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To: Mr Gavin Jones

Of: Australian Competition & Consumer Commission (ACCC)

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Reference:

From: Charles Munro (Waste Service NSW)

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Phone: (02) 9934 7022

Date: Monday, 19th July 2004

Fax: (02) 9934 7185

No. of Pages: 13 (including this sheet)

Reference: Waste Service NSW

Dear Gavin,

Please find attached the "Application for Authorisation by NSROC Waste Service NSW Submission on Draft Determination" document.

If you have any problems or queries in this regard, please do not hesitate to contact me on (02) 9934 7057 or 0419 753 969 at your earliest convenience.

Yours sincerely

Charles Munro
Manager, Marketing and Business Development
Waste Service NSW

APPLICATION FOR AUTHORISATION BY NSROC**WASTE SERVICE NSW SUBMISSION ON DRAFT DETERMINATION****1. SUMMARY AND INTRODUCTION**

- (a) Waste Service NSW (WSNSW) is a solid waste and industrial liquid waste service provider. WSNSW is a statutory State Owned Corporation established under section 4 of the *Waste Recycling and Processing Corporation Act 2001 (NSW) (WRPC Act)*. Section 5 and 6 of the WRPC Act sets out the principal objects of WSNSW which include:
- (i) to be a successful business;
 - (ii) to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates; and
 - (iii) to protect the environment by conducting its operations in compliance with the principles of ecologically sustainable development; and
 - (iv) to research, develop and implement alternative technologies for managing waste.
- (b) Given these objectives WSNSW strongly supports:
- (i) any initiative that seeks to encourage providers of alternative waste technology (AWT) to commence providing services in Sydney and NSW; and
 - (ii) awarding long term contracts to those persons that wish to provide a genuine AWT solution in order to remove some of the risk of making the initial capital investment in the necessary infrastructure; and
 - (iii) a free competitive market for AWT; and
 - (iv) the NSW State Government decision to introduce competition in landfilling by approving Collex's project developments at Clyde and Woodlawn.
- (c) The Northern Sydney Regional Organisation of Councils (NSROC), comprising the Councils of Hornsby, Hunters Hill, Ku-ring-gai, Lane Cove, North Sydney, Ryde and Willoughby, have lodged an application (Application) for authorisation of a contract, arrangement or understanding between them for the joint tendering for the services of

qualified contractors to provide waste transfer, processing and disposal services (waste disposal services) to the respective NSROC Local Government areas.

- (d) The Australian Competition and Consumer Commission (Commission) issued a draft determination on 16 June 2004 by which it proposed to grant authorisation to the Councils comprising NSROC to enter into the arrangement for the following periods:
- (i) for the period of the collective tender process up to a maximum of nine months from 3 March 2004; and
 - (ii) for the term of the contracts entered into under the tender process up to a maximum of 15 years.
- (e) WSNSW considers that the arrangements approved by the ACCC are not sufficiently prescriptive on the use of AWT, and that under these arrangements the potential exists for a long term contract to be awarded for the disposal of waste for NSROC Councils where the dominant waste disposal technique adopted by the successful tenderer is landfill.
- (f) If a contract were to be awarded to a Waste service provider based on a landfill solution, WSNSW considers that:
- (i) there would be a lessening of competition in the markets in which waste disposal services in general and landfill services in particular are provided;
 - (ii) there would be adverse environmental consequences as a result of failing to adequately encourage the development of AWT as an alternative to landfill, meaning that the proposed conduct would not result in any of the advocated public benefits; and
 - (iii) these adverse environmental consequences would be inconsistent with NSW Government public policies.
- (g) WSNSW considers that such an outcome would not result in a public benefit that would outweigh the detriment to the public caused by the lessening of competition.
- (h) WSNSW considers that if the Commission were minded to grant authorisation, it should only do so if the authorisation were subject to the following conditions:
- (i) joint tenders for waste disposal services should specify whether the method of disposal is landfill (whether conventional or bio-reactor) or AWT;

