

**Australian Competition
&
Consumer Commission**

Authorisation A30231

**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**

PRE-DECISION CONFERENCE

27 July 2004

Minutes

Pre-Decision Conference: Authorisation A30231 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

Tuesday 27 July 2004
Sydney Conference Room
Australian Competition and Consumer Commission
Level 7, Angel Place
123 Pitt Street
Sydney NSW 2000

Attendees:

Australian Competition and Consumer Commission (ACCC)

Ms Louise Sylvan, ACCC Deputy Chair

Mr Gavin Jones, Director, Adjudication Branch

Ms Tania Mayrhofer, Senior Project Officer, Adjudication Branch

Interested Parties

Mr Tony Khoury, Executive Officer, Waste Contractors & Recyclers Association of NSW

Mr Jim Perry, President, Waste Contractors & Recyclers Association of NSW

Mr Brian Thomas, Secretary, Waste Contractors & Recyclers Association of NSW

Mr Jeff Angel, Executive Director, Total Environment Centre

Ms Jane Castle, Total Environment Centre

Mr Damian O'Connor, Manager – Policy & Government Relations, Waste Service NSW

Mr Charles Munro, Acting General Manager – Marketing & Business Development, Waste Service NSW

Mr Tim Rogers, Executive Director – Sustainability Programs Division, Department of Environment and Conservation

Mr Neil Chapman, Director – Local Government Programs, Department of Environment and Conservation

Mr John Harley, Manager – Local Government, Department of Environment & Conservation

Mr Jason Daniel, Waste Manager, Rockdale City Council

Mr Les McMahon, Director of Operational Services, Botany Bay City Council

Mr John Lawson, Manager NSW, Global Renewables

Ms Fiona Stock, Waste Manager, Kogarah Council

Mr Garry Dickens, Environmental Services Manager, Hurstville City Council

Mr Talebal Islam, Waste Manager, Randwick City Council

Mr David Somerville, Waste Projects Co-ordinator, Southern Sydney Regional Organisation of Councils

Mr Frank Klostermann, Director, Rethmann Australia Environmental Services Pty Ltd

Mr Tony Reed, Group Manager – Public Works & Services, City of Ryde

Mr Dominic Johnson, Executive Director, Northern Sydney Region of Councils

Ms Jodie Higginson, Manager – Environmental Health, Lane Cove Council

Conference commenced: 2.20pm

Introduction

The ACCC Deputy Chair Louise Sylvan welcomed attendees, made some introductory remarks outlining the purpose of the conference, declared the pre-decision conference open and invited the first party that called the conference, Mr Damian O'Connor, on behalf of Waste Service NSW, to make an opening statement.

A submission from the City of Ryde and a submission from the Waste Contractors and Recyclers Association of NSW were handed to the ACCC Deputy Chair.

Opening Statements

Mr Damian O'Connor, Manager of Policy and Government Relations at Waste Service NSW, noted that Waste Service NSW views on the application by the Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove Council, North Sydney Council, the City of Ryde, Willoughby City Council, Mosman Municipal Council and Warringah Council (the Northern Sydney Region of Councils) to collectively tender for the provision of residual waste, transfer, processing and disposal services are outlined in its submission dated 19 July 2004. Mr O'Connor stated that Waste Service NSW supports a competitive waste services market, joint tendering for the provision of these services where it is in the public interest, and the Northern Sydney Region of Councils application for authorisation. However, Mr O'Connor stated that Waste Service NSW seeks the following amendments to the arrangements:

- joint tenders for waste disposal should specify whether the method of disposal is landfill (whether conventional or bio-reactor) or alternative waste technology;
- joint tenders awarded for landfill services should be limited to a period of up to three years on the basis that there is no economic or environmental rationale to encourage investment in landfill infrastructure through long term contracts; and
- joint tenders should specify the minimum level of waste required to be diverted from landfill.

Mr O'Connor submitted that while there is no definitive definition of alternative waste technology, it is generally considered to be, primarily, an alternative to the landfilling of waste, and secondly, recovery and conservation of resources and a reduction in the environmental impacts of waste management consistent with the principles of Ecologically Sustainable Development. Mr O'Connor recommended a condition on tenders that after three to five years all waste is to be processed using alternative waste technology and 70% of this waste is to be diverted from landfill. Mr O'Connor submitted that if such a condition were imposed, a long term contract of 15 years would be appropriate as this would encourage organisations to invest in alternative waste technology solutions.

