



Final Determination

Application for Authorisation

Lodged by

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

In respect of

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

Date: 16 December 2004

Authorisation no. A90886

Public Register no. C2003/1363

Commissioners:

Samuel
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King
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Smith
Willett

Executive Summary

The application

On 16 October 2003, the Australian Competition and Consumer Commission (the Commission) received an application for authorisation (A90886) from the Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Council. (the Councils). On 31 August 2004, the Commission was advised that Liverpool City Council had withdrawn from participating in the arrangements.

The authorisation process

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

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

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

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

The proposed arrangements

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

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

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

Assessment of the public benefit and anti-competitive detriment

The Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal. Given that competition for the provision of residual waste management services is currently minimal, the Commission considers that the proposed arrangements may increase competition in this market by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.

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

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

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

The Commission notes that the NSW Waste Avoidance and Resource Recovery Strategy establishes targets for waste avoidance and resource recovery, including a target for increasing recovery and utilisation of materials from the municipal sector from the current 26% to 66%. The Commission expects that the Councils will have strong regard to finding waste management solutions which will meet these targets when evaluating the waste management service provider's tenders.

Whilst the applicants initially sought authorisation to cover a contract period of 10 years, during the application process an amendment was sought to increase the contract period covered by the authorisation to a period of up to 20 years. The Commission is not satisfied that the Councils have made a case for the need for a 20 year contract period noting that, amongst other things: prior to the amendment requesting authorisation covering an extended contract period; interested parties did not express concern as to the 10 year duration of the contracts; industry experience demonstrates that a guaranteed contract period of 20 years is not required for service providers to establish the necessary infrastructure; and the Councils' Expressions of Interest document nominated a 15 year contract period and 12 parties lodged Expressions of Interest in response to the invitation. The Commission however notes that a contract term sufficiently long enough to allow new service providers is necessary in these circumstances. Accordingly, under these circumstances, the Commission considers an authorisation containing a contract period of 15 years to be appropriate.

Determination

Following consideration of the arguments advanced by the applicants and interested parties, overall the Commission is satisfied that the public benefit flowing from the proposed arrangements is likely to outweigh any anti-competitive detriment. Accordingly, the Commission **grants** authorisation A90886 as sought by the Councils for the following periods:

- for the period of the collective tender process up to a maximum of 12 months from the date the final determination comes into effect; and
- for the term of the contracts entered into under the tender process up to a maximum of 15 years.

List of Abbreviations & Glossary of Key Terms

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

TABLE OF CONTENTS

INTRODUCTION	1
Authorisations	1
The application.....	2
Draft determination	2
BACKGROUND TO THE APPLICATION	4
Expressions of interest	4
Events since expressions of interest.....	4
The market	5
Types of waste materials to be recovered and disposed	5
Alternative Technology Projects in New South Wales.....	11
Waste sale and ownership arrangements.....	11
The NSW Waste Avoidance and Resource Recovery Strategy 2003	12
Previous applications for authorisation (A30204 and A30205).....	14
Current similar authorisation application (A30231)	16
Current similar authorisation application (A90926)	16
THE APPLICATION	18
The arrangements.....	18
Submission from the Applicant.....	20
Term of authorisation.....	29
Amendment to the application and further submission lodged by the Applicants.....	29
SUBMISSIONS FROM INTERESTED PARTIES PRIOR TO DRAFT DETERMINATION	31
SUBMISSIONS RECEIVED POST DRAFT DETERMINATION	37
Written submissions received in respect of the draft determination	37
Issues raised at the pre-decision conference	41
Written submissions received after the pre decision conference	43
Written submissions received in respect of the amendment to the application.....	46
THE PUBLIC BENEFIT TEST	50
Definition of public benefit and anti-competitive detriment.....	51
Future with-and-without test.....	51
Term of authorisation.....	51
COMMISSION EVALUATION.....	52
This application for authorisation	52
Market definition	52
Future with-and-without test.....	53
Effect on Competition.....	54
Public Benefit.....	59
Balance of public benefit and detriment	63
Term of the authorisation.....	64
DETERMINATION	67

INTRODUCTION

Authorisations

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

The application

- 1.9 On 16 October 2003, the Commission received an application for authorisation (A90886) from the Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Council. The Councils are all located in the southern and western region of outer metropolitan Sydney.
- 1.10 The application seeks authorisation under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.¹
- 1.11 The Councils seek authorisation to collaboratively tender for the services of qualified contractors, able to process, market or otherwise dispose of kerbside collected waste materials (excluding bulky materials). The result of this tender process will be a small number of contracts, most likely one for dry recyclable material and either one or two for organic and residual waste, entered into by the Councils and the contractor(s).
- 1.12 On 31 August 2004, the Camden Council, acting on behalf of the Councils, submitted a request to amend the application for authorisation. In amending the application, the Councils have sought to have the term of the contract period covered by the authorisation extended and have advised that Liverpool City Council has withdrawn from the project.
- 1.13 The application is discussed in further detail in Chapter 3 of this determination.

Draft determination

- 1.14 On 16 June 2004, the Commission released a draft determination proposing to authorise the proposed arrangements. The Commission considered the anti-competitive detriment likely to be generated by the proposed arrangements to be minimal.
- 1.15 The Commission considered that, given that competition for the provision of residual waste management services is currently negligible, the proposed arrangements may increase competition in the market by providing critical mass of waste recovery to justify investment in the levels of infrastructure necessary for new providers to enter the market.
- 1.16 With respect to the markets for the provision of dry recyclable material and organic waste management services, the Commission considered that any anti-competitive detriment generated by the arrangements would also be limited by the current lack of significant competition for the provision of these services. In addition, the Commission considered that the combined dry recyclable and organic waste generated by the Councils party to the proposed arrangements would only be a small portion of the total amount generated in the Sydney metropolitan area,

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

meaning that existing and potential new providers unsuccessful in the tender process would still be able to compete to provide these services to other councils.

- 1.17 With respect to all three streams of waste, the Commission considered that the proposed arrangements may lead to a public benefit as the development of a common centralised system for processing and handling each of the waste streams would be likely to generate transportation and materials handling efficiencies. Additionally, the Commission considered that the proposed arrangements would be likely to result in transaction cost savings to both the Councils and the service providers. Such savings would be likely to be reflected in lower domestic waste management charges to ratepayers which the Commission considered to be a public benefit.
- 1.18 In addition, the Commission considered that the proposed collective tender would also produce some, limited, environmental benefits, by assisting to facilitate the development of alternative waste technologies to the current reliance on landfill for waste disposal more immediately than may have otherwise been the case.
- 1.19 Overall, the Commission was satisfied that the public benefit flowing from the proposed arrangements would be likely to outweigh any anti-competitive detriment. Therefore, the Commission proposed to grant authorisation A90886 as sought by the Councils for the following periods:
 - for the period of the collective tender process up to a maximum of nine months from the date the final determination comes into effect; and
 - for the term of the contracts entered into under the tender process up to a maximum of 10 years.
- 1.20 An interested party requested that the Commission hold a pre-decision conference in relation to the draft determination. A pre-decision conference was held on 27 July 2004.
- 1.21 Four interested parties provided the Commission with written submissions in response to the draft determination.
- 1.22 Three interested parties provided the Commission with written submissions in response to the pre-decision conference.
- 1.23 Following the draft determination and pre-decision conference, the applicants made two amendments to the application for authorisation.
- 1.24 Five interested parties provided the Commission with written submissions in response to the applicants' amendments.

BACKGROUND TO THE APPLICATION²

- 2.1 Three main sectors produce waste in Sydney:
- (1) the municipal sector
 - (2) the commercial and industrial sector
 - (3) the construction and demolition sector.
- 2.2 This application for authorisation is concerned primarily with the municipal sector. Municipal waste comprises household materials from kerbside collections, any material transported by a householder to a waste facility and any material collected by local councils from public places, the street and special events.
- 2.3 All Local Government councils in New South Wales (NSW) are responsible for the collection and removal of domestic waste within their Local Government area.
- 2.4 The cost of waste and recycling collection services is covered in the Domestic Waste charge that is part of the charge by Councils on rateable properties. Income obtained from charges for domestic waste management must be calculated by the Councils so as not to exceed the reasonable costs to the council of providing those services.
- 2.5 Under the proposed arrangements, the Councils will remain responsible for collection and transportation of waste to receiving facilities. Contractors will be responsible for the processing and sale (or disposal) of the waste material delivered to their receiving facility.