- (ii) joint tenders for landfill services should be limited to a period of up to 3 years on the basis that there is no economic or environmental rationale to encourage investment in landfill infrastructure through long term contracts; and
 - (iii) joint tenders for AWT should specify the minimum level of waste required to be diverted from landfill. There is no definitive definition of AWT, however, it is generally considered to be, primarily an alternative to the landfilling of waste, and secondly, consistent with the principles of Ecologically Sustainable Development (ESD) through the recovery and conservation of resources and a reduction in the environmental impacts of waste management. WSNSW therefore recommends a condition on AWT tenders that after 3-5 years all waste is to be processed using AWT and 70% of this waste is to be diverted from landfill. If such a condition were imposed, a longer term contract of, say, 15 years would be appropriate as this would encourage organisations to invest in AWT solutions.
- (i) If the above conditions were placed on the proposed arrangements, WSNSW considers that the Application should be authorised by the Commission.

2. STATUTORY TESTS

- (a) The Application by NSROC seeks authorisation under section 88(1) of the *Trade Practices Act 1974* (Cth) (TPA) to:
- (i) 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; and
 - (ii) 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.
- (b) The ACCC may only grant authorisation where the public benefit test in section 90 of the TPA is satisfied. That is, the ACCC may only grant authorisation if it is satisfied that:
- (i) the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - (ii) 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.

- (c) The onus of satisfying the test for the grant of authorisation rests on the applicant for authorisation.¹

3. FACTUAL AND COUNTERFACTUAL

- (a) In determining whether there would be a substantial lessening of competition and a countervailing public benefit, the Australian Competition Tribunal and the Federal Court have adopted a "future with and without" test.² This test invites a comparison of the potential public benefit and effect on competition if the authorisation was granted (the factual) and if the authorisation was not granted (the counterfactual).

3.1 Nature of Application and Potential factual

- (a) The joint tendering regime set out in the Application is not a joint tendering regime for AWT. It simply allow tendering for waste disposal services in general. Waste disposal services is a very generic term that includes the use of AWT and also landfill services.
- (b) An AWT solution would, by its very nature, involve the provision of some landfill services. There would be an initial lead time of between 3-5 years before the AWT plant is operational during which time waste would need to be disposed of almost entirely using landfill services. Further, once the plant is operational, only approximately 70% to 90% of the waste would be diverted away from landfill – the remaining 10% to 30% of waste would need to be disposed of using landfill services. However, a true AWT solution would otherwise not be reliant on landfill services.
- (c) Given the ambiguity of the nature of the tender the subject of the Application, there can be no certainty that the solution ultimately accepted by NSROC is one predominately based on AWT. There is a prospect that it could be a solution that is predominately based on landfill.
- (d) WSNSW considers that if a long term solution is adopted by NSROC that is predominately based on landfill services, the following market characteristics would apply:
- (i) the contract would have been awarded to either Collex Waste Management Pty Ltd (Collex) or WSNSW, who are currently, and will be for the foreseeable future, the only providers of landfill services;

¹ *Re Queensland Timber Board* (1975) 5 ALR 501; *Re Media Council of Australia (No 2)* (1987) ATPR 40-774; *Re John Dee (Export) Pty Ltd* (1989) 87 ALR 321.

² *Outboard Marine Australia Pty Ltd v Hecor Investments (No 6) Pty Ltd* (1982) ATPR 40-327.

- (ii) a significant stream of putrescible waste (18% of all Sydney municipal waste and 100% of all municipal waste in the northern Sydney region) is removed from the market for a period of 15 years and will be provided to one of the two existing waste disposal service providers;
- (iii) in response to this tender, there would be a trend for all landfill services contracts to be for longer terms as WSNSW and Collex move to guarantee putrescible waste streams in order to ensure minimum revenue stream requirements. WSNSW notes that such conduct would be contrary to many waste disposal markets where gate pricing or spot pricing is the norm³;
- (iv) the level of competition in relation to landfill and waste disposal services in general may decrease significantly. This is because:
 - A. absent a reliable stream of municipal waste in the northern regions of Sydney, there is every prospect that WSNSW or Collex (whoever the unsuccessful tenderer may be) will not proceed with new infrastructure development proposals (such as transfer stations) or will close existing infrastructure in the northern regions of Sydney as the lack of reliable revenue stream may not allow a reasonable return on these capital investments; and
 - B. the prospect of entry by a new provider of AWT services, particularly in the northern region of Sydney, would be extremely low. This would be due to the removal of the NSROC waste stream from the market as well as other waste streams removed from the market due to the general trend towards long term contracts for landfill services. That is, there would be significant barriers to entry for a provider of AWT services.
- (e) For the purposes of this submission, this scenario shall be considered the **Landfill Solution Factual**.

