



**Australian  
Competition &  
Consumer  
Commission**

## **Draft Determination**

# **Application for Authorisation**

**Lodged by**

**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**

**In respect of**

*joint tendering for the services of qualified contractors to provide waste transfer,  
processing and disposal services to their respective Local Government areas.*

**Date: 16 June 2004**

**Commissioners:**

**Authorisation no. A30231**

**Public Register no. C2004/31**

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# **Executive Summary**

## **The application**

On 11 December 2003, the Australian Competition and Consumer Commission (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 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 services of qualified contractors to provide waste transfer, processing and 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
- all councils may decide to enter into the one contract.

## **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 the services the subject of the collective tender process to councils contracting individually is currently negligible, the Commission considers that the proposed arrangements will in fact increase competition by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.

The Commission considers that this increase in the level of competition for the provision of these services will lead to some reduction in the price of waste management services, 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 may also produce environmental benefits by encouraging 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 A30231 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 3 March 2004; and
- for the term of the contracts entered into under the tender process for up to a maximum of 15 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.

### **Interim authorisation**

The Councils also sought interim authorisation for the process of advertising the tender. On 3 March 2004, the Commission granted interim authorisation to this element of the Councils application.

Interim authorisation will continue to protect the process for the advertising of the tender until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

## 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.
Anaerobic digestion	Involves the controlled degradation of organic wastes by microbial activity in a reactor in the absence of oxygen.
Bioreactor Landfill	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.
Cluster	A grouping of two or more member councils that are serviced by one contract.
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.
Enclosed composting	Takes place in a tunnel or enclosed hall under conditions where moisture and oxygen are optimised to achieve rapid stabilisation of the organic material.
Food Waste	Waste generated from the preparation and consumption of food exclusive of grease, oil, fat and meat waste.
Gasification	The conversion of organic material into combustible gases by partial oxidation under the application of heat, leaving an inert residue.
Green Waste	Putrescible green 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.
Northern Sydney Region of	A region of Councils formed under section 355 of the New South Wales <i>Local Government Act 1993</i> including

Councils (NSROC)	Hornsby, Hunters Hill, Ku-ring-gai, Lane Cove, North Sydney, Ryde and Willoughby Councils.
Putrescible	Any materials that cannot be separated into the dry recyclable materials or garden organics streams or material that are mixed together in such a way as to be impractical to separate by residents.
Pyrolysis	The thermal decomposition of organic compounds in the absence of oxygen and under pressure at temperatures between 400°C and 800°C.
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.
Shoroc Regional Organisation of Councils (SHOROC)	A region of Councils formed under section 355 of the <i>Local Government Act 1993</i> consisting of Manly, Mosman, Pittwater and Warringah Councils.
Transfer Station	The waste handling facility used to transfer waste from collection vehicles to a bulk haul vehicle for long-distance transportation. It may also be used to sort and redirect waste with the potential to recycle prior to disposal.
Vermicomposting	A system of stabilising organic materials under controlled conditions by specific worm species and micro-organisms under mesophilic temperatures.

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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 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 A30231 lodged with the Commission by 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 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 an opportunity to put oral submissions to the Commission in response to the draft determination. The Commission will also invite interested parties to lodge written submissions in response to 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 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.
- 1.9 The Commission also has the power to grant interim authorisation, at the time that an application is lodged, or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the Act while the Commission considers and evaluates the merits of the application.

## **The application**

- 1.10 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 Councils).
- 1.11 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.<sup>1</sup>
- 1.12 The 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
  - all councils may decide to enter into the one contract.
- 1.13 While the application is not made on behalf of any other parties, the application was lodged on the assumption that three additional councils, namely – Ku-ring-gai Municipal Council, Manly Council and Pittwater Council will participate in the joint tender process, subject to Commission authorisation. These three councils are named in the application as potential future participants in the tendering process.<sup>2</sup>

## **Interim authorisation**

- 1.14 On 11 February 2004, the Councils requested interim authorisation so that the process of advertising the tender could commence prior to the upcoming New South Wales (NSW) Local Government elections.<sup>3</sup> Interim authorisation was sought to advertise the tender only. On 3 March 2004, the Commission granted interim authorisation as requested by the Councils. Interim authorisation will continue to protect the process of advertising the tender until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

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

<sup>2</sup> Section 88(6) of the Act provides that an authorisation to engage in proposed arrangements has the effect of authorising the applicant(s) and any other party named in the application as a party or a proposed party to the proposed arrangements to also engage in the arrangements for which authorisation is sought.