Expressions of interest

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

Events since expressions of interest

- 2.8 Since July 2002 Camden, Campbelltown, Wollondilly and Wingecarribee councils have reconsidered their approach to regional contracts and commenced

² The information in this section is sourced primarily from the Councils submission in support of their application for authorisation and the NSW Waste Avoidance and Resource Recovery Strategy 2003.

discussions with Liverpool City Council, a council bordering both the Campbelltown and Camden Local Government Areas. Initially Liverpool City Council anticipated participating in the joint tender process, however during the authorisation process Liverpool City Council withdrew from the process. The four councils are now considering a collaborative tendering process for all kerbside collected waste material (excluding bulky wastes).

- 2.9 In 2004 a further expressions of interest process was conducted by the Councils, specifically inviting potential tenderers to lodge expressions of interest to enter into a waste management service contract for a period of 15 years. Expressions of interest were received from 12 potential tenderers.
- 2.10 Where councils seek to enter into contracts with waste service providers, under the *Local Government Act 1993* and *Local Government (Tendering) Regulation 1999* they are obliged to conduct a tender process in relation to the awarding of the contract.³

The market

- 2.11 The local government areas of Camden, Campbelltown, Liverpool, Wollondilly and Wingecarribee have a regional population of approximately 426,000 and in the financial year 2002/2003 collected over 156,000 tonnes of waste material through kerbside collection services to rate payers (excluding bulky wastes).
- 2.12 This application for authorisation relates to the provision of services for receiving, handling, processing, marketing and disposing (by sale or otherwise) of the following separate streams of kerbside collected waste materials, as defined in the glossary of this draft determination:
- dry recyclable material;
 - organic waste (mainly plant material from gardens); and
 - residual waste.
- 2.13 These councils account for approximately 9% of the total dry recyclable material, garden organics and residual waste collected by councils in Sydney.

Types of waste materials to be recovered and disposed

- 2.14 As noted above, there are up to three streams of material collected separately from the kerbside by councils on a weekly or fortnightly basis. They are:
- dry recyclable material;
 - organic waste (mainly plant material from gardens); and
 - residual waste.

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

2.15 Approximately 112,000 tonnes of waste material was generated within the four Council Local Government areas during the financial year 2002/2003.⁴

2.16 The following table was contained in the Councils' October 2004 Call for Expressions of Interest document. This table provides estimate annual domestic waste tonnages for each participating council in each waste stream.⁵

Estimated quantity of waste collected by waste stream (tonne/yr)⁶

	Residual Waste	Dry Recyclable Material	Organic Waste	Total
Camden	10,000	5,000	5,000	20,000
Campbelltown	30,000	13,500	14,000	57,500
Wollondilly	8,000	2,000	nil	10,000
Wingecarribee	5,000	4,000	nil	9,000
Total	53,000	24,500	19,000	96,500

Dry recyclable material

2.17 The Councils collect dry recyclable material in two streams:

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

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

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

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

⁵ These figures are estimates current at June 2004. Tonnages shown in the dry recyclable materials and organic waste columns are gross amounts with contamination included.

⁶ Call for Expressions of Interest document, South Waste Sydney Councils Resource Recovery Project, advertised October 2004.

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

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

Types of dry recyclable material

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

- 2.21 The Councils submit that it is likely that populations in their Local Government areas will increase and the pattern of waste generation will change over the duration of the contracts intended to be entered into under the proposed arrangements. While the overall waste generated will increase in line with population growth, the Councils anticipate that further materials will be diverted to the dry recyclable material and garden organics stream as residents recycle more material.
- 2.22 One material recycling facility is currently used by the Councils:⁷
- Waste Service NSW's Jack Gully Waste Management Centre which accepts recyclables in two streams, paper/cardboard and containers, and sorts it into individual product streams, which are then compacted and transported to users;
- 2.23 Transporting glass with other dry recyclable material over long distances results in glass breakage and reduced resource recovery. Consequently, Wingecarribee introduced a separate glass collection which includes kerbside sorting of glass. Glass from Wingecarribee is delivered directly to manufacturers of glass beverage containers.

Organic waste

- 2.24 Material placed in the organics stream must be compostable (biodegradable through aerobic decay). Acceptable material is usually termed 'garden organics' and consists of:
- grass clippings;
 - non-woody garden organics;
 - woody garden organics;
 - trees and limbs; and
 - stumps and rootballs.
- 2.25 Although plastics are organic they are not compatible with composting systems and are defined as a contaminant when found in the organic waste stream. Other common contaminants include treated timber, garden hoses, garden pots (from pot plants) and bags of mixed waste. Overall contamination is approximately 5% in material collected from the kerbside and less than 1% in material dropped-off at supervised waste management centres.
- 2.26 Camden and Campbelltown Councils currently provide a mobile garbage bin for their residents to dispose of garden organics. Camden Soil Mix currently provides the garden organics waste management services to these two councils. Campbelltown also allows residents to drop-off garden organics at their Lynwood

⁷ Call for Expressions of Interest document, South Waste Sydney Councils Resource Recovery Project, advertised October 2004.

Road waste management facility. The remaining two Councils provide facilities for residents to drop-off garden organics or direct their residents to waste management centres provided by Waste Service NSW. However, residents in Wollondilly and Wingecarribee Local Government areas tend to use their garbage bin (collected weekly), at least for smaller branches, leaves and grass clippings. This means that organic and residual waste streams in these Local Government areas are generally mixed.

- 2.27 The Councils submit that the two rural councils, Wollondilly and Wingecarribee, are unlikely to adopt a kerbside collection service for garden organics due to travel distances and resident satisfaction with current drop-off facilities. When sufficient material has been stockpiled a contractor is employed by these councils to size reduce (chip) the garden organics collected. Each council then allows their residents to pick up this material, sometimes at a cost, and use it as a low quality mulch on their own properties. They may also use some of this material on their own parks and gardens.
- 2.28 Garden organics processing infrastructure varies from mobile size reduction units provided by small contractors (these generally come to the residents property) right through to large scale windrow composting facilities (where the organics must be delivered to a central location).
- 2.29 Given the scale and nature of the proposed contract, the Councils anticipate that it will be the large scale processing facilities that compete for processing of kerbside collected garden organics. There are three large scale processing facilities within the combined boundary of the Councils:
- Camden Soil Mix;
 - M Collins & Sons; and
 - Australian Native Landscapes. Australian National Landscapes is contracted by Waste Service NSW to process the large quantities of garden organics delivered to Waste Service NSW landfills and transfer stations throughout the Sydney metropolitan area.

Residual waste

- 2.30 Residual waste consists of any material that cannot be separated into the dry recyclable material or garden organic streams. It generally includes any materials which are mixed together in such a way as to be impractical to separate by residents.
- 2.31 Residual waste is generally collected from residents at kerbside in mobile garbage bins. Currently, most residual waste collected by the Councils is disposed of through landfill.
- 2.32 Residual waste generation rates typically depend upon a number of variables:

- properties housing young families produce significantly more waste materials than those housing an old couple or housing that acts as a weekend holiday home;
 - conscientious recyclers will divert around 20% of material they generate to the recycling stream;
 - home composting and worm farming will also reduce waste generation at the kerbside; and
 - the size and number of bins provided for waste disposal appears to make a large difference to waste generation. Smaller garbage bins tend to reduce the waste collected through kerbside collection. There is potential for this 'avoided waste' to either contaminate the recycling and garden organics bins or to be dumped illegally.
- 2.33 The Councils are experiencing growing populations as Sydney expands into the south and west. Consequently, the Councils anticipate an increase in the overall quantity of residual waste produced by its residents.
- 2.34 Apart from one facility owned by Collex, Waste Service NSW owns all residual waste landfilling infrastructure in the Sydney metropolitan area.
- 2.35 The Councils note that in 2002 Waste Service NSW entered into an agreement with Global Renewables Limited (GRL) to construct their UR-3R plant at the Waste Service NSW, Eastern Creek waste management centre. This facility will employ a mechanical biological treatment system to separate and process (mixed) solid waste. GRL claim that this plant will contain a mix of technologies never used together on this scale and that it will be able to achieve an 80% resource recovery rate from kerbside collected solid waste. The GRL plant at Eastern Creek has been commissioned to Waste Service NSW and was opened on 8 September 2004.
- 2.36 The most significant private disposal infrastructure (not owned by Waste Service NSW) with the capacity to take significant amounts of Sydney's residual waste has been developed by Collex at Woodlawn, south east of Goulburn. The Woodlawn facility utilises wet bioreactor technology to accelerate degradation of the organic material in the waste, re-circulate leachate and capture the gas generated. Although Collex have successfully obtained approval for their bioreactor technology and inter-modal facility, they have yet to secure significant long term supply of waste. The Woodlawn facility opened in 2004.
- 2.37 The map at [Attachment A](#) details the residual waste transfer stations and landfill sites owned by Waste Service NSW in the Sydney market.