3.2 Counterfactual

- (a) If the Application was not authorised by the Commission, WSNSW considers that the market characteristics, or the counterfactual, would be as follows.

Current level of competition between WSNSW and Collex would gradually increase

³ For example, DRM waste in Melbourne is disposed on a spot price basis. There are no long term contracts in place.

(b) As noted in paragraph 3.27 of the draft determination, the ACCC did not consult with interested parties prior to issuing the draft determination. As a result, the factual findings set out in draft determination are based primarily on information provided by NSROC. These findings underestimate the current level of competition for waste transfer and landfill services in Sydney.

(c) The ACCC found that WSNSW operates as the sole provider of waste disposal services to the majority of councils within the greater metropolitan area of Sydney (with the exception of the councils of Manly, Mosman, Pittwater and Warringah) and all of the NSROC councils.⁴ The ACCC concluded from this that:

"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".

(d) This finding flows through all of the Commissions' reasoning in section 5 of the draft determination, for example:⁵

"the Commission considers, based on the available evidence, that absent the proposed arrangements, it is likely to remain the case that [WSNSW] will remain the sole provider of residual waste management services to the Councils for the foreseeable future".

(e) This finding is unsustainable given evidence which shows that there has been competition for waste collection and disposal between Collex and WSNSW for a considerable period of time in the lead up to the opening of Collex's infrastructure, and that, with the establishment of a transfer facility at Clyde and a landfill site at Woodlawn, Collex is now in direct competition with WSNSW for waste processing and disposal through landfill.

(f) On 22 June 2004 (one week after the draft determination was issued) the City of Ryde Council, one of the councils within NSROC, resolved to accept an offer from Collex for the provision of waste disposal services (including landfill services) commencing immediately and continuing up to the implementation of the NSROC tender. See attached letter. Councils can quickly and easily call a tender for landfilling services, without the need for joint tendering processes. On this occasion, WSNSW was contacted by telephone, and requested to provide prices for the landfilling of waste on the same day.

⁴ pars [2.3] and [5.13]

⁵ par [5.16], see also pars [5.17], [5.21], [5.22], [5.23] and [5.41].

- (g) Clearly, WSNSW is not operating as a monopoly supplier of landfill services either to Sydney in general or to NSROC in particular. As Collex develops its landfill business, its market share will grow.
- (h) If the Application were not authorised, some Councils would tender for the provision of landfill services. Collex and WSNSW would compete vigorously in relation to these tenders. On the whole WSNSW considers that any contracts awarded would be short term contracts as Councils would be reluctant to be committed to particular technologies or particular prices for an extended period of time in circumstances where other Councils were not.

Providers of AWT services would enter the market

- (i) Under the counterfactual, that is, absent the authorisation, WSNSW considers that AWT service providers will commence providing AWT services in NSW. This is because:
- (i) there would be large amounts of reliable and geographically diverse streams of waste to dispose of; and
- (ii) environmental attitudes of all levels of Government and of consumers would encourage this entry and provide AWT service providers with a competitive advantage over existing landfill service providers when responding to tenders.
- (j) The ACCC found that although there was no restriction on other providers entering the market, and in particular no barriers to entry resulting from the informal and flexible arrangement between some councils and WSNSW for the provision of waste disposal services, no council has chosen to individually tender for the provision of waste disposal services.⁶ The ACCC concluded from this that:

"this indicates, that at least in the view of the Councils, other potential waste service providers are unable to effectively compete with [WSNSW] for the provision of these services."

and

"[I]t 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."

