arrangements have the potential for Waste Service NSW to be granted all the waste and recycling referred to in the application.

¹⁴ For example, approvals, cost and locating a landfill site.

THE PUBLIC BENEFIT TEST

- 5.1 The Commission may only grant authorisation where the public benefit test in section 90 of the Act is satisfied.
- 5.2 The Councils lodged an application for authorisation under sub-section 88(1) of the Act to:
- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
 - give effect to a provision of a contract, arrangement or understanding where the provision has the purpose, or has or may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.3 In assessing an application made under sub-section 88(1) of the Act to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the Act, the relevant test that the applicants must satisfy for authorisation to be granted is outlined in sub-sections 90(6) and 90(7) of the Act.
- 5.4 Under section 90(6) of the Act, the Commission may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.5 Under section 90(7) of the Act, the Commission may grant authorisation in respect of a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.6 In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is

greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation.

- 5.7 If this is not the case, the Commission may refuse authorisation or, alternatively, in refusing authorisation, indicate to the applicant how the application could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.
- 5.8 Section 91(3) of the Act allows the Commission to grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the anti-competitive detriment.

Definition of public benefit and anti-competitive detriment

- 5.9 Public benefit is not defined by the Act. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁵

- 5.10 Similarly, public detriment is not defined in the Act but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:

...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.¹⁶

- 5.11 The public detriment relevant to the consideration of this application is that constituted by a lessening of competition.

Future with-and-without test

- 5.12 The Commission also applies the ‘future with-and-without test’ established by the Australian Competition Tribunal to identify and weigh the public benefit and anti-competitive detriment generated by arrangements for which authorisation has been sought.
- 5.13 Under this test, the Commission compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the Commission to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

¹⁵ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677

¹⁶ *Ibid* at 42683.

Whether arrangements breach the Act

5.14 As indicated above, the Council's application seeks to:

- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
- give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

5.15 However, in assessing an application for authorisation, the Commission does not form a view about whether Council's proposed arrangements contain provisions which breach section 45 of the Act. It only determines whether the net public benefit test has been satisfied.

Term of authorisation

5.16 Section 91(1) of the Act allows the Commission to grant authorisation for a specific period of time.

5.17 The Commission may authorise different aspects of conduct for which authorisation is sought for different periods.

COMMISSION EVALUATION

This application for authorisation

- 6.1 The Councils have sought authorisation to collaboratively tender for the services of qualified contractors, able to process, market or otherwise dispose of kerbside collected waste materials.

Market definition

- 6.2 The first step in assessing the competitive effects and the public benefit/detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 6.3 The Commission may use market analysis to identify and measure the public benefit and anti-competitive detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.
- 6.4 The Councils submitted detailed market definitions outlined in paragraphs 3.19 to 3.33.
- 6.5 In respect of the product market, the Councils submitted that there are separate markets for each of the three kerbside collected waste materials the subject of the current application: dry recyclable material; garden organics; and residual waste. However, the Councils submitted that there is some crossover between the markets for residual waste and garden organics, given that, with the right infrastructure both, or at least elements of both, can be processed together. However, the Councils submitted that the market for dry recyclable material is independent of the market for the other two streams of waste given that, unlike those other streams of waste, it cannot be disposed of through landfills or in conjunction with those other streams.
- 6.6 In the case of each material, the Councils submitted that the recovery, handling, processing and disposal (by sale or otherwise) of the material constitute a single service.
- 6.7 In considering this application for authorisation, the Commission considers that it is not necessary to comprehensively define the relevant product markets, beyond noting the market definition espoused by the applicants above. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.

- 6.8 With respect to dry recyclable material, the Commission notes that three providers currently compete to process and dispose of this stream of waste.¹⁷
- 6.9 With respect to the processing and disposal of residual waste, the Commission notes that Waste Service NSW currently has a monopoly in the Sydney metropolitan area. However, there is the potential for other providers to enter the market if the right incentives to do so are provided.
- 6.10 In the case of garden organics, the Commission notes that a number of service providers supply this service to the Councils.
- 6.11 With respect to the geographical boundaries of the markets, the Commission considers that these are most accurately defined as regional due to the fact that, ideally, processing and disposal stations should be located in close proximity to the area from which the waste is collected.
- 6.12 The Commission considers there to be high barriers to entry into these markets due to the significant capital required to establish waste processing facilities. However, entry is likely to be more feasible for potential entrants who either already provide other waste disposal services in a region, or provide similar waste disposal services to those the subject of the current application in adjoining regions.
- 6.13 With respect to potential new market entrants, the Commission notes that given the absence of existing infrastructure, it would, all else being equal, be equally feasible for them to set up in any geographical area within the Sydney market.
- 6.14 The Commission also notes that, while not directly related to the conduct for which authorisation is sought, the markets for the sale of recycled dry recyclable material and organic waste products may also be affected by the proposed arrangements.