<sup>3</sup> The NSW Local Government elections were held on 27 March 2004.



## **BACKGROUND TO THE APPLICATION<sup>4</sup>**

- 2.1 All Local Government councils in NSW are responsible for the collection and removal of domestic waste within their Local Government area.
- 2.2 Local Government Councils collect domestic waste from residents/small commercial businesses and deliver domestic waste to collection points. After receiving the domestic waste at the collection points, waste service provider(s) transfer, process and dispose of that waste through licensed waste management facilities.
- 2.3 Currently Waste Service NSW, a NSW Government Agency, operates as the sole provider of waste transfer, processing and disposal services to the majority of councils located within the Greater Metropolitan Area of Sydney.<sup>5</sup> As a consequence, most Local Government councils do not have formal contractual arrangements with Waste Service NSW for the transfer, processing and disposal of domestic waste but operate under an annual gate price arrangement.<sup>6</sup>
- 2.4 On 29 August 2002, the NSW Minister for Urban Affairs and Planning granted approval for Collex Waste Management Pty Ltd to build a waste transfer station and railhead facility at Clyde to be linked to a landfill site located at Woodlawn. Whilst approval to construct these facilities has been granted, construction has not yet commenced. However, once the transfer station and railhead are commissioned, alternative suppliers to Waste Service NSW will be available for the transfer and disposal of waste within the metropolitan area of Sydney.
- 2.5 In these circumstances, councils may wish to enter into contracts with a waste service provider rather than rely on the informal arrangement they currently have with Waste Service NSW.
- 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.<sup>7</sup>

### **Expressions of interest**

- 2.7 The Councils sought and evaluated expressions of interest from waste service providers to receive waste collected by the member councils and to transfer, process and dispose of that waste through a licensed facility. The primary purpose of the expression of interest process was to assist participating councils to decide whether some form of joint tender process for waste disposal services would be worthwhile and, if so, what public benefits would be achieved. Responses were received from:

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<sup>4</sup> The information in this section is sourced primarily from the Councils submission in support of their application for authorisation.

<sup>5</sup> With the exception of the Councils of Manly, Mosman, Pittwater and Warringah who jointly operate a licensed facility at Kimbriki.

<sup>6</sup> The councils are invoiced on a monthly basis based upon gate prices per tonne.

<sup>7</sup> This requirement relates to works with values in excess of \$100,000.

- Rethmann – Australia Environmental Services Pty Ltd<sup>8</sup>;
- The Enviroenergy Group – Enviroenergy Developments Australia Pty Ltd;
- Waste Service NSW;
- Collex;
- Thiess Services;
- Cleanaway; and
- Environmental Waste Technologies.<sup>9</sup>

2.8 As a result of the expression of interest process, the Councils decided to engage in a joint tender process. As service price for the provision of waste disposal services is influenced by both gross tonnages and the term of the contract, the Councils determined that there is likely to be financial benefits as a result of a joint tender due to, amongst other things, the combined tonnages of the Councils.

## **The market**

2.9 The Northern Sydney Region of Councils (NSROC) and Shoroc Regional Organisation of Councils (SHOROC) are regions of councils formed under section 355 of the *Local Government Act 1993*. The seven constituent councils of the NSROC are:

- Hornsby
- Hunter Hill
- Ku-ring-gai
- Lane Cove
- North Sydney
- Ryde
- Willoughby

The four constituent councils of SHOROC are:

- Manly

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<sup>8</sup> The submission by Rethmann was not an Expression of Interest for the provision of waste transfer processing and disposal services to the member Councils. It was a letter which confirmed that Rethmann was interested in finding solutions for the provision of services to the Councils, however based on existing infrastructure, Rethmann could not provide a viable solution.

<sup>9</sup> Environmental Waste Technologies indicated that they had not been able to respond to the advertised Expression of Interest in the timeframe available but were interested in participating in any future tendering process.