Mr O'Connor explained that historically Waste Service NSW was the sole provider of putrescible waste management services to the Sydney market. However, more

recently, competition has increased in the Sydney market with the entry of Collex as a putrescible waste management service provider.

Mr O'Connor stated that Waste Service NSW has traditionally disposed of putrescible waste via landfill but is currently moving towards increased resource recovery, including through the use of alternative waste technologies.

Mr O'Connor stated that the proposed Northern Sydney Region of Councils joint tender for putrescible waste management services has the potential to be the largest such contract offered in NSW and estimated the net present value of the contract at \$300 million over 15 years, representing 18% of Sydney's putrescible waste market.

Mr O'Connor stated that Waste Service NSW has a strong interest in supporting the introduction of alternative waste technology in the Sydney market as a means of processing and disposing of putrescible waste.

Mr O'Connor submitted that awarding a long term contract for disposal of putrescible waste via landfill would not be in the public interest. Mr O'Connor submitted that Waste Service NSW considers that contracts for disposing of putrescible waste via landfill should have a maximum term of three years as an interim arrangement whilst alternative waste technology facilities are being established.

Mr O'Connor stated that if long term contracts are awarded for disposal via landfill, such contracts would be likely to be awarded to one of the two existing service providers as it is unlikely that the NSW Government would approve the development of a new landfill facility. Consequently, awarding a long term contract for disposal via landfill would be likely to restrict, rather than promote competition for the provision of these services.

Mr O'Connor noted that in its draft determination the ACCC had stated that by aggregating their waste service needs the Northern Sydney Region of Councils would promote new providers entering the market. However, for the reasons discussed above, Mr O'Connor submitted that this would be unlikely if landfill was to be used as the method of waste disposal. Rather, Mr O'Connor submitted, the tender would be provided to one of the two existing providers, Waste Service NSW or Collex. Mr O'Connor submitted that this would decrease competition over the life of the contract as the non-successful tenderer would be required to close its businesses or scale down its facilities.

Mr O'Connor stated that a further result of granting a long term contract to a waste management service provider using landfill as the means of disposal would be that the development of alternative waste technology in the Northern Sydney Region area would be discouraged. Mr O'Connor stated that continuing reliance on landfill would be detrimental to the environment and would be at odds with the NSW Waste Avoidance and Resource Recovery Strategy. Mr O'Connor submitted that the effects of this decision may also set a precedent for other councils.

Regarding disposal of putrescible waste through landfill, Mr O'Connor stated that at this stage, Waste Service NSW has no plans to establish a new waste management facility in the Sydney region apart from the alternative waste technology facility at the Eastern Creek Waste Management Centre.

Mr O'Connor stated that Waste Service NSW already has one competitor, Collex, in the market for putrescible waste management services through landfill. In terms of disposal of putrescible waste through landfill, Mr O'Connor submitted that Waste Service NSW and Collex would compete to provide this service irrespective of whether long term contracts were entered into. Mr O'Connor gave the example of the City of Ryde which has already decided to use Collex as its putrescible waste management service provider. Mr O'Connor reiterated that there is a duopoly in the market for the disposal of putrescible waste through landfill and that there is unlikely to be further competitors entering that market.

Mr O'Connor submitted that short term contracts awarded to putrescible waste management service providers will allow more alternative waste technology facilities to be established in the market.

Mr O'Connor submitted that there are already a number of councils contracting individually with putrescible waste management service providers. Mr O'Connor gave the examples of:

- Fairfield Council – In September 2001, Fairfield Council commenced an Expressions of Interest process seeking alternative waste technology processing services for its municipal waste. A total of 21 organisations submitted Expressions of Interest. In September 2002, Fairfield Council called for tenders from a selected group. Fairfield Council awarded a contract to Waste Service NSW's alternative waste technology services for a period of 20 years.
- Blacktown City Council – In March 2004, Blacktown City Council called for Expressions of Interest for the alternative waste technology processing of its municipal waste. Blacktown Council has announced that seven Expression of Interest submissions were lodged. Blacktown Council has not yet called for tenders.
- Gosford City Council – In October 2003, Gosford City Council commenced an Expression of Interest process seeking alternative waste technology processing services and received 16 responses.