Future with-and-without test

- 6.15 As noted at paragraph 5.12, in order to identify and measure the public benefit and public detriment generated by the conduct for which authorisation is sought the Commission applies the ‘future with-and-without test’. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The Commission will compare the public benefits and public detriment that will result in the future if authorisation is granted with the counterfactual.
- 6.16 The Commission did not receive any submissions from the Councils on what an appropriate counterfactual would be.
- 6.17 The Commission considers that the likely counterfactual is a situation where the Councils either:

¹⁷ Resource NSW, Visy and Chullora.

- individually tender for the services of contractors to process, market and dispose of specific streams of waste;¹⁸ or
 - continue to engage the services of waste transfer providers under the existing arrangements as detailed in paragraph 2.12 to 2.40 of this draft determination.
- 6.18 Given the similar outcomes likely under each of these counterfactuals. The Commission does not consider that its assessment of the effects on competition or public benefits of the proposed arrangements is affected by which of these counterfactuals is adopted.

Effect on Competition

- 6.19 As discussed in Section 5, the Commission must assess the extent to which the proposed arrangements give rise to any detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.
- 6.20 The Commission notes that Waste Service NSW is currently the major supplier of the dry recyclable material and garden organics waste management services to the Councils and that it is currently also the sole provider of residual waste disposal services.

Residual waste

- 6.21 In respect of the disposal of residual waste, the Commission notes that, at present, a single contractor, Waste Service NSW, operates as the sole provider of waste processing and disposal services to the majority of councils in greater metropolitan Sydney, including all councils party to the current application. Given current market conditions, it is unlikely that any other contractor will seek to enter the market for the provision of these services to these councils if the councils continue to contract for the supply of these services individually.
- 6.22 There is no restriction on other providers entering the market. Indeed the current arrangement between the Councils and Waste Service NSW is an informal one to which neither party is bound in the longer term. However, the Commission notes that, to date, no council has chosen to individually tender for the provision of these services. This indicates, that at least in the view of the Councils, other potential waste service providers are unable to effectively compete with Waste Service NSW for the provision of these services. Although, as noted at paragraph 2.32, new waste transfer station and railhead facilities have been approved which may make it more viable to alternative waste management providers to enter the market in the future.
- 6.23 However, the Commission notes the major barriers to alternative residual waste processing and disposal providers entering to the industry, for example, the significant time required to locate an appropriate site, the difficulties in gaining approval to develop a facility and the cost in establishing a facility. Any potential

¹⁸ If the total value of any Councils prospective contract is less than \$100,000, that council would not be required to tender.

new entrant to the market would also have to bear the risk that having established a new facility, they may be unable to secure enough business to ensure adequate returns on their investment.

- 6.24 These barriers to entry restrict the number of providers able to tender for the provision of residual waste processing and disposal services. The Commission notes that Collex and Waste Service NSW are currently the only potential bidders to provide landfill disposal services to the Councils in respect of residual waste.
- 6.25 In this respect, the WCRA submission notes that it does not consider that the proposed arrangement or the contracts themselves are likely to result in increased competition in the relevant market because a collective tender has the potential to result in one company having a monopoly over the provision of residual waste management services to the Councils.
- 6.26 While barriers to new contractors competing to provide residual waste processing and disposal services are already significant, the Commission notes that, by allowing (potentially) a single company to provide residual waste management services to the Councils for the next 10 years, the proposed arrangements could impose further barriers on other providers entering the market. In this respect, while barriers to entry are high even absent of the proposed arrangements, it is difficult to speculate, particularly given potentially new technological developments, whether this will remain the case over the life of the proposed arrangements. However, the Commission considers, based on the available evidence, that absent of the proposed arrangements, it is likely to remain the case that Waste Service NSW will remain the sole provider of residual waste management services to the Councils for the foreseeable future.
- 6.27 While the proposed arrangement, by allowing (potentially) a single company to provide residual waste management services to the Councils for the next 10 years, restricts on-going day-to-day competition for these services, as noted above, competition in this regard is currently negligible. In this sense, the proposed arrangements do not create a new barrier to entry. However, they do create a competitive environment for the provision of these services at a particular point in time (i.e. when the tender process is run). This is discussed in greater detail below at paragraphs 6.32 to 6.34.
- 6.28 More generally, the Commission notes that the five councils party to the proposed arrangements generate only a small proportion of the total volume of residual waste generated in the Sydney metropolitan area. Potential new market entrants, would still be able to compete for the provision of these services to other councils.
- 6.29 In addition, the Commission notes that the cost of any restriction on competition generated by the arrangements, for example, increased prices, less choice or lower quality of products and services, will ultimately be borne by the Councils and their ratepayers. Consequently, it is unlikely that the Councils will seek to engage in conduct which would lessen competition for the provision of these services.