- Mosman
  - Pittwater
  - Warringah
- 2.10 The combined areas of the NSROC and SHOROC are located in the north eastern sector of the Sydney metropolitan area and represent 24% of the total Sydney metropolitan area. Attachment B provides a map of the Sydney metropolitan area.
- 2.11 This application for authorisation relates to the provision of services for waste transfer, processing and disposal of the following streams of waste, as defined in the glossary of this draft determination:
- putrescible waste;
  - green waste;
  - cleanup waste; and
  - food waste.
- 2.12 As such, the application relates mainly to waste transfer, processing and disposal of light commercial and domestic waste. However some member councils also provide collection services to a number of small commercial customers.
- 2.13 The NSROC/SHOROC Councils accounted for 18.2% of all domestic waste disposed of through landfill in the Sydney metropolitan area in 2003/2004.

### **Existing market infrastructure**

- 2.14 The existing infrastructure in respect of the transfer, processing and disposal of waste in the Sydney Metropolitan Area is predominately owned and operated by Waste Service NSW.
- 2.15 The Councils submit that, to date, Waste Service NSW has been operating in a competitor-free environment.

2.16 Currently, waste disposal locations used by the Councils are:<sup>10</sup>

<b>Name of the Disposal Facility</b>	<b>Councils Using the Facility</b>
Artarmon Waste Management Centre	North Sydney Council Lane Cove Council Willoughby City Council
North Ryde Waste Management Centre	The City of Ryde Ku-ring-gai Municipal Council Hornsby Council Hunters Hill Council
Kimbriki Waste Management Centre	Manly Council Mosman Council Pittwater Council Warringah Council
Belrose Waste Management Centre	Manly Council Mosman Council Pittwater Council Warringah Council Hornsby Council
Seven Hills Waste Management Centre	Hornsby Council

2.17 Putrescible waste and green waste can also be disposed at transfer stations located at:

- Rockdale;
- Auburn; and
- Chullora.

2.18 This waste type can also be disposed directly to landfill sites at:

- Eastern Creek;
- Jack's Gully; and
- Lucas Heights.

2.19 The map at Attachment A details the transfer stations and landfill sites available in the Sydney metropolitan area.

### **Possible future market infrastructure**

2.20 During the expression of interest process a number of suppliers nominated possible service solutions based on alternative waste technology. That is, waste processing technologies that provide an alternative to landfill disposal.

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<sup>10</sup> Councils Tender Document, 9 December 2003, pg 10.

- 2.21 The Councils submit that there are a number of viable technologies which could be introduced to the Sydney market. The main technology types, as described in the glossary of the draft determination, are:
- enclosed composting;
  - anaerobic digestion;
  - pyrolysis/gasification; and
  - vermicomposting.
- 2.22 Nominations received in response to the expression of interest process identified that, a large dollar value contract plus a reasonable contract period (minimum 15 years) would be required in order to allow the capital investment in infrastructure required in order to establish a viable alternative provider to Waste Service NSW to be recovered over the life of the contract.
- 2.23 In November 2000, planning approval was granted by the NSW Government to Collex Waste Management for the development of a new putrescible landfill site at Woodlawn. The site is an old mining site and the Councils submit that it is ideally suited for the purpose of landfill, incorporating modern bioreactor technology. A critical link in the infrastructure network is the transfer station and transport node planned for Clyde. Planning approval for this transfer station was granted by the Minister for Urban Affairs and Planning in August 2002.

### **Restriction on location of transfer stations**

- 2.24 If a transfer station is nominated for a service collection area in the Councils Local Government area, then the location of the transfer station should preferably be no further from the Councils Local Government area boundary than the following distances:<sup>11</sup>

Willoughby City Council	10 kms
North Sydney Municipal Council	5 kms
Ku-ring-gai Municipal Council	10 kms
Hornsby Shire Council	30 kms
The City of Ryde	10 kms
Lane Cove Council	5 kms
Hunters Hill Council	10 km
Manly Council	10 kms
Mosman Council	15 kms
Pittwater Council	10 kms
Warringah Council	10 kms

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<sup>11</sup> Councils Tender Document for ACCC, 9 December 2003, pgs 10 – 11.

## **Previous applications for authorisation (A30204 and A30205)**

- 2.25 The Commission has previously considered applications for authorisation relating to similar arrangements in the Sydney region waste transfer and processing industry.
- 2.26 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).
- 2.27 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.<sup>12</sup>
- 2.28 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 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.<sup>13</sup>
- 2.29 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.
- 2.30 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

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<sup>12</sup> 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.

<sup>13</sup> 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.

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.