Mr O'Connor stated that there would be more competition for the provision of alternative waste technologies as a means of disposal of putrescible waste, and that using alternative waste technologies would result in a better outcome for both the environment and the community.

Mr O'Connor submitted that there is no shortage of potential competitors to provide alternative waste technology services as establishing alternative waste technology facilities is easier than establishing landfill facilities.

However, noting the ambiguity of the meaning of the term alternative waste technology, Mr O'Connor submitted that it should be properly defined to refer to the diversion of waste from landfill to resource recovery. Mr O'Connor submitted that, consistent with the NSW Waste Avoidance and Resource Recovery Strategy, councils should be aiming to divert around 70% of their waste from landfill to resource recovery. Mr O'Connor stated that using landfill as a means of disposal only in the

short term, while alternative waste technology facilities are being developed, would be more consistent with this strategy.

The ACCC Deputy Chair Louise Sylvan invited the second party that called the conference, Mr Tony Khoury, on behalf of the Waste Contractors and Recyclers Association of NSW (WCRA NSW), to make an opening statement.

Mr Tony Khoury, Executive Director of WCRA NSW, handed the ACCC Deputy Chair a signed copy to of the WCRA NSW submission dated 27 July 2004 in respect of the Northern Sydney Region of Councils draft determination. A copy of the written submission is available on the ACCC's public register.

In summary, Mr Khoury submitted that the ACCC should not accept the submission of the Northern Sydney Region of Councils that the public benefits of the collective tender outweigh the anti-competitive detriment and that therefore the ACCC should not grant any authorisation for the proposed tender arrangements.

Mr Khoury submitted that if the ACCC does grant authorisation that it should be subject to the following conditions:

- Authorisation should not be granted in respect of the kerbside collection of waste and/or recyclables from domestic residents and its transport to waste transfer stations. Mr Khoury submitted that the application submitted by the Northern Sydney Region of Councils is unclear about whether it is intended that the proposed arrangements extend to kerbside waste collection.
- All proposed contracts should provide adequate lead times to allow for the required approvals to be obtained as possible entry to the market of alternative service providers is limited by the time delays involved in obtaining of approvals to undertake the work envisaged.

Mr Khoury stated that the WCRA NSW is of the view that clarification is required as to the exact definitions of some of the wording used in the Northern Sydney Region of Councils application and reiterated that clarification was required that the application does not relate to the kerbside collection of waste and/or recyclable material from domestic residences and its transport to waste transfer stations, processing facilities and landfills.

Mr Khoury stated that the WCRA NSW is strongly of the view that any application for authorisation of a collective tender for kerbside collection of waste and/or recyclable material should be the subject of a further separate application.

Mr Khoury discussed the physical structure of the Sydney market for the disposing of domestic waste, including the dominant position of Waste Service NSW, as the owner and operator of the majority of waste transfer stations and landfills in the greater Sydney area for the receipt of class one solid waste. Mr Khoury stated that the WCRA NSW is of the opinion that the proposed collective tendering arrangements by the Northern Sydney Region of Councils will further entrench the position of Waste Service NSW and enhance its position in the market to the potential substantial detriment of any resident rate payer in the Northern Sydney region. Mr Khoury

submitted that the dominant position of Waste Service NSW does not encourage competition and therefore will not lead to a better cost outcome for residents.

Mr Khoury stated that the WCRA NSW does not object per se to the Northern Sydney Region of Councils seeking to undertake a collective tender for the services of waste management providers, however considered that the proposed terms of the collective contracts is of concern. Mr Khoury submitted that the terms of the contracts and the lead times permitted in the contracts should be sufficient so as not to discourage new entrants from entering the market for putrescible waste management services. Specifically, Mr Khoury noted that potential new entrants would require sufficient lead time to develop new facilities.