Alternative Technology Projects in New South Wales⁸

2.38 The following schemes are currently in operation or in the development stage in NSW for processing of mixed waste and source separated household and business waste:

- A mechanical/biological composting facility processing mixed residual waste for Port Stephens Council. The scheme is owned by EWT Pty Ltd and has capacity for approximately 30,000 tpa.
- A mechanical/biological composting facility processing source separated household food waste and garden waste in one system, and processing mixed residual waste in a further system for Hastings Council. The scheme is owned by Rethmann Australian Environmental Services Pty Ltd and has capacity of approximately 20,000 tpa.
- A gasification facility for processing mixed residual waste for Wollongong City Council. The scheme is owned by Brightstar Environmental and has capacity of approximately 50,000 tpa. This facility is currently in hibernation.
- An anaerobic digestion facility processing source separated food waste on a commercial basis. The scheme is owned by EarthPower Limited and has capacity of some 80,000 tpa.
- The GRL plant at Eastern Creek as discussed at paragraph 2.36.
- A mechanical pre-treatment facility is being developed for processing mixed residual waste at South Windsor. The scheme is owned by Thiess Services Pty Ltd and is currently in the design phase.
- Coffs Harbour City Council is considering proposals for a waste processing scheme.

Waste sale and ownership arrangements

Change of ownership

2.39 Councils deliver material to a waste management facility which consists of a landfill, transfer station, composting facility, material recycling facility or other waste processing plant. In general, each collection vehicle is weighed on arrival and departure to determine the net weight of each load and councils are then issued an invoice for payment of a 'gate fee' to the owners of the facility to cover costs associated with the handling, sorting and process (or disposal). The gate fee is based on a cost per tonne (\$/t). Where waste is disposed to landfill, the operator of the facility must pay a levy to the state government based on the number of tonnes received at the gate.

⁸ The information in this section is primarily sourced from a background paper prepared for Resource NSW by Tony Wright of Wright Corporate Strategy Pty Ltd in June 2002, *Shaping the Vision and Strategy for Sustainable Waste Management in New South Wales*.

- 2.40 When material is delivered to a waste management facility ownership changes at the point of delivery to the owner/operator, usually at the time the load is weighed at the gate. Where recyclable material is delivered direct to the recycled products industry from kerbside, ownership changes to the receiver of the material, for example Amcor, Visy or ACI.
- 2.41 Councils that process garden organics at their own facility own the material prior to returning it to residents in the form of low quality mulch.

Resource recovery

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

Renewable energy

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

The NSW Waste Avoidance and Resource Recovery Strategy 2003

- 2.47 The NSW Waste Avoidance and Resource Recovery Strategy 2003 (the Strategy) provides a framework for reducing waste and making better use of resources. The development of a NSW Strategy to avoid waste and recover resources is a

requirement under the *Waste Avoidance and Resource Recovery Act 2001* (WARR Act). The Strategy is the primary strategic document to guide the efforts of state and local government agencies, industry and the broader community in waste prevention and avoidance, re-use and recycling. The Strategy establishes targets for waste avoidance and resource recovery and a framework for action. The targets and actions in the Strategy have been endorsed by the NSW Government.

2.48 The objectives of the *Waste Avoidance and Resource Recovery Act 2001* are as follows:

- (a) to encourage the most efficient use of resources and to reduce environmental harm in accordance with the principles of ecologically sustainable development;
- (b) to ensure that resource management options are considered against a hierarchy of the following order:
 - i. avoidance of unnecessary resource consumption;
 - ii. resource recovery (including re-use, reprocessing, recycling and energy recovery);
 - iii. disposal.
- (c) to provide for the continual reduction in waste generation;
- (d) to minimise the consumption of natural resources and the final disposal of waste by encouraging the avoidance of waste and the re-use and recycling of waste;
- (e) to ensure that industry shares with the community the responsibility of reducing and dealing with waste;
- (f) to ensure the efficient funding of waste and resource management planning, programs and service delivery;
- (g) to achieve integrated waste and resource management planning, programs and service delivery;
- (h) to assist in the objectives of the Protection of the Environment Operations Act 1997.

2.49 Section 14 of the *Waste Avoidance and Resource Recovery Act 2001* states that Resource NSW may request a local council to provide the reasons for any specified non-compliance by the local council with the objectives of the current waste strategy.

2.50 The following table indicates the broad targets for each outcome area:

Outcome Area	Target
Preventing and avoiding waste	To hold level the total waste generated for the next 5 years
Increased recovery and use of secondary resources	By 2014 to: <ul style="list-style-type: none"> • Increase recovery and utilisation of materials from municipal sector from the current 26% to 66% • Increase recovery and utilisation of materials from the commercial and industrial sector from the current 28% to 63% • Increase recovery and utilisation of materials from the construction & demolition sector from the current 65% to 76%
Reducing toxic substances in products and materials	By 2014 or earlier: <ul style="list-style-type: none"> • To phase out priority substances in identified products as a first choice or if not possible to achieve maximum resource recovery for re-use and; • Where identified products containing these priority substances require disposal as a last resort, the permitted “leachability” of the substances will be reduced to the levels that are permitted for inert waste.
Reducing litter and illegal dumping	Reduce total volume and tonnages of litter reported annually. Reduction in total tonnages of illegal dumped material reported by regulatory agencies and Regional Illegal Dumping (RID) squads annually.

Previous applications for authorisation (A30204 and A30205)

2.51 The Commission has previously considered applications for authorisation relating to similar arrangements in the Sydney region waste transfer and processing industry.

2.52 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).

- 2.53 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.⁹
- 2.54 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.¹⁰
- 2.55 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.
- 2.56 The Commission considered that public detriment could arise from allowing councils to collectively negotiate with material recycling facilities if it were to lead to an increase in the price of products created from dry recyclable material. However, the Commission considered that, in practice, minimal public detriment would result from the two proposals, particularly because of the existence of downstream processors which appeared to have sufficient market power to resist significant price increases by material recycling facilities and because the councils in the inner and southern Sydney regions were small suppliers of dry recyclable material.
- 2.57 The scope of the collaborative tendering process proposed by the Councils in this application is wider than that in the two applications mentioned above. In addition to tendering for the processing and marketing of dry recyclable material it is proposed that a separate but simultaneous tender be called for processing both organic and residual waste. These additional waste material streams increase the size of the tender significantly as they represent a much larger quantity of material at a higher cost per tonne to produce.

⁹ 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.

¹⁰ 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.

Current similar authorisation application (A30231)

- 2.58 On 11 December 2003, the Commission received an application for authorisation (A30231) from Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove Council, North Sydney Council, the City of Ryde, Willoughby City Council, Mosman Municipal Council and Warringah Council (the Northern Sydney Region of Councils).
- 2.59 The Northern Sydney Region of Councils seek authorisation to advertise for and subsequently jointly tender for the services of qualified contractors to provide waste transfer, processing and disposal services (waste disposal services) to their respective Local Government areas. The tender will be in the form of a joint tender, where it is proposed that dependent upon the tender evaluation:
- individual councils may decide to independently commission a contractor to service their Local Government area under a separate contract;
 - a number of councils may agree to combine their services under the one contract; or
 - all councils may decide to enter into the one contract.
- 2.60 The scope of the collective tendering process proposed by the Northern Sydney Region of Councils differs from this application in that this application relates to the provision of services for waste transfer as well as processing and disposal. Further, the Northern Sydney Region of Councils application is limited to putrescible waste, green waste, cleanup waste, and food waste, while this application also includes processing, marketing and disposing of the dry recyclable materials waste stream.
- 2.61 On 16 June 2004, the Commission released a draft determination proposing to grant authorisation A30231 as sought by the Northern Sydney Region of Councils.
- 2.62 Interested parties called a pre-decision conference which was held on 27 July 2004.
- 2.63 A separate final determination will be concurrently issued by the Commission in respect of the Northern Sydney Region of Councils' application for authorisation.

Current similar authorisation application (A90926)

- 2.64 On 7 July 2004, the Commission received an application for authorisation from the Southern Sydney Regional Organisation of Councils (the SSROC) – a collective of nine councils located in the southern Sydney region. The SSROC seek authorisation to collectively tender for the services of a contractor to transfer, process and dispose of residual waste. In their application for authorisation, the SSROC also sought interim authorisation to allow them to commence the process of seeking tenders from contractors only.
- 2.65 The SSROC has submitted that all facilities available in the southern Sydney region for the disposal of residual waste, including transfer stations and Class 1

landfills, are currently owned and operated by Waste Service NSW. Through the authorised conduct, the SSROC aim to provide another contractor with the ability to establish the necessary facilities to provide an alternative disposal service to the Waste Service NSW facilities.