- 2.31 Application A30231 differs from the above authorisations mainly in respect of the type of waste proposed to be collected, processed and disposed. Authorisations A30204 and A30205 related specifically to dry recyclable material, whereas application A30231 relates to the provision of services for waste transfer, processing and disposal of light commercial and domestic waste other than dry recyclable materials.

### **Current similar authorisation application (A90886)**

- 2.32 On 16 October 2003, the councils of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Council (the Macarthur Region Councils) jointly lodged an application for authorisation.
- 2.33 The Macarthur Region Councils seek authorisation to collectively tender for the services of qualified contractors, able to process, market or otherwise dispose of kerbside collected waste materials. The Macarthur Region Councils submit that the result of the tender process will be two (or three) contracts jointly signed by the Macarthur Region Councils with the contractors.
- 2.34 The scope of the collective tendering process proposed by the Macarthur Region Councils is wider than previously authorised in A30204 and A30205 and varies from that proposed in the current application. The Macarthur Region Councils propose to tender for dry recyclable material, organic (mainly plant material from gardens) and residual waste.
- 2.35 Concurrent with the release of this draft determination, the Commission has released a draft determination proposing to grant authorisation to the Macarthur Region Councils application.

# **THE APPLICATION**

## **The arrangements**

- 3.1 The Councils seek authorisation to advertise for and subsequently jointly tender for the services of qualified contractors to provide waste transfer, processing and disposal services to their respective Local Government areas.
- 3.2 The tender will be in the form of a joint tender, where 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
  - all councils may decide to enter into one contract.

The individual councils may decide which of the above arrangements to enter into.

## **Evaluation criteria**

- 3.3 The Request for Tender document will include evaluation criteria addressing financial, environmental, technical and social issues. An evaluation matrix will be used to assist in the evaluation of tender bids. The evaluation matrix will allocate weightings against each of the following selection criteria as part of the analysis:
- Environmental, technical and social outcomes;
  - Total tender price including rise and fall provisions;
  - Previous experience;
  - Organisation structure-technical and financial capability;
  - Demonstrated understanding of principal's requirements;
  - Proposed personnel including sub-contractors;
  - Outline of the methodology and operational procedures;
  - Occupational Health Safety and Rehabilitation (OHS&R);
  - Conformity to Environmental Protection Authority (EPA) requirements and past records of non-compliance;
  - Insurance;
  - Conformity to the tender documentation;



- Legal status of the entity;
  - Referees;
  - Quality assurance program and past performance; and
  - Demonstrated service quality.
- 3.4 The Councils state that they are committed to ecologically sustainable development and will aim to appoint providers who have similarly demonstrated a commitment to ecologically sustainable development.

### **Other considerations**

- 3.5 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. The waste service provider will be required during the term of the contract to supply and operate all necessary equipment for monitoring leachate, gas emissions, dust, noise, sound and service water associated with the sites. Monitoring is to be in accordance with NSW EPA requirements.
- 3.6 The waste service provider must also develop and rehabilitate waste disposal sites in a manner that reduces loss of amenity and the risk of environmental harm. The contractor must also develop, monitor and maintain a program that ensures that the landfill does not pose a threat to the environment or be a concern to the neighbouring community.

### **Submission from the Applicant**

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

#### *Claimed public benefits*

##### Financial

- 3.8 In their supporting submission, the Councils state that cost of preparing tender documents, advertising and evaluation of the tender are estimated at in excess of \$50,000. The Councils argue that in proceeding with a joint tender costs would be shared, therefore, based on the presumption that all eleven councils participate in the joint tendering process, there would be a cost saving of \$500,000 across the councils. The Councils submit that this saving would be a direct saving to the public because, as councils are permitted to charge the full cost of supply of waste management services within their domestic waste charge to ratepayers, a saving the waste management expenditure of the council is effectively a direct saving to the general community in respect of their rate payments. In addition, the Councils submit that savings on the current gate price will be generated from the joint tendering arrangements. The Councils state that based upon the result of the expressions of interest process, a number of market suppliers are prepared to bid contract prices (based on a critical mass of waste and an extended contract period) lower than the current gate price. The Councils estimate that based on current

tonnages this will result in a saving of \$2 million per annum to the ratepayers of NSROC/SHOROC participating councils.