Mr Khoury noted that only two service providers currently have facilities to service the Northern Sydney Region Councils' waste management requirements.

Mr Khoury noted that the Northern Sydney Region of Councils are claiming that the following benefits will flow from authorisation to undertake a collective tender:

- Fostering of business efficiencies;
- Better use of resources as a result of industry rationalisation;
- Encouragement of employment;
- The promotion of cost savings;
- The encouragement of economic development and capital investment;
- Improvement in the quality and safety of goods and services;
- The promotion of competition; and
- The development of equitable dealings in the marketplace.

Mr Khoury submitted that the WCRA NSW is of the view that none of the above suggested benefits will necessarily result from a collective tendering process.

In conclusion, Mr Khoury emphasised that it is the WCRA NSW's view that there are no net gains to be made for rate payers by granting authorisation A30231 and requested that no grant be made.

The ACCC Deputy Chair asked Mr Anthony Reed, on behalf of the applicants, the Northern Sydney Region of Councils, if he wished to address the conference.

Mr Anthony Reed stated that environmental outcomes are important to the Northern Sydney Region of Councils tender and that the tender documentation is comprehensive and requires the completion of a number of mandatory schedules. Mr Reed explained that Schedule 10 requires the provision of information by each prospective tenderer on environmental due diligence and impacts associated with their proposal and that the tender evaluation criteria clearly indicates that the environmental and the technical aspects of the proposal are a significant component of the evaluation criteria.

Mr Reed submitted that it is up to the tenderers to demonstrate that their proposals are environmentally sustainable and that the tender evaluation matrix clearly shows that environmental outcomes, as well as tender prices, are critical to the Northern Sydney Region of Councils evaluation.

Mr Reed stated that it would appear that Waste Service NSW argued that authorisation should only be granted for 15 years if alternative waste technologies, as defined by it, are used. Mr Reed stated that all the councils were asking was that Waste Service NSW, as with any other potential provider, demonstrate through the tender process that their proposal is environmentally sustainable.

Mr Reed clarified that while the tender is a joint one, tenderers are required to submit a price in relation to the provision of waste management services to each individual council, as well as a price for the provision of these services to the councils collectively. Mr Reed explained that the decision to proceed with joint arrangements would be dependent, on part, on these relative prices.

Mr Reed stated that service providers who had responded to the Northern Sydney Region of Councils call for Expressions of Interest in November 2003 had indicated that a 15 year contract term would be necessary to establish the required infrastructure, and that they could not commence building such infrastructure without the certainty of long term contracts. Additionally, potential service providers had noted the need to enter into short term arrangements with an existing provider while they developed the necessary infrastructure to provide these services in the longer term. Mr Reed submitted that the tender documents provide for this.

Mr Reed questioned whether alternative waste management service providers other than Waste Service NSW would be in a position to service the needs of the Northern Sydney Region of Councils without the certainty of long term contracts.

Mr Reed submitted that if a new entrant were to be awarded the tender, it would need to be supported by Waste Service NSW in the short term while it developed its facilities.

The ACCC Deputy Chair asked if representatives from any other organisations wished to address the conference.

Mr Tim Rogers, Executive Director of the Sustainability Programs Division at the Department of Environment and Conservation, noted the previous submissions made by the Department of Environment and Conservation in respect of the application.

Mr Rogers noted that, unlike similar arrangements proposed by the Macarthur Region Councils, the arrangements proposed by the Northern Sydney Region of Councils do not bind all councils to participate. Consequently, the same benefits in aggregating their waste management needs as identified in respect of the Macarthur Region Councils arrangements may not result from the Northern Sydney Region of Councils arrangements.

With respect to the length of contracts proposed, Mr Rogers noted his support of the comments of previous speakers that contracts should be reviewed at an early stage if they provide for waste disposal by landfill rather than alternative waste technologies.

Mr Jeff Angel, Executive Director of the Total Environment Centre Inc, referred to the NSW Waste Avoidance and Resource Recovery Strategy and the target of 66% resource recovery by 2014 reflected in that strategy. Mr Angel submitted that the various tender documents should reflect this target. Mr Angel stated that it is likely that this target will be revised in the future and that the Northern Sydney Region of Councils should not be locked into long term contracts past 2014.