- 6.30 Further, the Commission notes that, based on the information provided, it appears that it will remain the case that any council seeking to individually contract with an alternative provider is unlikely to be able to offer the critical mass of waste necessary to provide sufficient return on the investment required to establish an alternative provider. In this regard, the Commission notes the applicants' assertions that it is only by tendering collectively that they can offer the critical mass of waste necessary to justify such investment.
- 6.31 Consequently, it is unlikely that the proposed arrangements will lessen competition in the market for waste processing and disposal services relating to residual waste. While the proposed arrangements may result in a single contractor providing residual waste processing and disposal services to the Councils, this would be a no less competitive outcome than that which is currently the case and is likely to remain the case in the foreseeable future absent of the proposed arrangements.
- 6.32 However, the Commission considers that the proposed tender process may in fact increase competition in the market for the provision of residual waste processing and disposal services. In this respect, the Commission again notes the argument of the Councils that the potential for collective tender arrangement will increase competition within the market by providing greater tonnages than exist in one council area, consequently providing a level of certainty to encourage service providers to establish infrastructure enabling them to enter the market.
- 6.33 Even if the critical mass of waste available through the collective tender process does not offer sufficient incentive for other potential alternative providers to tender for the provision of these services, it should, at the very least, allow those two potential providers who have already lodged expressions of interest to provide more competitive tender bids.
- 6.34 In addition, the Commission notes that if a service provider other than Waste Service NSW is selected by the Councils this may also increase the level of competition within the participating council areas for the provision of other like waste service facilities and in adjoining geographical markets also currently served exclusively by Waste Service NSW. That is, once a new entrant is established, it may be able to compete for the provision of other services with the participating council areas and/or for the provision of services in adjoining areas which do not have the critical mass of waste to justify the investment necessary to establish a competing service provider.

Dry recyclable material

- 6.35 With respect to dry recyclable material waste management, the Commission notes that three providers currently provide this service to the Councils. Specifically, Waste Service NSW's Jacks Gully Waste Management Centre services three of the Councils. One council is serviced by a Visy recycling plant in Smithfield and one by the Chullora recycling plant near Bankstown.¹⁹ There is

¹⁹ Glass from this councils is delivered directly to manufacturers of glass beverage containers as it is unsuitable for transport over the long distances to the Chullora plant.

also an additional Visy recycling plant within the Councils' local government areas however the Councils contend that this plant has insufficient capacity to meet the Councils recycling needs at this time.

- 6.36 The proposed arrangements are likely to result in a single waste management provider providing all of the processing, marketing and disposal services for dry recyclable materials to the Councils. This may lessen competition for the provision of these services to the Councils as it will preclude at least two existing providers (as well as any potential new entrants) from providing these services for the next 10 years. However, in this respect, the Commission notes that all three current providers are able to tender (along with any potential new entrant) to provide these services.
- 6.37 It can be expected that the result of the tender process will be the most efficient service provider being appointed to service the Councils needs. To the extent that a single provider is unable to meet the needs of all the Councils, or that the appointment of one provider to all the Councils will not provide the most efficient outcome, individual councils can opt out of the arrangements. In this respect, as discussed above in relation to residual waste, the Councils are unlikely to enter into the proposed arrangements unless they will provide for more efficient dry recyclable material waste management services than would be available absent of the arrangements.
- 6.38 With respect to potential new market entrants, the Commission notes that entering into a contract with a single provider will prevent other providers from supplying these services to the Councils for the life of the contract. However, in this respect, the Commission notes that barriers to entry, while not as significant as in the market for the provision of residual waste, do exist even absent of the proposed arrangements. In addition, potential new entrants are not restricted in competing for the supply of these services in the first instance. Indeed, the Commission considers that the guaranteed waste tonnages may in fact facilitate the entry of new service providers in the market for processing, marketing or otherwise disposing of dry recyclable materials.
- 6.39 Finally, the Commission notes that the combined dry recyclable waste generated by the Councils is only a small portion of the total amount generated in the Sydney metropolitan area. Consequently, the proposed arrangements are unlikely to impact significantly on the ability of potential new entrants, or indeed, existing providers unsuccessful in the tender process, to compete to provide these services to other councils.