- 3.9 Finally, the Councils submit that the proposed contract/s will provide a formal mechanism for the co-ordination of waste management practices between the participating councils leading to service delivery efficiencies and associated cost savings.

#### Increasing competition

- 3.10 The Councils submit that the joint tender will create the opportunity for increased competition within the waste disposal market. The Councils explain that the joint tender will, to some extent, guarantee sufficient tonnages to allow new entrants to develop the necessary infrastructure to service the contract and incorporate a capital recovery component within their pricing structure.
- 3.11 The Councils submit that in order for new entrants to enter the market using alternative waste technology, a critical mass of waste in terms of tonnes per annum is necessary to justify such an investment.
- 3.12 The Councils state that the supply of 50,000 tonnes per year is considered the minimum supply to support the development and operation of an alternative waste technology. Further, the Councils state that in many instances it is not until such a facility can obtain greater than 100,000 tonnes per year over a period of 10 years or more that a supplier can offer a gate fee comparable to today's landfill gate fee.
- 3.13 The Councils state that the combined tonnages associated with a joint tender awarded to NSROC/SHOROC amounts to around 225,000 tonnes per annum.
- 3.14 The Councils also note that awarding sub-regional contracts may allow more than one new waste disposal service provider to enter the market.

#### Environmental

- 3.15 The Councils submit that if the awarding of the contract permits the introduction of a locally based alternative waste technology within the northern precinct of Sydney, significant environmental benefit will be generated through increased waste recycling and the subsequent reduction of waste tonnages to landfill.
- 3.16 The Councils also submit that a locally based facility will result in a reduction in the transport of waste either by road or rail and, as such, will generate a reduction in the discharge of greenhouse gases.
- 3.17 The Councils submit that alternative suppliers may be able to offer more strategically located sites in respect of the north eastern precinct of the Sydney metropolitan area than the current landfill sites managed by Waste Service NSW and Collex.
- 3.18 The Councils state that existing facilities operated by Waste Service NSW, particularly the landfill sites, have a limited life of between eight and 15 years. According to the Councils, Jacks Gully will cease operation within two years. As a consequence of needing to extend the life of the available landfills, Waste

Service NSW will need to introduce recycling facilities within future development proposals at these sites.

- 3.19 The Councils consider that if Waste Service NSW is a successful tenderer, given the critical mass of waste and the contract period, Waste Service NSW will be able to invest in appropriate technology to service the contract and, at the same time, generate environmental benefits.
- 3.20 Finally, the Councils state that, in the event that a service provider using the infrastructure of the Woodlawn bioreactor is successful in the tender, further environmental benefits will flow. The Woodlawn bioreactor incorporates a whole series of environmental benefits relating to site remediation and utilisation of a buffer zone for wind generated electricity. The Councils explain that the bioreactor itself creates green energy as a result of the operation of the landfill.

*Anti-competitive detriment*

- 3.21 The Councils argue that a decision to grant contracts on a regional or sub-regional basis will increase competition by giving more suppliers the opportunity to enter the market.

*Period of authorisation*

- 3.22 The Councils submit that in order to encourage alternative suppliers to enter the market it is necessary for them to organise site opportunities for the alternative waste technology plants and construct the necessary infrastructure.
- 3.23 The Councils submit that at least 24 to 36 months is required for such infrastructure to be developed. The Councils note that it may be possible for suppliers to develop short term arrangements, for example using Waste Service NSW or Collex infrastructure, while long term infrastructure to be used in the contract is being commissioned and constructed.
- 3.24 Given this, the Councils consider that if competing service providers are not given sufficient time to prepare a response to the tender, they will be disadvantaged in the tender process.
- 3.25 The Councils submit that the tender process should be nine months to allow prospective suppliers to develop their proposals and to demonstrate that they have some form of, in principle, agreement to occupy a site and develop the necessary infrastructure.
- 3.26 With respect to the terms of the contracts entered into, the Councils submit that the contract period should be 15 years with a five year option. The Councils submit that this would allow potential alternative suppliers sufficient time to recoup the capital investment in infrastructure necessary to establish alternative waste management services. The Councils submit that based on the information supplied through the expression of interest process, such a contract period should permit the offer of a number of competitive service prices.