- 2.66 As discussed earlier, the councils of the SSROC (through Resource NSW as the applicant) have previously obtained an authorisation (A30204) 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.
- 2.67 On 11 August 2004, the Commission granted interim authorisation to the SSROC to proceed with advertising the tender while the Commission considers the substantive application for authorisation. Interim authorisation was not granted to allow the SSROC to enter into contracts with tenderers.
- 2.68 The Commission is currently considering the issues raised in submissions lodged by interested parties. The Commission will issue a separate draft determination in respect of this application.

THE APPLICATION

The arrangements

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

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

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

Submission from the Applicant

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

Market definition

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

Dry recyclable material

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

Residual waste

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

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

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

Garden organics

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

Separation of markets

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

Geographical boundaries

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

Claimed public benefits

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

Increased competition

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

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

Efficient service delivery

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

Appropriate infrastructure

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

Residual waste stream

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

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

Dry recyclable material stream

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

Garden organics stream

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

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

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

Resource recovery and environmental benefits

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

Anti-competitive detriment

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

Effect on supply of waste management service providers

- 3.63 The Councils submit that their waste represents only a small proportion of the overall supply of dry recyclable material, garden organics and residual waste.¹¹
- 3.64 The Councils submit that in addition to kerbside collected material there are also many private generators (and therefore suppliers) of waste and recycled materials. The Councils submit that their waste material represents less than 2.2% of the 7.2 million tonnes processed and disposed within the combined Sydney resource recovery and disposal markets.
- 3.65 The Councils state that whether they tender individually or collectively, it is likely that, at least in terms of supply, the same result will be achieved. The need for critical mass of material guaranteed over an extended period forces service providers to obtain supply from multiple Councils over extended contracts. Service providers must therefore attract regional groups of councils, preferably from the same geographical area, rather than individual councils. In either case, the Councils submit that this means that kerbside collected waste materials from the Sydney metropolitan area will be supplied to somewhere between five and 10 major waste processing facilities.

Competition in downstream markets

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

¹¹ The Councils are four Local Governments amongst the 44 councils in the Sydney metropolitan area and Illawarra.

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

Term of authorisation

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

Amendment to the application and further submission lodged by the Applicants

- 3.70 On 31 August 2004, the Camden Council, acting on behalf of the Councils, submitted a request to amend the application for authorisation. In amending the application, the Councils sought to have the term of the contract period covered by the authorisation extended from 10 years to a term of up to 20 years. In summary, the Councils advise that by seeking an extension to the contract period from 10 years to 20 years the Councils aim to:

- increase the level of competition by making the tender proposal more attractive to a greater range of potential technology and service providers;
 - facilitate the introduction of a system of best practice integrated resource recovery and reduce the quantity of waste material disposed of to landfill; and
 - increase the benefits to the community through improving environmental outcomes, increased economic stability and the introduction of long term sustainable resource management.
- 3.71 Camden Council also advised that Liverpool City Council had withdrawn from the project and would take no further part in either the authorisation process or the resultant tender and contractual arrangements.
- 3.72 Camden Council confirmed that neither the application for authorisation nor the resultant regional contractual arrangement include components relating to the kerbside collection of waste and resource materials or the transport of this material from kerbside to the designated transfer/processing/receival facility. It is intended that each of the Councils will maintain their own independent collection and transport arrangements, which reflect their own individual requirements. Camden Council explained that these individual Council collection services will then be underpinned by the regional processing arrangement.

- 3.73 Camden Councils submitted that the amendment had been made to the requested term of the authorisation due to the fact that it had become clear since lodging the original application that in order to maximise competition between service and technology suppliers and to maximise public benefit a longer period of authorisation is necessary.
- 3.74 Camden submitted that in order to meet the aims of the regional processing arrangement, the application of some form of alternative waste technology is likely to be required. Camden Council submits that it is also clear that a critical mass of material combined with a sufficiently long term contractual agreement is an essential component of any arrangement involving the application of alternative waste technology.
- 3.75 Camden Council submitted that due to Liverpool City Council's withdrawal from the project, the anticipated amount of waste tonnages available for processing has been reduced. Consequently, there is a need to extend the contract term in order to achieve the overall aims and outcomes of the project.
- 3.76 Furthermore, Camden Council submitted that in order to make the tender for the regional arrangement attractive to a broad range of technology and service providers thereby increasing competition as well as ensuring the best outcome, a contract period that will allow for the amortisation of the establishment costs over a sufficiently lengthy period to allow for healthy competition is necessary.
- 3.77 In addition, Camden Council submitted that the Councils recognise the often lengthy processes involved in the establishment of new facilities and have made allowances for this in the tendering/establishment process to ensure that it does not have a detrimental effect on potential tenderers. Camden Council stated that given this lead time, the infrastructure required and the likely application of alternative waste technology, a contract term of up to 20 years is considered essential to achieve this outcome.
- 3.78 Camden Council submitted that the level of public benefit will also increase with an extension in the contract term from 10 years to up to 20 years. Camden Council stated that benefits to the community are also achieved through increasing the level of sustainability within the integrated resource recovery system. It was argued that a contact term of up to 20 years will facilitate the application of best practice integrated resource recovery systems and the development of long term stable secondary resource markets which will lead to a reduction in the dependency on landfill disposal for domestic residual wastes and an increase in the conservation of natural resources.
- 3.79 Camden Council considered that increased community benefit will also be achieved through reduced system costs and long term price stability. Camden Council argued that an increase in the term of the authorisation, which will provide for a longer term contractual arrangement, will allow for the system costs to be amortised over an extended period thereby reducing processing costs to both the Councils and the community. Camden Council further argued that price stability will also be achieved through the use of appropriate processing and recovery technology and a reduction in the dependency on landfilling for the disposal of residual wastes.

SUBMISSIONS FROM INTERESTED PARTIES PRIOR TO DRAFT DETERMINATION

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

Campbelltown City Council (Campbelltown)

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

Camden Council (Camden)

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

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

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

Wollondilly Shire Council (Wollondilly)

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

NSW Department of Environment and Conservation (The Department)

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

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

Amcor Australasia (Amcor)

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

Waste Service NSW

- 4.18 Waste Service NSW states that it is the current service provider for the waste disposal needs of each of the Councils. However, it contends that while it is the dominant player in the market, it holds only approximately 25% share in the dry recyclable material market and less than 50% of the garden organics market.
- 4.19 Waste Service NSW generally agrees that there could be a benefit to the public from the increased competition in the waste receipt/processing/disposal industry as a result of the proposed arrangements.
- 4.20 Waste Service NSW agrees that there will be a likely public benefit associated with construction of enhanced resource recovery infrastructure in the region. As a result of a residential development proposed within 500 metres of its current landfill site (Jacks Gully Waste Management Centre) Waste Service NSW plans to construct an alternative waste technology processing facility to replace putrescible landfilling operations by 2007.¹²
- 4.21 Waste Service NSW agrees that the proposed arrangements may lead to improved environmental outcomes if it facilitates the development of alternative waste technologies.
- 4.22 However, Waste Service NSW does not believe that there would be any impact on or change to the service efficiencies as a result of the proposed arrangements. The Councils operate collection arrangements to suit local conditions and community preferences. Waste Service NSW questions how that situation would be improved or altered by a regional arrangement.
- 4.23 Waste Service NSW states that the assumption that long-term contracts will deliver superior value to councils needs to be examined on a case-by-case basis. Waste Service NSW considers that true competition would exist if councils were

¹² Waste Service NSW notes that the current landfill site has at least 15 years operating life and that it intends to continue its operation.

able to decide on a day-to-day basis where to take their waste if there were a number of players in the market. However, that this would need to be balanced against whether market players are prepared to take infrastructure development risks as well as logistic and approvals issues.

- 4.24 With respect to likely public detriment arising from the proposed arrangements, Waste Service NSW submits that:
- pricing for alternative waste technology is likely to be higher than landfill;
 - Visy currently holds 48% of the dry recyclable material market. Should Visy be successful with this regional tender in the dry recyclable material component, their market share will increase to 53%;
 - garden organics outcomes may be constrained by the need to move into enclosed composting processing to effectively manage odour issues;
 - long terms contracts move obsolescence risk of facilities from the contractor to the council; and
 - a contractor with a long term contract will have much more market power in the region than the application seems to ascribe to Waste Service NSW incumbency.
- 4.25 Waste Service NSW believes that, on balance, there would be benefits to the councils in the Macarthur region, however, this does not hold true uniformly across Sydney (i.e. introducing similar arrangements in other areas may not produce such benefits).

Waste Contractors and Recyclers Association of NSW (WCRA)

- 4.26 WCRA considers that the following public benefits may arise from the proposed arrangements:
- there is potential for reduced dry recyclable material charges being imposed on Councils if there is complete uniformity in collection systems, recyclable types and contract periods.¹³
 - if uniformity is achieved, it will more than likely result in increased efficiencies in material handling/transfer/processing and transportation, which may result in more dry recyclable material being recycled.
 - if a single company (who can address the issue of identifying a sustainable re-use system for all of the garden organic material generated in this area) will provide the garden organic processing service, the arrangements may result in a greater diversion of this material from waste streams to landfill.