⁶ par [5.14]

- (k) However, there are at least three instances of councils in the Sydney region individually calling for expressions of interest (EOI) for AWT processing of municipal waste, and two where Councils have called tenders or quotes for landfilling services (Canada Bay Council and Ryde Council).
- (l) In September 2001, Fairfield Council commenced an EOI process, seeking AWT processing services for its municipal waste. A total of 21 organisations submitted EOIs and these were evaluated by the Council. In September 2002, Fairfield Council called for tenders from a selected group. After evaluating the tenders Fairfield Council awarded a contract to WSNSW's AWT services. Under the terms of the contract, municipal waste from Fairfield Council will be processed at the AWT facility currently under construction by WSNSW at the Eastern Creek Waste Management Centre.
- (m) In March 2004, Blacktown City Council called for EOI for the AWT processing of its municipal waste. Blacktown Council has announced that seven EOI submissions were lodged. Blacktown Council has not yet called for tenders.
- (n) In October 2003 Gosford City Council commenced an EOI process, seeking AWT processing services, and received 16 responses.
- (o) The above examples indicate that some councils in Sydney are willing to tender individually for the provision of AWT services and that organisations other than WSNSW and Collex are prepared to submit tenders for contracts with individual councils for the provision of AWT services. This competition for expressions of interest in relation to the individual councils noted above appears to be of the same magnitude as the competition referred to in paragraph 5.20 of the draft determination in relation to EOI provided to NSROC for the proposed tender. The ACCC noted that:

"[NSROC has] 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".

- (p) The willingness of organisations to tender for AWT with individual councils indicates that there may be some exaggeration in the claim by NSROC that joint tenders are necessary to provide the "critical mass" of waste to justify investment in waste disposal facilities. In fact, there is some evidence that suggests that individual councils have been more successful than joint tenders in implementing AWT projects. For example, the Port Stephens Council tender process that resulted in the construction of the Port Stephens AWT Facility, the Hastings Council AWT facility, and the Coffs Harbour AWT project

(soon to be awarded). Conversely, the four Hunter Councils have been following an AWT process for three to four years with no result to date.

4. ANALYSIS

4.1 Detriments

- (a) WSNSW considers that the level of competition under the Landfill Solution Factual would be substantially less than that it would be under the counterfactual described in section 3 above.
- (b) The Application by NSROC notes that the waste produced by the Councils comprises 18% of all of the municipal waste produced in the greater metropolitan area of Sydney. The size of the proposed tender, at 184,000 tonnes, is likely to be the largest waste tender ever called in Sydney.
- (c) Under the Landfill Solution Factual, competition between Collex and WSNSW in the northern regions of Sydney would be stifled. The lack of access to municipal council waste streams in this area may lead to the closure of existing and proposed transfer stations and other waste disposal infrastructure in the region operated, or to be operated, by Collex or WSNSW.
- (d) In addition, WSNSW considers that it is considerably less likely that an alternative AWT provider would enter the market, due to the existence of long term contracts being in place over a significant portion of the available waste streams. The current arrangements between WSNSW and councils in terms of short term contracts or gate pricing creates an environment in which a new entrant is not locked out of securing business. By contrast, if NSROC were allowed to contract with a single provider of landfill services for 15 years, this would create a significant barrier to new entry.
- (e) This would certainly be the case if this Application represented the commencement of a trend towards long term contracts for landfill services. In these circumstances, there would be little if any prospect of AWT service providers entering the market.
- (f) WSNSW considers that under the Landfill Solution Factual, consumers would suffer significant detriment, particular in the northern regions of Sydney.
- (g) Accordingly, unless the Commission can be satisfied that the joint tendering process will provide a genuine long term AWT solution, WSNSW considers that the Commission cannot be satisfied that consumers will not suffer detriment as a result of a substantial lessening of competition flowing from the conduct the subject of the Application.