## **Submissions from interested parties**

- 3.27 The Commission placed the application and supporting submission on its website, but did not otherwise consult with interested parties prior to issuing this draft determination. The Commission will conduct a public consultation process following the release of this draft determination. The Commission did not consider it necessary to actively consult prior to issuing a draft determination given the nature of the arrangements for which authorisation is sought, the Commission's past consideration of similar arrangements as discussed in Chapter 2 of this draft determination and the extensive public consultation process conducted in respect of these previous applications.
- 3.29 As provided for in the Act, in advising interested parties of this draft decision, the Commission has invited interested parties to notify the Commission if they wish it to hold a pre-determination conference in relation to this draft determination. The Commission has also invited interested parties to lodge written submissions in response to the draft determination.

## **THE PUBLIC BENEFIT TEST**

- 4.1 The Commission may only grant authorisation where the public benefit test in section 90 of the Act is satisfied.
- 4.2 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.
- 4.3 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.
- 4.4 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.
- 4.5 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.
- 4.6 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.

- 4.7 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.
- 4.8 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**

- 4.9 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.<sup>14</sup>

- 4.10 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.<sup>15</sup>

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

### **Future with-and-without test**

- 4.12 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.
- 4.13 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.

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<sup>14</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677

<sup>15</sup> *Ibid* at 42683.

## **Whether arrangements breach the Act**

4.14 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.

4.15 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**

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

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

## **COMMISSION EVALUATION**

### **This application for authorisation**

- 5.1 The Councils have sought authorisation to advertise and subsequently jointly tender for the services of contractors to provide light commercial and domestic waste transfer, processing and disposal services to their respective Local Government areas.

### **Market definition**

- 5.2 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.
- 5.3 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.
- 5.4 In its consideration of this application for authorisation, the Commission considers that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variation in precise market definition.
- 5.5 In respect of the product market in which the Councils seek to collectively tender, the Commission notes that it could be narrowly defined to include the transfer, processing and disposal of light commercial and domestic waste (i.e. those products in respect of which the Councils seek to collectively negotiate) or more broadly defined to include the transfer, processing and disposal of waste more generally. However, as noted above, the Commission does not consider that its analysis of the public benefits and anti-competitive detriment of the proposed arrangements is overly affected by the possible variations in the precise definition of this market.
- 5.6 With respect to the geographical boundaries of the market, the Commission considers that these are most accurately defined as regional due to the fact that, ideally, transfer, processing and disposal stations should be located in close proximity to the area from which the waste is collected.
- 5.7 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.



## **Future with-and-without test**

- 5.8 As noted at paragraph 4.11, 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.
- 5.9 The Commission did not receive any submissions from the applicant on what an appropriate counterfactual would be.
- 5.10 The Commission considers that the likely counterfactual is a situation where the councils either:
- individually tender for the services of contractors to transfer, process and dispose of specific streams of waste;<sup>16</sup> or
  - continue to engage the services of Waste Service NSW under the current annual gate price arrangements.
- 5.11 To the extent that the counterfactual adopted may affect the Commission’s assessment of the proposed arrangements, this is discussed where relevant in the Commission’s assessment of the effects on competition and public benefits of the proposed arrangements below.

## **Effect on Competition**

- 5.12 As discussed in Section 4, 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.
- 5.13 The Commission notes that, at present, a single contractor, Waste Service NSW, operates as the sole provider of waste transfer, 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.
- 5.14 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 2.4, new

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<sup>16</sup> If the total value of any Councils prospective contract is less than \$100,000, that council would not be required to tender.

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.

- 5.15 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 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. Therefore, based on the information provided to the Commission, 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.
- 5.16 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 15 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.
- 5.17 While the proposed arrangements, by allowing (potentially) a single company to provide residual waste management services to the Councils for the next 15 years, restrict 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. While the proposed arrangements may result in a single contractor providing light commercial and domestic waste transfer, 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.
- 5.18 More generally, the Commission notes that the 11 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.
- 5.19 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.

- 5.20 However, the Commission considers that the proposed tender process may in fact increase competition in the market for the provision of waste transfer, processing and disposal services. Specifically, they create a competitive environment for the provision of these services at a particular point in time (i.e. when the tender process is run). In this respect, the Commission notes that the Councils have received seven responses to the expressions of interest process in respect of the proposed tender, which suggests that competition exists for the provision of waste transfer, processing and disposal provided that there is a critical mass of waste sufficient to justify the capital investment necessary for new providers to enter the market.
- 5.21 While the proposed tender process will result in either a small number of contractors being appointed either collectively by the 11 councils, collectively by sub-groups of councils, or by individual councils, or, more likely, a single contractor being appointed to service all 11 councils, this is likely to be on more competitive terms than is currently the case. In this respect, the Commission again notes the argument of the Councils that the potential for joint 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.
- 5.22 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.