¹³ This uniformity can be achieved by the use of one common recycling system across all five Council areas. WCRA contend that any such system must as a minimum utilise the same style of bins, be based on the same education program to all residents in the areas, utilise the same style of collection equipment/vehicles and have common contractual timeframes.

- if uniformity is achieved by the use of one common garden organics system, the likelihood that more material will be diverted away from landfill is increased.¹⁴
 - the potential entry into the market for residual waste of Collex (or another commercial operator of a waste transfer facility) which could result in increased competition between Collex/another competitor and Waste Service NSW.
- 4.27 WCRA submits that large contracts such as that proposed by the five Councils can only be performed by large operators with the capital and financial capability to be able to bid for these contracts, precluding many small to medium waste and recycling operators from bidding for this work. However WCRA submits that provided that the sufficient timeframes are allowed for potential service providers to prepare a tender, sign the contract and develop the necessary infrastructure there are several companies within the industry that are capable of undertaking this project.
- 4.28 However, WCRA states that if only one service provider expresses an interest in the proposed arrangements in any of the three waste streams (dry recyclable material, garden organics and residual waste) then it will reinforce that one player's monopoly position.
- 4.29 While WCRA submits that the collective tender process may result in increased competition if sufficient time periods are provided to facilitate entry into the markets by new service providers, WCRA does not consider that the proposed arrangements or the contracts themselves are likely to result in increased competition in relevant waste stream markets for the following reasons:
- the Councils currently have options to dispose of dry recyclable material at Jacks Gully, Chullora and Milperra. These facilities are operated by Waste Service NSW, Thiess and Visy Recycling. The Councils are therefore currently well served by dry recyclable material processing facilities. WCRA is concerned that a collective tender has the potential to result in market domination by one company because all of the dry recyclable material generated by the five councils could potentially then be diverted to the one processing facility. This could result in the demise of one or more of the existing facilities.
 - the Council areas are well served with a number of competing garden organics processing facilities. The WCRA is concerned that a collective tender for the processing of garden organics may result in market domination by one company. This could result in the demise of several existing facilities including those currently operated by Wollondilly and Wingecarribee Councils where shredded green waste is currently given away to residents for free for beneficial reuse on their properties.

¹⁴ WCRA contend that such a system must as a minimum be based on the same education program to all residents in all five areas, utilise the same style of collection equipment/vehicles and have common contractual timeframes.

- Collex and Waste Service NSW are currently the only potential bidders to provide a landfill disposal service to the Councils in respect of residual waste. There are major barriers to entry that would prevent another provider from entering this segment of the market.¹⁵ If Collex does not obtain the approvals required, or if Waste Service NSW is the successful tender bidder, the proposed arrangements have the potential for Waste Service NSW to be granted all the waste and recycling referred to in the application.

¹⁵ For example, approvals, cost and locating a landfill site.

SUBMISSIONS RECEIVED POST DRAFT DETERMINATION

Written submissions received in respect of the draft determination

- 5.1 Submissions were received from the following four interested parties in response to the draft determination:
- NSW Department of Environment and Conservation (The Department)
 - Waste Service NSW
 - Waste Contractors and Recyclers Association of NSW (WCRA)
 - Total Environment Centre (TEC)
- 5.2 While these submissions are generally in support of the draft determination, a number of issues have been raised. The main concerns raised by interested parties are:
- The possibility that the arrangements may lead to the longer term application of landfill as a waste management solution to the expense of the development and application of alternative waste technology.
 - The provision of adequate lead times to allow tenderers to provide the required infrastructure to meet the Councils needs.

NSW Department of Environment and Conservation (The Department)

- 5.3 The Department submits that it is interested in the environmental outcomes of the arrangements and particularly potential to contribute to the goals of resource recovery and reduction of waste disposed of to landfill. The Department acknowledges that the *NSW Waste Avoidance and Resource Recovery Strategy* recognises the role that alternative waste treatment technologies will play in this process and supports regional arrangements that will contribute to that outcome.
- 5.4 The Department is responsible for delivering the *NSW Waste Avoidance and Resource Recovery Strategy*. The Strategy proposes that by 2014 there will be an increase in the recovery and utilisation of materials from the municipal waste stream from the current 26% level to 66%. The Department submits that in order to gain an increase of this level, there will need to be an improved recovery of recycled material such as paper and containers, increased separation and recovery of garden organics material, potentially the collection of some additional organic wastes with the garden organics stream, and the treatment of the residual waste through one of a number of alternative waste technology systems.
- 5.5 The Department anticipates that progress towards the target of 66% recovery will not be linear across the 12 years of the Strategy, but will depend on a

combination of gradual improvement of existing collection systems, the introduction of new materials processing facilities and the commissioning of alternative waste technology plants. The Department submits that there will also be improvements as markets for recovered materials change and as processing facilities for those markets expand.

- 5.6 The Department considers that the principal aims of such regional arrangements for the processing and marketing of the recovered material are improved environmental outcomes, reduced system costs, increased long term economic processing and market stability, increased transport efficiencies and reduced dependency on landfill as a disposal method.
- 5.7 The Department notes that its *Alternative Waste Treatment Technologies Assessment Handbook and Assessment Tool* indicates that a key pre-requisite for the successful procurement of alternative waste technology is providing a level of certainty both in terms of the long term participants and the quantity of material available to be processed.
- 5.8 The Department suggests that any authorisation which does not include a requirement for alternative waste treatment as an outcome should be for a limited period in respect of any landfill component. The Department considers that this would allow the option of improved recovery to be revisited as this technology becomes more established.

Waste Service NSW

- 5.9 Waste Service NSW submits that it does not oppose the application.
- 5.10 Waste Service NSW clarified that when the Councils originally advised it of their interests in moving to a joint tender process, Waste Service NSW supported the process because the Councils clearly indicated their interest in having their waste processed by an alternative waste technology facility, and that new waste infrastructure was required in the region. Waste Service NSW explained that it specifically agreed to cease putrescible landfilling at Jacks Gully on the clear understanding that the Councils would move to alternative waste technology.
- 5.11 Waste Service NSW submits that any long term tender for the Macarthur Councils should be for alternative waste technology, and should a landfilling option be included, it should be for a much shorter duration.

WCRA

- 5.12 In addition to issues previously raised in the WCRA submission lodged prior to the draft determination, the WCRA generally stated that the Commission should not accept the submissions of the Councils that the public benefits outweigh the anti-competitive effect of the proposed arrangement and therefore the Commission should not grant any authorisation for the proposed conduct.

- 5.13 The WCRA submits that if the Commission grants authorisation, then the Association recommends that the following conditions be applied:
- Authorisation should be restricted to the requirements of the Councils that relate to the disposal and/or treatment of waste and/or recyclable at waste transfer stations, processing facilities, landfills and beyond. The authorisation should not relate to kerbside collection of waste and/or recyclables and its transport to the waste facilities.
 - All proposed contracts should provide adequate lead times to allow for the required approvals to be obtained. The possible entry to the market of other service providers is limited by the extensive time delays that apply to the obtaining of approvals to undertake the work envisaged.
- 5.14 The WCRA submits that it is of the view that there is little or no competition at this time for the disposal of domestic waste from waste transfer stations to landfills or other legal facilities. The WCRA considers that a collective tender may result in encouraging new entrants into the market for waste transfer stations, waste processing and landfills, however the long lead times for the approval process makes such an outcome problematic.
- 5.15 The WCRA states that the application by the Councils appears to assume that competition will be enhanced by the tender arrangements, however the WCRA is of the opinion that there is no evidence to support this position and that barriers to entry are substantial due to the significant delays and costs in obtaining planning approvals and the capital costs for equipment. The WCRA considers it critical that the Councils factor in adequate time periods to allow other service providers to be encouraged to enter the market for the provision of services for the transfer, processing and disposal of waste.
- 5.16 The WCRA submits that it does not per se object to the Councils seeking to undertake a collective tender, however considers that at the moment there are only two operators that have the capacity at this time to tender for the services and undertake the work immediately. The WCRA submits that given time, an operator may be able to secure some facilities.
- 5.17 The WCRA discusses an example of a tender for services by Fairfield City Council for alternative waste processing, recyclable materials processing and disposal which resulted in a 20 year contract being awarded to Waste Service NSW. The WCRA stated that it is of the view that there is no justification for a 20 year contract in such circumstances.
- 5.18 The WCRA states that it is of the view that none of the benefits claimed by the Councils will necessarily be an outcome from a collective tendering process.