4.2 Benefits

- (a) WSNSW considers that there would be no public benefit as a result of the Application if the Landfill Solution Factual were adopted.
- (b) Principally, this is because it is less likely that there would be entry by AWT service providers in circumstances where significant streams of the waste (including the NSROC waste) is committed exclusively to landfill disposal. In contrast, under the counterfactual, WSNSW considers that the market conditions would be more conducive to the entry by AWT services providers as large amounts of geographically diverse waste streams would be available.
- (c) An outcome whereby the entry of AWT service providers was less likely, would be contrary to NSW Government policy. The NSW Government has published a strategy paper called "The NSW Waste Avoidance and Resource Recovery Strategy 2003" (NSW Waste Strategy) which provides a framework and sets targets for reducing waste and increasing the use of renewable and recovered materials. In particular, the NSW Waste Strategy sets a target of increasing recovery and utilisation of materials from the municipal sector from the current level of 22% to 66% by 2014.
- (d) Accordingly, unless the Commission can be satisfied that the joint tendering process will provide a long term genuine AWT solution, WSNSW considers that the Commission cannot be satisfied that there will be any public benefits as a result of the authorisation the subject of the Application.

4.3 Conditions on Authorisation

- (a) WSNSW recognises that there may be a public benefit in joint tendering to encourage investment by competitors in AWT facilities. While WSNSW does not consider that it is necessary to have long term contracts in place in order to encourage AWT service providers to commence offering services, it acknowledges that such entry would be more likely if a long term contract was awarded to remove the risk of making the capital investment in new infrastructure.
- (b) Accordingly, WSNSW supports the joint tendering regime set out in the Application, but only to the extent that the tender will result in a genuine AWT solution being adopted. Further, WSNSW considers that the Commission cannot be satisfied that the benefits of the proposed conduct outweigh the detriments of the proposed conduct unless it can be certain that a genuine AWT solution was adopted.

- (c) Accordingly, WSNSW believes that if the Application by NSROC is to be approved, it should be subject to conditions, pursuant to section 91(3) of the TPA, that:
- (i) joint tenders for waste disposal services should specify whether the method of disposal is landfill (whether conventional or bio-reactor) or AWT;
 - (ii) joint tenders for landfill should be limited to a period of 3 years;
 - (iii) joint tenders for AWT should specify the minimum level of waste required to be diverted from landfill. WSNSW recommends a condition on AWT tenders that after 3-5 years, all waste is to be processed using AWT and 70% of this waste is to be diverted from landfill. If such a condition were imposed, a longer term contract of, say, 15 years would be appropriate.

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File No.	F2463-08	DOC No.	44221

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Mr T Cade
General Manager, Marketing & Business Development
Waste Service NSW
Zenith Centre, Level 4
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Our Ref: S6538-09

23 June 2004

Dear Tony

Waste Disposal at the Wicks Road Transfer Station.

I refer to your Letter of Offer dated 16 June 2004.

Council, at its meeting on 22 June 2004, considered the Letter of Offer from Waste Service NSW, in conjunction with an alternate Letter of Offer from Collex Pty Ltd. The matter was dealt with under confidential session and the information contained within both offers was treated as "Commercial - In Confidence".

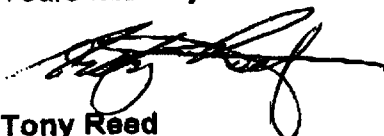
Following deliberation on both offers, Council resolved to accept the Collex Pty Ltd offer.

As a consequence to this decision, Council's use of the Wicks Road Transfer Station will diminish in frequency and quantity over the next two (2) months, as the Clyde Transfer Terminal comes on line.

The arrangements offered by Collex Pty Ltd have been accepted by Council on the basis that these arrangements will cease upon letting of the NSROC / SHROC Joint Tender for the transfer processing and disposal of waste services, and the commencement of service delivery under that Contract.

Should you have any further enquiries on this matter please contact me on 9952 8102.

Yours faithfully



Tony Reed
Group Manager - Public Works & Services