Garden organics

- 6.40 The Commission notes that limited competition also currently exists in the market for processing, marketing and otherwise disposing of garden organics. The applicants state that two service providers currently service 21 of the 27 Councils in the Sydney metropolitan area.
- 6.41 The Councils submit that there are three existing waste service providers within their council boundaries which possess the infrastructure necessary to tender for the provision of garden organic waste management services to the Councils.

- 6.42 The proposed arrangements are likely to result in a single waste management provider providing all of the processing, marketing and disposal services for garden organic waste materials to the Councils. This may lessen competition for the provision of these services to the Councils as it will preclude at least some of the existing providers (as well as any potential new entrants) from providing these services for the next 10 years. However, in this respect, the Commission notes that all of the current providers are able to tender (along with any potential new entrant) to provide these services. In this respect, the proposed arrangements do create a competitive environment for the provision of these services by both existing providers, and potential new entrants, at a particular point in time (i.e. when the tender process is run).
- 6.43 It can be expected that the result of the tender process will be the most efficient service provider being appointed to service the Councils needs. To the extent that a single provider is unable to meet the needs of all the Councils, or that the appointment of one provider to all the Councils will not provide the most efficient outcome, individual councils can opt out of the arrangements. In this respect, as discussed above in relation to residual waste, the Councils are unlikely to enter into the proposed arrangements unless they will provide for more efficient garden organics waste management services than would be available absent of the arrangements.
- 6.44 With respect to potential new market entrants, the Commission notes that entering into a contract with a single provider will prevent other providers from supplying these services to the Councils for the life of the contract. However, in this respect, the Commission notes that barriers to entry, while not as significant as in the market for the provision of residual waste, do exist even absent of the proposed arrangements. In addition, potential new entrants are not restricted in competing for the supply of these services in the first instance.
- 6.45 Finally, the Commission notes that the garden organic waste generated by the Councils is only a small portion of the total amount generated in the Sydney metropolitan area. Consequently, the proposed arrangements are unlikely to impact significantly on the ability of potential new entrants, or indeed, existing providers unsuccessful in the tender process, to compete to provide these services to other councils.

Effect on downstream markets – dry recyclable material and organic material

- 6.46 The Commission notes that different types of dry recyclable material and organic wastes are effectively raw materials that can potentially be used in the production of new products. Public detriment could arise from allowing councils to collectively tender with service providers if this were to lead to an increase in the price of these products for consumers.
- 6.47 However, the Commission considers this an unlikely prospect for the reasons outlined below.
- 6.48 It appears that the Councils would only be able to negotiate a small reduction in the fee charged to dispose of dry recyclable material and garden organics as a

consequence of any increase in bargaining power generated by acting collectively.

- 6.49 By acting collectively, councils would be offering to supply a significantly greater amount of dry recyclable material to material recycling facilities and garden organics to processing facilities than they would if they supplied their material to the facilities separately. Indeed, each council individually supplies only a small portion of all the dry recyclable material and garden organics collected in Sydney.
- 6.50 However, even when aggregated, the amounts of many, if not all, types of dry recyclable material and organic waste supplied by the five Councils only constitutes a small proportion of the total supply to downstream markets. Therefore, any increase in the cost of handling these streams of waste (i.e. a reduction in the fee paid by the Councils) is unlikely to impact significantly on the end price of new products produced with the waste material even if such cost increases are able to be passed on by waste service providers.
- 6.51 In any event, the Commission notes the submission of Councils that these markets are currently well supplied, which would limit the capacity for cost increases, particularly in respect of such a small volume of the overall supply of these markets, to be passed on.
- 6.52 This is not to say that the Councils may not be able to negotiate more substantial fee reductions for reasons other than a mere increase in their bargaining power. For example, the economies of scale and scope and other increased efficiencies which may be generated by the greater volume of waste the Councils are able to supply collectively. However, any fee reductions negotiated in this respect will be reflective of the cost savings to service providers and are unlikely to be passed on to downstream purchasers in the form of higher prices.