Total Environment Centre (TEC)

- 5.19 TEC strongly advocates for the establishment of ecologically sustainable development and increased resource recovery requirements in the authorisation of joint tenders for the provision of waste transfer, processing and disposal services by local government areas.

- 5.20 TEC considers that the draft determination does not sufficiently take into consideration of the public and environmental benefits to be gained from the use of high value alternative waste technologies. TEC believes that, if approved, the tendering process may result in public and environmental detriment through the lock-in of inferior waste disposal destinations, in particular, to landfill.
- 5.21 TEC considers the lack of prescription in the tendering process to be in direct conflict with NSW Government policies which have articulated the strong public desire for specific targets for the diversion of waste away from landfill and towards increased levels of resource recovery.
- 5.22 TEC submits that the applicants have not demonstrated a clear and specific commitment to higher value alternative waste technology, as required by the NSW Strategy.
- 5.23 TEC explains that the target of 66% diversion from landfill does not equate to the general term ‘alternative waste technology’ as used in the draft determination and various council submissions. TEC further explains that not all alternative waste technologies delivers diversion of waste from landfill and recovery of resources. Waste to energy via landfill or use of low grade compost as day cover in landfills is not in accord with the target. TEC explains that day cover is simply a dumping of the waste in another form. Furthermore, waste to energy, such as by a bioreactor in a landfill does not comply. These forms of waste disposal avoid higher value uses and should not be used for the bulk of waste management.
- 5.24 TEC notes that the development consent for Woodlawn provides for receipt of up to 400,000 tpa of Sydney waste, with the requirement of a reduced input each five years. While the organic waste segment may contribute to a bioreactor, it is not part of the diversion target. The requirement of a reducing input to Woodlawn recognises there will be staggered development of higher value resource recovery, with increasingly less reliance on landfill. TEC does not consider that the use of low grade compost as day cover for landfill will help meet the target.
- 5.25 TEC considers that the integration of the specific waste reduction target and its staggered achievement in the Commission’s determination will support implementation of the target and achievement of significant public benefits. TEC submits that the Commission should specify that in council tenders calling for long term waste contracts (10 or up to 15 years) there is a reduction in the nominated waste flows in accordance with the NSW target of 66%, either met in one step or two steps.
- 5.26 TEC states that while higher value alternative waste technologies may appear to cost more for individual councils attempting to achieve the greatest public benefit through greater sustainability, the aggregation of contracts enabled by the group tendering process would eventually reduce costs through economies of scale. As the proliferation of alternative waste technologies are mainstreamed, reduced costs and increased competition would push down prices further. TEC considers that this will ultimately result in ecologically

sustainable resource recovery and waste management practices becoming more broadly available and more cost-effective.

- 5.27 To ensure the public benefit, environmental benefit and ongoing competition in the waste management and resource recovery sector, TEC submits that the Commission should require the following in joint tenders for waste disposal services:
- joint tenders should seek specification whether the method of disposal is landfill, bioreactor landfill or higher value alternative waste technology;
 - joint tenders should be required to ensure that at least 66% of waste collected is to be diverted from landfill;
 - joint tenders for landfill services (as opposed to alternative waste technology) should be short term, so that a guaranteed waste flow to high value resource recovery alternative waste technology is able to be provided and high value alternative waste technology can be ramped up.

Issues raised at the pre-decision conference

- 5.28 In response to the draft determination, the WCRA requested that the Commission hold a pre-decision conference. The pre-decision conference was held on 27 July 2004.
- 5.29 The main issues raised by interested parties at the pre-decision conference were in respect of:
- the potential for a long term contract to lock the Councils into using landfill as a method of waste disposal for a significant period rather than being able to utilise alternative waste technology methods as they emerge; and
 - the issue of tenderers requiring adequate lead times in order to adequately service the Councils.
- 5.30 Interested parties considered that a collective tender may encourage new entrants into the market for waste transfer stations, waste processing and landfills, however the long lead times for the approval process in respect of developing such facilities may make such an outcome problematic. It was submitted that the proposed tender process should be long enough to allow potential new entrants to secure approval to develop alternative facilities.
- 5.31 Interested parties submitted that through money can be saved on conducting and responding to the tender process collectively. It was submitted that these savings have the potential to result in lower costs for providers and therefore the possibility of lowering prices for the provision of services to councils.
- 5.32 It was suggested that if Waste Service NSW were the successful tenderer it could potentially preclude the entry of other possible suppliers of waste disposal services into the market for the life of the contract entered into.

- 5.33 It was submitted by one interested party that if the Commission decided to grant authorisation, it should be subject to the following conditions:
- Authorisation should not be granted in respect of kerbside collection of waste and/or recyclables from domestic residents and its transport to waste transfer stations.
 - 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.
- 5.34 The applicants advised that Liverpool City Council had withdrawn from the application for authorisation.
- 5.35 It was confirmed by the applicants that the arrangements the subject of the application do not include collective tendering for kerbside collection services. The applicants clarified that each individual council has its own arrangements in relation to collective contracts and that it would continue that every council participating in the arrangements would continue to individually contract with collection service providers.
- 5.36 The applicants explained that the purposes of the proposed collective tender was to open up the market and provide an opportunity for other potential providers to compete with Waste Service NSW for the provision of waste transfer, processing and disposal services.
- 5.37 It was noted by the applicants that substantial capital investment and a minimum contract term of 10 years was necessary in order to enter the market for waste processing services, and that the process of obtaining approvals for new facilities is lengthy and complex. It was also submitted by an interested party that in order for a waste management service provider to establish new infrastructure a guaranteed minimum waste tonnage of 100,000 tonnes per annum and a contract term of 10 years would be necessary. It was stated that long term contracts would favour potential new entrants as they would provide certainty of return to justify capital investment necessary to provide the waste management services.
- 5.38 The applicants indicated that they would seek a variation to their application for authorisation to increase the term of authorisation sought from 10 years to 15 to 20 years due to the size of the contract needed to attract a new service provider.
- 5.39 The development of further landfill was opposed by interested parties. It was submitted that the Sydney waste management industry now had the opportunity to move away from landfill as a way of disposing of waste towards alternative waste technologies, and that the benefits of moving away from landfill were considered highly important.
- 5.40 It was submitted that if a collective contract arrangement for waste disposal via landfill were entered into, then it will close off the prospect of recovery of

this waste for the period of the contract entered into. It was suggested that the Commission impose a condition of authorisation limiting the period of authorisation granted in the event that the arrangements entered into are for disposal of waste through landfill.

- 5.41 Interested parties submitted that any long term regional tender should be for alternative waste technology.
- 5.42 It was submitted that the term ‘alternative waste technology’ refers to the diversion of waste from landfill, rather than waste going to a bioreactor or being used as day cover in landfills.
- 5.43 Interested parties requested that the Commission reinforce the targets set out in the Strategy of 66% diversion from landfill by 2014.
- 5.44 Interested parties explained that increasing the recovery and utilisation of materials from the municipal waste stream from 26% to 66% will require a series of steps, namely:
- improved recovery of dry recyclable material;
 - increased separation and recovery of garden organic material; and
 - the treatment of residual waste through one of a number of alternative waste technology systems.
- 5.45 Concerns were raised in respect of lead times required for tenderers to obtain approvals and establish infrastructure to provide waste management services. It was submitted that long lead times are required, particularly in obtaining approvals to establish new facilities and that if the tender timeframe is insufficient to accommodate this, only those service providers with existing facilities will be in a position to respond to the tender.
- 5.46 The applicants clarified that appropriate lead times are allowed for in the Expression of Interest document and that it is the intention of the Councils to allow sufficient lead time for tenderers to develop the necessary infrastructure.

Written submissions received after the pre decision conference

- 5.47 After the pre-decision conference, submissions were received from the following parties:
- NSW Department of Environment and Conservation (The Department)
 - Waste Service NSW
 - Alternative Waste Technology Working Group (AWTWG)
 - Amendment to application submitted by Camden Council (as discussed at paragraphs 3.70 to 3.79)

NSW Department of Environment and Conservation (The Department)

- 5.48 The Department submits that the NSW Waste Avoidance and Resource Recovery Strategy sets ambitious targets for increased recovery of resources from the domestic waste stream and recognises that alternative waste treatment will play an important role in achieving this outcome. The Department wishes to ensure that any decision to grant an authorisation does not result in a long term landfilling arrangement as this would limit the opportunity for review as alternative waste technology options become increasingly available.
- 5.49 The Department notes that the tender proposed by the Councils will likely put in place contractual arrangements, which will effectively lockup the supply of waste materials from the participating council areas through a long-term agreement. The Department seeks to ensure that final collective arrangements will make a substantial difference in terms of improved environmental outcomes, and contribute to the increased sustainability of resource management in NSW.
- 5.50 The Department requests that any authorisation, which does not include a requirement for alternative waste treatment as an outcome, have a limitation imposed providing for a maximum period of five years in respect of any landfilling component as this will allow the option of improved resource recovery to be revisited as technology becomes more established.