### *Conclusion*

- 5.23 For the reasons outlined above, the Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal. The Commission considers that the proposed arrangements are likely to in fact increase competition in the market for waste transfer, processing and disposal services. The public benefits which the Commission considers may flow from this increase in competition are discussed below.

### **Public Benefit**

- 5.24 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.

- 5.25 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 transfer, processing and disposal services*

- 5.26 As noted above, the Commission considers that the proposed arrangements will provide for greater competition between potential new entrants and the incumbent service provider.
- 5.27 The applicants have estimated, based on nominations received through the expressions of interest process, that savings on the cost of acquiring these services as a result of a competitive joint tender process will be \$2 million per annum. While the Commission has not had access to information to allow it to independently assess the Councils estimated cost saving, 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. Based on the information provided by the applicant, particularly in respect of the expressions of interest process conducted, these savings can be expected to be significant.
- 5.28 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.
- 5.29 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*

- 5.30 The Councils contend that the costs of conducting a tender process of the type envisaged is in excess of \$50,000. Consequently, they contend that processing with a joint tender rather than each of the 11 councils individually tendering would result in cost saving of \$500,000.
- 5.31 As noted above with respect to the applicant's estimates of cost savings as a result of increased price competition, the Commission has not had access to information to allow it to independently assess the Councils estimated transaction costs savings through running a joint tender process. It may be for example that the costs of each individual, smaller scale, tender process would be less than the cost of running a single larger scale process. If this were the case, the aggregate cost saving as a result of running a joint tender process would be somewhat less than the \$500,000 estimated by the Councils. However, more generally, the Commission accepts that running a single, joint tender process would result in transaction cost savings compared to a situation where each council individually

ran a tender process. 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.

- 5.32 However, the Commission considers it by no means certain that, in the absence of the proposed arrangements, individual councils would choose to tender for the provision of these services. The Commission notes that in the past none of the Councils have chosen to do so. Rather all have chosen to operate under an informal arrangement with Waste Service NSW. Proposed new infrastructure developments, as detailed in paragraph 2.4 of this draft determination, may make it more commercially viable for other potential service providers to tender for the provision of waste transfer, processing and disposal services to Councils individually. However, as noted by the Councils themselves, it is only by aggregating their waste service management needs that tendering for the provision of these services becomes a commercial viable option for potential service providers other than Waste Service NSW.
- 5.33 In conclusion, while the Commission considers that transaction cost savings would accrue to the Councils in jointly tendering, compared to a situation where each council tendered individually, the extent to which councils would in fact tender individually absent of the proposed arrangements is unclear.
- 5.34 The Commission therefore accepts, but on the basis of the available information does not place great weight on, the argument that a public benefit would arise through reductions in the domestic waste management charge as a result of transaction cost savings accruing through the Councils running a joint tender process for the provision of waste transfer, disposal and processing services.

#### *Environmental benefits*

- 5.35 The Commission recognises the environmental benefits which are likely to flow from the joint tendering arrangements, specifically the potential development of alternative waste technology. That is, waste processing technologies that provide alternatives to landfill disposal.
- 5.36 The applicants contend that during the expression of interest process a number of potential suppliers proposed waste management solutions based on alternative waste technology. The applicants contend that potential providers of alternative waste technology have submitted that they would require a large dollar value contract and reasonable contract period (for example, 15 years plus) in order to allow them to recover the investment in infrastructure necessary to develop and enable such technology.
- 5.37 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 it is likely that alternative waste technology will be introduced in the Sydney metropolitan area regardless of whether the Councils collaboratively tender.

5.38 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.

### *Conclusion*

5.39 Overall the Commission is satisfied that the proposed arrangements are likely to generate a 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.

### **Balance of public benefit and detriment**

5.40 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.

5.41 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 the services the subject of the collective tender process to councils contracting individually is currently negligible, the Commission considers that the proposed arrangements will in fact increase competition by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.

5.42 The Commission considers that this increase in the level of competition for the provision of these services will lead to some reduction in the price of waste management services, likely to be reflected in lower domestic waste management charges to ratepayers, which the Commission considers to be a public benefit.