Conclusion

- 6.53 For the reasons outlined above, the Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal.

Public Benefit

- 6.54 In order to grant authorisation, the Commission must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 6.55 The Commission considers the public is likely to benefit from the introduction of the proposed arrangements on several levels.

Competition for the provision of waste processing, marketing and disposal services

- 6.56 As noted above, the Commission considers that the proposed arrangements may provide for greater competition between potential new entrants and the current

service providers in each of the relevant waste material streams, in particular residual waste.

- 6.57 While the Commission has not had access to information to allow it to independently assess the magnitude of any cost saving which may be generated by the Councils under the proposed arrangements, it accepts that the proposed arrangements are likely to result in increased price competition between potential services providers and consequently cost savings to the Councils.
- 6.58 Further, the Commission notes that the success of the tender process will be measured, in part, by the capability of proponents to demonstrate that the Councils will benefit financially under the regional arrangements. This may mean that, in relation to the supply of material, Councils may either benefit with an improved rate in \$/tonne or a reduced distance to receipt facilities.
- 6.59 Given that the *Local Government Act 1993* requires that the income from the domestic waste management charge levied on ratepayers must be calculated so as not to exceed the reasonable costs of the provision of domestic waste management services, lower fees would be passed on to ratepayers in the form of a lower domestic waste management charge which the Commission considers to be a public benefit.
- 6.60 In addition, as noted above, the proposed arrangements may also result in an increase in competition for the provision of other similar waste services within the Councils regions and/or increased competition for the provision of the waste services the subject of the application in adjoining council regions. To the extent that this occurs, this is also likely to be reflected in lower domestic waste management charges to ratepayers.

Transaction cost savings

- 6.61 The Commission notes that there are transaction costs associated with entering into contractual arrangements with service providers, and that these costs are likely to be lower in negotiating and implementing a collectively negotiated agreement involving only a single negotiating process than where a contractor must negotiate and implement agreements with each council.
- 6.62 The Commission accepts that running a single, joint tender process would result in transaction cost savings to the Councils compared to a situation where each council individually ran a tender process or individually engaged service providers under the current arrangements. As discussed above, such savings are likely to be reflected in lower domestic waste management charges to ratepayers which the Commission considers would be a public benefit.
- 6.63 In addition, the joint tender process is also likely to result in transaction cost savings to service providers compared to a situation where they have to deal with multiple councils. Any such savings are also likely to be reflected in more competitive tender bids and lower prices to ratepayers for provision of those services as discussed above.

Efficiencies

- 6.64 The Councils have submitted that by entering into contracts for waste management services collectively there is potential for improved coordination of collection and disposal services across the five councils.
- 6.65 Specifically, the Councils contend that by entering into a joint tender process:
- there will be a consistency in the type of dry recyclable material collected, resulting in a consistent mix delivered to a sorting facility requiring only one configuration of sorters and equipment.
 - consistent messages will be able to be communicated to the public using consistent promotional materials which will assist in reducing contamination and increase dry recyclable material yields reducing necessary infrastructure and increasing processing efficiency; and
 - transport and material handling efficiencies will be enhanced by the centralised handling process.
- 6.66 The Commission notes that Waste Service NSW claims that there would not be any impact on or change to the service efficiencies as a result of the proposed arrangements. Waste Service NSW states that the Councils operate collection arrangements to suit local conditions and community preferences mostly with differing contract expiry periods.
- 6.67 However, the Commission notes that while this is currently the case, it appears that, through the tender arrangements the Councils are endeavouring to move away from localised arrangements to a centralised, common waste management system.
- 6.68 The Commission is satisfied that a centralised system for processing and handling materials in bulk is likely to generate transportation and materials handling efficiencies. Similarly, the consistencies in the mix of dry recyclable material collected should similarly reduce the need for sorting facilities handling the Councils dry recyclable material to operate under different configurations to handle the dry recyclable material from different councils.
- 6.69 While the Commission has not received any information to indicate the magnitude of any efficiency gains that may result from a common system for processing and handling of these types of waste materials across the Councils, the Commission considers that to the extent that productivity efficiencies are generated, these are likely to be reflected in more competitive tender bids, and ultimately lower prices paid by the Councils and their ratepayers for these services which the Commission considers constitutes a public benefit.