Waste Service NSW

- 5.51 Waste Service NSW submits that it strongly supports:
- initiatives that encourage the introduction of alternative waste technology processing solutions that will provide superior and sustainable environmental outcomes to the residents of Sydney and NSW.
 - awarding long-term contracts to the providers of genuine alternative waste technology solutions in order to remove some of the risk of making the initial capital investment in the necessary infrastructure.
 - a competitive market for alternative waste technology.
 - the waste policy of the NSW State Government, including its Waste Avoidance and Resource Recovery Strategy.
- 5.52 Waste Service NSW submits that it is opposed to long-term joint regional tenders where the method of waste disposal is landfill (whether conventional or bio-reactor).
- 5.53 Waste Service NSW believes that if the Commission grants authorisation, it should be subject to the following conditions:

- joint tenders for waste disposal services should specify whether the required method of disposal is landfill (conventional or bio-reactor) or alternative waste technology;
- joint tenders for landfill (if allowed at all) should be limited to a period of three years;
- joint tenders for alternative waste technology should specify the minimum level of waste diversion to be diverted from landfill. Waste Service NSW recommends that a minimum of 70% diversion from landfill should be achieved for a process to claim to be a genuine alternative waste technology.

Alternative Waste Technology Working Group (AWTWG)

- 5.54 The AWTWG raises concerns in relation to the proposed structure of the contracts entered into by the successful tenderer. Specifically, the AWTWG is concerned with the requirement that the successful tenderer must be in a position to commence delivery of service by 1st April 2005. The request for tender document further states that where a tenderer proposes to construct infrastructure as part of their solution to the long term delivery of the service that tenderer's tender must include an explanation of how delivery of the service will be accommodated between 1st April 2005 and the date on which the construction of the new infrastructure will be completed.
- 5.55 The AWTWG explains that the planning, approval and construction of an alternative waste technology plant requires at least 24 months and most commonly, up to four years to complete.
- 5.56 The AWTWG submits that the practical effect of the requirement described above is that any of the 25 alternative waste technology providers wishing to tender will need to seek pricing for disposal of the residual waste for the interim period from the only two companies able to provide landfill service in that period – Waste Service NSW and Collex. Both of whom will be potential bidders for the contract in their own right.
- 5.57 The AWTWG recommends that the provision of services between 1st April 2005 and the date on which the construction of new infrastructure will be complete should not be part of the tender. The AWTWG considers that the Councils should retain responsibility for the disposal of waste until the AWT of other infrastructure is commissioned.
- 5.58 The AWTWG notes the Commission draft determination in which it discussed the public benefits which may occur as a result of the development of alternative waste technology and noted that it was likely that alternative waste technology would be introduced in the Sydney metropolitan area regardless of whether the Councils collaboratively tender. The AWTWG states that this will only occur where the environmental and social benefits of alternative waste technology are appropriately accounted for and incorporated into the tender evaluation process. The AWTWG raises concerns that the

environmental costs and benefits of alternative waste technology as compared to landfill are generally not being adequately accounted for in waste management service provision tender processes.

- 5.59 Furthermore, the AWTWG suggests that the environmental standards being required of alternative waste technology facilities do not necessarily reflect the same environmental standards being applied to the approvals of some landfills, which the AWTWG considers adds a significant cost element to alternative waste technology.
- 5.60 The AWTWG strongly supports the move by Councils, both individually and collectively, to explore alternative waste treatment technologies, however in an open playing field where environmental, economic and social benefits can be considered.

Written submissions received in respect of the amendment to the application

- 5.61 In response to the amendments made to the application, the following parties provided written submissions to the Commission:
- Wollondilly Shire Council
 - Waste Service NSW
 - Waste Contractors and Recyclers Association of NSW (WCRA)
 - Global Renewables Investments Pty Limited (Global Renewables)
 - Total Environment Centre Inc (TEC)

Wollondilly Shire Council (Wollondilly)

- 5.62 Wollondilly supports the increase of the term of the contract from 10 years to a maximum of 20 years.
- 5.63 Wollondilly submits that it has been evident in the process of preparing the tender documentation that a 10 year contract term may be detrimental to the satisfactory development of a facility(s) for the Macarthur Region.
- 5.64 Wollondilly further submits that the withdrawal of Liverpool City Council from the project has reduced the quantity of material available for processing and to maintain the viability of the project, a longer time period is necessary.
- 5.65 Wollondilly anticipates that the joint tender arrangements will result in the development of a multi-million dollar facility for the benefit of the Macarthur Region, which over a 10 year contract period would have adverse financial consequences for the participating councils and the rate paying public. Wollondilly considers that a contract period of not less than 20 years would allow a more realistic period whereby the successful tendering company would be able to construct and operate a facility and spread their capital

investment over a longer period of time and thus provide a service which would be more economically viable to the participating councils and their constituents.

Waste Service NSW

- 5.66 In respect of the amendment to extend the contract term to up to 20 years, Waste Service NSW's position remains unchanged provided that the intention of the Councils is to award a long-term contract to a provider of genuine alternative waste technology solutions.
- 5.67 Waste Service NSW remain opposed to long-term joint regional tenders where the method of waste disposal is landfill (whether conventional or bio-reactor).

Waste Contractors and Recyclers Association of NSW (WCRA)

- 5.68 WCRA notes that kerbside collections are excluded from the application for authorisation the subject of this determination.
- 5.69 In respect of the amendment to the contract term, WCRA considers that if the authorisation results in a 20 year contract being awarded to Waste Service NSW then it will only further entrench their monopoly position as the owner and operator of the majority of waste transfer stations and landfills in the greater Sydney area for the receipt of sold waste class one and the owner of the only alternative waste processing plant.

Global Renewables Investments Pty Limited (Global Renewables)

- 5.70 Global Renewables supports the application by the Councils for the collaborative tendering arrangements and for the extension of the contract period to 20 years.
- 5.71 Global Renewables submits that it 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. Global Renewables explains that the facility is a Urban Resource-Reduction, Recovery, Recycling (UR-3R) Facility which uses mechanical-biological waste processing to recovery metals, glass, plastics and paper from domestic residual waste, and recycle the organic fraction into high quality compost and renewable energy. Global Renewables submits that the facility will 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. Furthermore, Global Renewables states that the facility has extensive odour control equipment, captures 100% of the biogas generated and requires no water supply or wastewater disposal.
- 5.72 Global Renewables requests that the Commission separate the authorisation of short term landfilling arrangements from long-term alternative waste technology contracts. Global Renewables considers that this will allow the lead time for alternative waste technology selection, consent and construction. Global Renewables submits that in Sydney there are only two companies

which currently provide landfilling services for municipal solid waste and that if council regional alternative waste technology contracts also requiring landfilling in the short term, then competition from other potential players is virtually eliminated. Global Renewables submits 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.

- 5.73 Global Renewables states that it is likely that the Councils will provide the essential base load for municipal solid waste processing facilities needed to ensure the economies of scale required to make alternative waste technology gate prices low enough to compete for commercial and industrial putrescible waste against landfills with much lower environmental standards. Global Renewables considers that the regional tender arrangements being developed by the Councils are thus of critical importance to improved environmental and competitive performance in these regions.
- 5.74 Global Renewables also addresses some of the incorrect assertions raised in another interested party's submission in that Waste Service NSW is not the owner of the only alternative waste processing plant in the greater Sydney area for the receipt of solid waste class one, rather that Global Renewables owns the facility, the Eastern Creek UR-3R facility. Global Renewables submits that while the base load capacity is contracted to Waste Service NSW. Global Renewables has the right under some circumstances to seek additional waste input. Global Renewables further submits that commercial putrescible waste can be received by the Earthpower plant at Camellia.
- 5.75 Global Renewables states that it is not tied to Waste Service NSW for the construction and operation of any other facilities in the Sydney region and at this stage is likely to tender for the residual waste streams through the tender process the subject of this determination.
- 5.76 Global Renewables submits that, in its experience in tendering for significant alternative waste technology facilities, in order to strike an affordable gate fee, there is need for the councils to offer contracts up to 20 or 25 years.
- 5.77 Global Renewables supports the Commission's approval of the Councils' tendering their waste processing for a 20 year period or longer. Global Renewables considers that if the Commission does not grant authorisation for 20 years, waste will continue to be disposed of into the current landfills in the Sydney region and the public benefits of achieving the NSW Waste Strategy's 66% landfill diversion will not be achieved.

Total Environment Centre (TEC)

- 5.78 TEC urges the Commission to ensure that resource recovery rates are guaranteed under an extended authorisation for waste and resource processing arrangements for the Councils by stipulating that resource recovery rates must be specified in tenders, and must be equal to or greater than those set out in the NSW Government's Waste Avoidance and Resource Recovery Strategy.