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

5.44 Consequently, the Commission concludes that the public benefits likely to result from the proposed arrangements will outweigh the anti-competitive detriment.

### **Term of the authorisation**

5.45 The Commission notes that the Councils have sought authorisation for 15 years. The Councils submit that contracts entered into pursuant to the tender process would need to be for at least 15 years in order to provide potential new entrants

sufficient time to recover the costs associated with establishing the necessary infrastructure to provide the waste management service.

- 5.46 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 15 year authorisation is warranted.
- 5.47 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. The Commission granted interim authorisation on 3 March 2004 to the process of advertising the tender.
- 5.48 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 3 March 2004; and
  - for the term of the contracts entered into under the tender process up to a maximum of 15 years.
- 5.49 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 exists at the time authorisation expires.
- 5.50 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*

- 6.1 On 11 December 2003, 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 Councils) lodged application A30231 with the Australian Competition and Consumer Commission (the Commission).
- 6.2 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.
- 6.3 The application relates to an agreement between the Councils to advertise for and subsequently jointly tender for the provision of waste transfer, processing and disposal services to the Councils Local Government areas.

### *The Statutory Test*

- 6.4 For the reasons outlined in section 5 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*

- 6.5 The Commission therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the Act, to grant authorisation to application A30231 for the following periods:
- for the period of the collective tender process up to a maximum of nine months from 3 March 2004; and
  - for the term of the contracts entered into under the tender process up to a maximum of 15 years.



- 6.6 Pursuant to subsection 88(6) the proposed authorisation extends to three additional councils, namely Ku-ring-gai Municipal Council, Manly Council and Pittwater Council.
- 6.7 This draft determination is made on 16 June 2004.

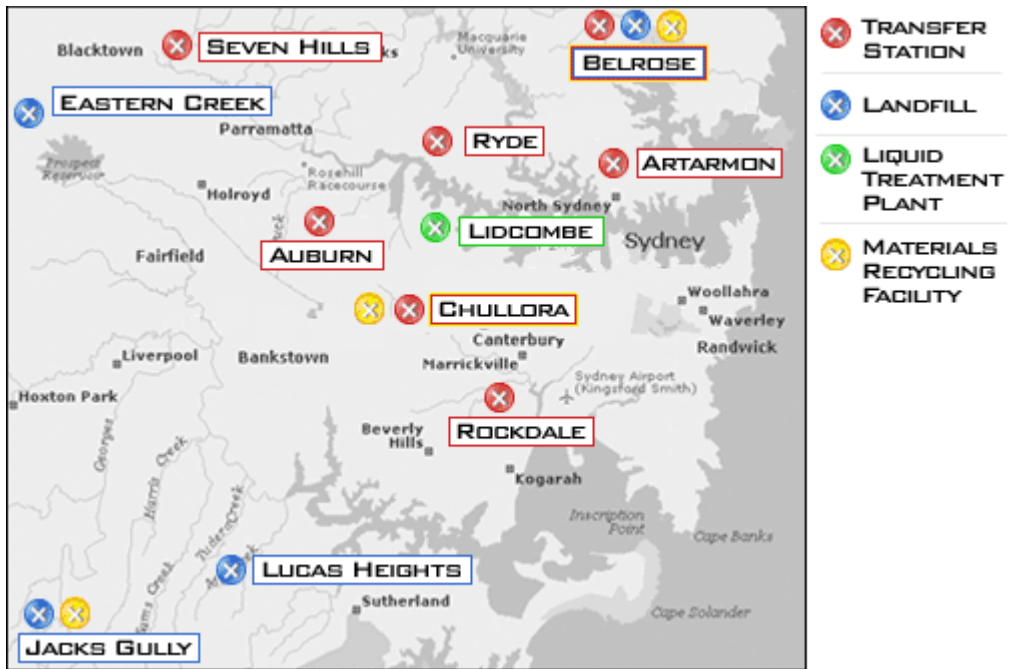
*Interim authorisation*

- 6.8 On 11 February 2004, the Councils requested interim authorisation for the process of advertising the tender. On 3 March 2004, the Commission granted interim authorisation in respect of the process of advertising the tender. Interim authorisation will continue to protect the process for advertising of the tender until the date the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

*Further submissions*

- 6.9 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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