Mr Angel stated that the submission made by the Northern Sydney Region of Councils accompanying their application for authorisation made no mention of these resource recovery targets.

In relation to comments regarding an appropriate definition of alternative waste technology, Mr Angel stated that it refers to a diversion of waste from landfill to resource recovery, not using a bioreactor to dispose of waste. Mr Angel stated that the use of a bioreactor to dispose of waste had a lower environmental benefit than diverting waste away from landfill.

Mr Angel submitted that the collective tender and the ACCC's determination should not undermine the targets set in the NSW Waste Avoidance and Resource Recovery Strategy. Mr Angel expressed his concern that consideration of these targets could be reopened as a result of the authorisation and collective tendering processes.

Mr Dominic Johnston, Executive Director of the Northern Sydney Region of Councils, sought clarification regarding the role of the ACCC in the collective tendering process. Specifically whether the ACCC can take into consideration benefits other than those which relate to competition. Mr Johnston stated that it is appropriate for the ACCC to consider the impact of the arrangements on competition, but it should be for the councils to determine the financial and environmental benefits from the arrangements.

The ACCC Deputy Chair explained that while a key objective of the *Trade Practices Act 1974* (the Act) is to prevent anti-competitive conduct, thereby encouraging competition, the Act recognises that competition may not always be in the public interest and therefore allows the ACCC to grant immunity from the Act in certain circumstances by 'authorising' businesses to engage in conduct which might otherwise raise concerns under the Act.

The ACCC Deputy Chair explained that the ACCC may 'authorise' businesses to engage in conduct where it is satisfied that the public benefits from the conduct outweighs any detriment to the public constituted by any lessening of competition. The ACCC Deputy Chair explained that the Courts have, in past cases, taken a very broad view of what constitutes a public benefit and that the ACCC considers all benefits, be they economic, financial or environmental, in determining whether to authorise arrangements.

Mr John Lawson, NSW Manager of Global Renewables, stated that Global Renewables is building a 175,000 tonnes per year waste-to-resource facility under contract to Waste Service NSW at the Eastern Creek Waste Management Centre in Western Sydney. Mr Lawson stated that the Urban Resource-Reduction, Recovery, Recycling (UR-3R) Facility uses mechanical-biological waste processing to recover

metals, glass, plastics and paper from domestic residual waste, and recycle the organic fraction into high quality compost and renewable energy. Mr Lawson submitted that the facility will employ over 80 people, divert over 80% of the input garbage from landfill, produce no putrescible waste, and have a greenhouse gas abatement impact equivalent to taking 50,000 cars off the road. Mr Lawson stated that the UR-3R facility has extensive odour control equipment, captures 100% of the biogas generated and requires no water supply or wastewater disposal.

Mr Lawson stated that the greatest obstacle to the construction of more facilities like Global Renewables' UR-3R around Australia is the existence of artificially low-priced landfills. Mr Lawson submitted that current landfill standards do not require the extensive environmental protection that a UR-3R facility must implement, and so landfills frequently emit odours, landfill gas, leachate, contaminated surface water runoff, dust and litter. Mr Lawson submitted that the cost of these emissions is generally externalised in the case of landfills but must be internalised in the case of the best alternative waste technology facilities. Mr Lawson stated that the externalisation of environmental costs in landfilling is uncompetitive and unsustainable behaviour.

Mr Lawson discussed the worldwide trend towards policies which ban putrescible waste and aim for a zero waste target. Mr Lawson stated that ceasing to landfill putrescible waste in the near future is a world trend, and in the public interest.

Mr Lawson submitted that given that the NSW Waste Avoidance and Resource Recovery Strategy adopts a goal of 66% landfill diversion for municipal solid waste by 2014, there is very little future scope for putrescible waste landfilling in Sydney. Mr Lawson stated that in order to meet such a goal, a significant proportion of Sydney's municipal solid waste will need to be processed in some form of alternative waste technology. Mr Lawson submitted that if councils are forced to enter into long term landfilling contracts in order to satisfy their current waste disposal needs, they may not be able to meet their long term strategic obligations.