Environmental

- 6.70 The Commission recognises the environmental benefits which are likely to flow from the joint tendering arrangement, specifically an increase in the amount of materials recycled and the potential development of alternative waste technology.

That is, waste processing technologies that provide alternatives to landfill disposal.

- 6.71 Development of alternative waste technology would lead to a reduction in the use of landfill as a means of waste disposal with associated environmental benefits which the Commission consider would constitute a public benefit. However, the Commission notes that, as submitted by the Councils themselves, it is likely that alternative waste technology will be introduced in the Sydney metropolitan area regardless of whether the Councils collaboratively tender.
- 6.72 The Commission considers that the proposed arrangements may provide a greater incentive to contractors to establish alternative waste technologies more immediately to meet the waste management needs of the Councils. However, as it is likely that the development of alternative waste technologies will occur in the future regardless of the proposed arrangements, the Commission does not place significant emphasis on this benefit.
- 6.73 The Commission also notes that increased efficiencies in material handling, transfer, processing and transportation (as discussed above) may result in more dry recyclable material and organic material being recycled which, again, the Commission considers would be a public benefit.

Conclusion

- 6.74 Overall the Commission is satisfied that the proposed arrangements are likely to generate a small public benefit. Specifically, the Commission considers that the proposed arrangements will reduce the cost of waste transfer, processing and disposal services which will be reflected in lower domestic waste management charges to rate payers. Additionally, the Commission considers that the proposed arrangements may produce an environmental benefit by encouraging the development of alternative waste technologies to the current reliance on landfill for waste disposal sooner than they might otherwise be developed, and increasing the amount of materials recycled.

Balance of public benefit and detriment

- 6.75 The Commission may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment constituted by any lessening of competition.
- 6.76 The Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal. Given that competition for the provision of residual waste management services is currently negligible, the Commission considers that the proposed arrangements will in fact increase competition in this market by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.
- 6.77 With respect to the markets for the provision of dry recyclable material and organic waste management services, any anti-competitive detriment generated by

the arrangements is also limited by the current lack of significant competition for the provision of these services. In addition, the combined dry recyclable and organic waste generated by the Councils party to the proposed arrangements is only a small portion of the total amount generated in the Sydney metropolitan area, meaning that existing and potential new providers unsuccessful in the tender process would still be able to compete to provide these services to other councils.

- 6.78 With respect to all three streams of waste, the Commission considers that the proposed arrangements may increase competition as the development of a common centralised system for processing and handling each of the waste streams is likely to generate transportation and materials handling efficiencies. Additionally, the proposed arrangements are likely to result in transaction cost savings to both the Councils and the service providers. Such savings are likely to be reflected in lower domestic waste management charges to ratepayers which the Commission considers to be a public benefit.
- 6.79 In addition, the Commission considers that the proposed collective tender will also produce some, limited, environmental benefits, by assisting to facilitate the development of alternative waste technologies to the current reliance on landfill for waste disposal more immediately than may have otherwise been the case.
- 6.80 Consequently, the Commission concludes that the public benefits likely to result from the proposed arrangements will outweigh any anti-competitive detriment.

Term of the authorisation

- 6.81 The Commission notes that the Councils have sought authorisation for 10 years. The Councils submit that contracts entered into pursuant to the tender process would need to be for at least 10 years in order to provide potential new entrants, and existing providers seeking to develop new infrastructure, sufficient time to recover the costs associated with establishing the necessary infrastructure to provide the waste management services.
- 6.82 In considering previous applications for authorisation of similar arrangements, the Commission has considered that given the establishment costs involved in developing new waste management services, amortising establishment costs over too short a period of time is unlikely to produce sufficient cost savings for the tender process to yield a satisfactory outcome for the Councils. In addition, the Commission has noted the general preference in the waste industry for longer term contracts. Consequently, granting authorisation for too short a period, which would necessitate shorter term contracts being offered, would be likely to dissuade many potential waste management service providers from tendering and consequently jeopardise the prospects of the project proceeding. Given this, the Commission considers that in this instance a 10 year authorisation is warranted.
- 6.83 In respect of the process of running the collective tender process, the Councils have contended that a period of up to nine months will be necessary to advertise, evaluate and award tenders.
- 6.84 The Commission therefore proposes to grant authorisation for the following periods:

- for the period of the collective tender process up to a maximum of nine months from the date the final determination comes into effect; and
- for the term of the contracts entered into under the tender process up to a maximum of 10 years.