Mr Lawson further submitted that in order to create a competitive market place for alternative waste technology supply, it is necessary to separate short term landfilling needs from long term alternative waste technology contracts, which would allow the lead time for alternative waste technology site selection, consent and construction. Mr Lawson explained that in Sydney there are only two companies which can provide landfilling services for municipal solid waste and if council regional alternative waste technology contracts also require landfilling in the short term, then competition from other potential players is virtually eliminated. Mr Lawson, however, stated that there are many companies who could potentially provide an alternative waste technology facility given adequate lead time, secure waste supply and appropriate commercial and financial terms.

Mr Lawson stated that the proposed Northern Sydney Region of Councils joint tender arrangements are of critical importance to the possibility that an alternative waste technology facility will be established given that sufficient scale and base loads are required for this type of investment.

Mr Lawson concluded by stating that Global Renewables believes that the ability of alternative waste technology companies to compete to provide environmentally

sustainable solutions will be enhanced if the ACCC authorises landfill contractual arrangements only in the short term and reserves long term authorisations for alternative waste technology facilities.

The ACCC Deputy Chair opened the conference for discussion and invited additional questions in relation to the issues raised.

Mr Tony Reed submitted, in response to Mr Angel's concerns about whether the proposed arrangements support the targets aimed for in the NSW Waste Avoidance and Resource Recovery Strategy, that the tender document does not guarantee minimum tonnages to the successful tenderers because the Northern Sydney Region of Councils aim to reduce waste tonnages over the term of the contract through increased resource recovery.

Mr Reed stated that the purpose of the proposed arrangements is not to review or undermine the NSW Waste Avoidance and Resource Recovery Strategy.

Mr Khoury reiterated the WCRA NSW's view that Waste Service NSW is the only waste management service provider who currently has alternative waste technology and landfill infrastructure in the Sydney region.

Mr Khoury submitted that as the best possible level of diversion of waste from landfill to resource recovery which could be hoped for is 80%, there will still be a requirement for landfill as a method of disposal for the remaining 20%.

Mr Khoury suggested that the most appropriate solution would be to provide adequate lead times for competitors to establish the infrastructure so that they can submit proposals through the tender process.

Mr Angel stated that, based on Mr Reed's comments, he assumed that the Northern Sydney Region of Councils had no objection to ensuring resource recovery targets are incorporated into the tender documents. Mr Angel sought assurance that the targets identified in the NSW Waste Avoidance and Resource Recovery Strategy will be considered in the tender process.

Mr O'Connor stated that it is important to note the distinction between alternative waste technology and landfill as methods of disposing of putrescible waste by considering the following points:

- the establishment of alternative waste technology facilities require major upfront costs;
- infrastructure for competition in landfill already exists;
- it is highly unlikely that new landfill facilities will be established in the Sydney region;
- there are rational economic arguments for bulking up of waste tonnages over time and over councils;

- a bioreactor is landfill, not alternative waste technology as it does not divert waste away from landfill towards resource recovery;
- environmental benefits flowing from the use of bio reactors are overstated in the ACCC's draft determination; and
- all landfill operators are required to conduct remediation.

Mr O'Connor stated that competition is being introduced, not just through an increase in the number of players in the waste management services market, but also through the type of technology being used to process and dispose of waste. Mr O'Connor submitted that NSW and the community have a general interest in diverting waste away from landfill and towards resource recovery.

With respect to the comment that the best possible level of diversion of waste from landfill which could be hoped for was 80%, **Mr John Lawson** stated that while this was a target, the best possible level of diversion was 100%.

Mr Lawson noted that Germany plans to ban landfilling from January 2005 which demonstrates that disposing of waste exclusively via alternative waste technologies is feasible.

The ACCC Deputy Chair then called for any further comments. No further comments were made. The ACCC Deputy Chair closed the conference by noting that the ACCC would be providing a further opportunity for parties to make written submissions in respect of its draft determination and requesting further submissions reach the ACCC by 20 August 2004. The ACCC Deputy Chair also explained that the ACCC would be writing to those who attended the conference to provide details of how such submissions could be made, as well as to provide participants with a record of the conference, which would also be placed on the ACCC's public register.

Conference closed: 3.25 pm