6.85 Authorising arrangements for a limited period allows the Commission an opportunity to assess whether the public benefits upon which its decision was based actually eventuate in practice and the appropriateness of the authorisation in the market environment as it exist at the time authorisation expires.

6.86 In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstances since the authorisation was granted.

DRAFT DETERMINATION

The Application

- 7.1 On 16 October 2003, the Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Councils (the Councils) jointly lodged application A90886 with the Australian Competition and Consumer Commission (the Commission).
- 7.2 The application was made using Form B, Schedule 1 of the *Trade Practices Regulations 1974*. The application was made under sub section 88(1) of the *Trade Practices Act 1974* (the Act) and the *Competition Code* of New South Wales, and sought authorisation to:
- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
 - give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 7.3 The application relates to an agreement between the Councils to advertise for and subsequently jointly tender for the provision of services of contractors able to process, market or otherwise dispose of three streams of kerbside collected waste materials, namely dry recyclable material, organic waste, and residual waste.

The Statutory Test

- 7.4 For the reasons outlined in Section 6 of this draft determination, the Commission concludes that in all circumstances the provisions of the proposed arrangements would or be likely to result in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result if the proposed arrangements were made and the provisions concerned were given effect to.

Conduct for which the Commission proposes to grant authorisation

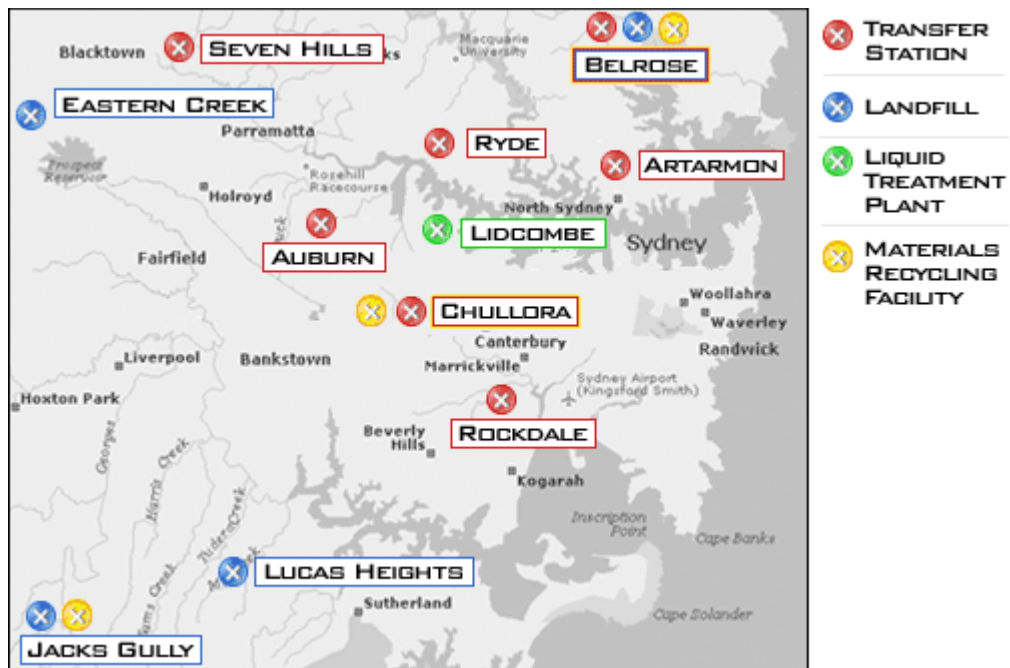
- 7.5 The Commission therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the Act, to grant authorisation A90886 for the following periods:
- for the period of the collective tender process up to a maximum of nine months from the date the final determination comes into effect; and
 - for the term of the contracts entered into under the tender process up to a maximum of 10 years.

7.6 This draft determination is made on 16 June 2004.

Further submissions

7.7 The Commission will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the Commission hold a pre-determination conference pursuant to section 90A of the Act.

ATTACHMENT A



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