- 5.79 TEC submits that landfill extensions, as a destination for waste while alternative waste technology infrastructure is being build, should only be allowed for a maximum of three years and should be required to be linked to new or long-term alternative waste technology to meet the 2014 waste reduction target.
- 5.80 TEC notes that there are vast differences between the various types of technologies that are being described as alternative waste technology. TEC submits that it is critical that the distinction is taken into account between bio-reactor landfills that merely siphon off methane gas, and high quality technologies that recover up to 80% of resources. TEC states that the lock-in of waste to bioreactor landfill labelled alternative waste technology would result in a vastly reduced public benefit due to the waste of resources.
- 5.81 TEC considers that without adequate conditions, authorisation for long term contracts attained through joint tender could lead to the lock-in of municipal waste to landfill for 10 to 20 years. TEC states that this would cause significant loss of public benefit through the failure to use available technologies to appropriately recover resources and reduce waste.

THE PUBLIC BENEFIT TEST

- 6.1 The Commission may only grant authorisation where the public benefit test in section 90 of the Act is satisfied.
- 6.2 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.
- 6.3 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-section 90(6) of the Act.
- 6.4 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.
- 6.5 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.
- 6.6 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.
- 6.7 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

6.8 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.¹⁶

6.9 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.¹⁷

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

Future with-and-without test

6.11 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.

6.12 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.

Term of authorisation

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

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

6.15 Under section 88(12) of the Act, authorisation does not operate retrospectively. Accordingly, any agreement made prior to this authorisation coming into effect does not receive protection afforded by this authorisation.

¹⁶ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677

¹⁷ *Ibid* at 42683.

COMMISSION EVALUATION

This application for authorisation

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

Market definition

- 7.2 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.
- 7.3 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.
- 7.4 The Councils submitted detailed market definitions outlined in paragraphs 3.19 to 3.33.
- 7.5 In respect of the product market, the Councils submitted that there are separate markets for each of the three kerbside collected waste materials the subject of the current application: dry recyclable material; garden organics; and residual waste. However, the Councils submitted that there is some crossover between the markets for residual waste and garden organics, given that, with the right infrastructure both, or at least elements of both, can be processed together. However, the Councils submitted that the market for dry recyclable material is independent of the market for the other two streams of waste given that, unlike those other streams of waste, it cannot be disposed of through landfills or in conjunction with those other streams.
- 7.6 In the case of each material, the Councils submitted that the recovery, handling, processing and disposal (by sale or otherwise) of the material constitute a single service.
- 7.7 In considering this application for authorisation, the Commission considers that it is not necessary to comprehensively define the relevant product markets, beyond noting the market definition espoused by the applicants above. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variations in precise market definition.
- 7.8 With respect to dry recyclable material, the Commission notes that Waste Service NSW currently processes and disposes of this stream of waste for all of the participating Councils.

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

Future with-and-without test

- 7.15 As noted at paragraph 6.12, in order to identify and measure the public benefit and public detriment generated by the conduct for which authorisation is sought the Commission applies the ‘future with-and-without test’. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The Commission will compare the public benefits and public detriment that will result in the future if authorisation is granted with the counterfactual.
- 7.16 The Commission did not receive any submissions from the Councils on what an appropriate counterfactual would be.
- 7.17 The Commission considers that the likely counterfactual is a situation where the Councils either:

- individually tender for the services of contractors to process, market and dispose of specific streams of waste;¹⁸ or
 - continue to engage the services of waste transfer providers under the existing arrangements as detailed in paragraph 2.17 to 2.46 of this determination.
- 7.18 Given the similar outcomes likely under each of these counterfactuals. The Commission does not consider that its assessment of the effects on competition or public benefits of the proposed arrangements is affected by which of these counterfactuals is adopted.

Effect on Competition

- 7.19 As discussed in Section 6, 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.
- 7.20 The Commission notes that Waste Service NSW is currently the major supplier of the dry recyclable material and garden organics waste management services to the Councils and that it is currently also the majority provider of residual waste disposal services.

Residual waste

- 7.21 In respect of the disposal of residual waste, the Commission notes that, at present, a single contractor, Waste Service NSW, operates as the majority provider of waste processing and disposal services to the majority of councils in greater metropolitan Sydney, including all councils party to the current application. Given current market conditions, apart from Collex, 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.
- 7.22 The current contractual arrangements between participants do not create a 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 2.36, new waste transfer station and railhead facilities have been approved which may make it more viable to alternative waste management providers to enter the market in the future.
- 7.23 However, the Commission notes that there are a number of barriers to entry likely to be faced by an alternate provider of residual waste processing and disposal

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

- services, 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.
- 7.24 These barriers to entry restrict the number of providers able to tender for the provision of residual waste processing and disposal services. The Commission notes that Collex and Waste Service NSW are currently the only potential bidders to provide landfill disposal services to the Councils in respect of residual waste.
- 7.25 In this respect, the WCRA submission notes that it does not consider that the proposed arrangement or the contracts themselves are likely to result in increased competition in the relevant market because a collective tender has the potential to result in one company having a monopoly over the provision of residual waste management services to the Councils.
- 7.26 While barriers to new contractors competing to provide residual waste processing and disposal services are already significant, the Commission notes that, by allowing (potentially) a single company to provide residual waste management services to the Councils for the next 10 or 20 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.
- 7.27 While the proposed arrangement, by allowing (potentially) a single company to provide residual waste management services to the Councils for the next 10 or 20 years, restricts on-going day-to-day competition for these services, as noted above, competition in this regard is currently negligible. In this sense, the proposed arrangements do not create a new barrier to entry. However, they do create a competitive environment for the provision of these services at a particular point in time (i.e. when the tender process is run). This is discussed in greater detail below at paragraphs 7.32 to 7.34.
- 7.28 More generally, the Commission notes that the four 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.
- 7.29 In addition, the Commission notes that the cost of any restriction on competition generated by the arrangements, for example, increased prices, less choice or lower quality of products and services, will ultimately be borne by the Councils and their ratepayers. Consequently, it is unlikely that the Councils will seek to engage in conduct which would lessen competition for the provision of these services.

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

Dry recyclable material

- 7.35 With respect to dry recyclable material waste management, the Commission notes that Waste Service NSW currently provides this service to the Councils. There is also an additional Visy recycling plant within the Councils' local government areas however the Councils contend that this plant has insufficient capacity to meet the Councils recycling needs at this time.
- 7.36 The proposed arrangements are likely to result in a single waste management provider providing all of the processing, marketing and disposal services for dry recyclable materials to the Councils. It can be expected that the result of the

tender process will be the most efficient service provider being appointed to service the Councils needs. To the extent that a single provider is unable to meet the needs of all the Councils, or that the appointment of one provider to all the Councils will not provide the most efficient outcome, individual councils can opt out of the arrangements. In this respect, as discussed above in relation to residual waste, the Councils are unlikely to enter into the proposed arrangements unless they will provide for more efficient dry recyclable material waste management services than would be available absent of the arrangements.

- 7.37 With respect to potential new market entrants, the Commission notes that entering into a contract with a single provider will prevent other providers from supplying these services to the Councils for the life of the contract. However, in this respect, the Commission notes that barriers to entry, while not as significant as in the market for the provision of residual waste, do exist even absent of the proposed arrangements. In addition, potential new entrants are not restricted in competing for the supply of these services in the first instance. Indeed, the Commission considers that the guaranteed waste tonnages may in fact facilitate the entry of new service providers in the market for processing, marketing or otherwise disposing of dry recyclable materials.
- 7.38 Finally, the Commission notes that the combined dry recyclable waste generated by the Councils is only a small portion of the total amount generated in the Sydney metropolitan area. Consequently, the proposed arrangements are unlikely to impact significantly on the ability of potential new entrants, or indeed, existing providers unsuccessful in the tender process, to compete to provide these services to other councils.

Garden organics

- 7.39 The Commission notes that limited competition also currently exists in the market for processing, marketing and otherwise disposing of garden organics. The applicants state that two service providers currently service 21 of the 27 Councils in the Sydney metropolitan area. Both of these service providers pass on (under contract) to organic waste processors the kerbside collected material and garden organics which has been dropped off at their waste management centres.
- 7.40 The Councils submit that there are three existing waste service providers within their council boundaries which possess the infrastructure necessary to tender for the provision of garden organic waste management services to the Councils.
- 7.41 The proposed arrangements are likely to result in a single waste management provider providing all of the processing, marketing and disposal services for garden organic waste materials to the Councils. This may lessen competition for the provision of these services to the Councils as it may preclude at least some of the existing providers within the area (as well as any potential new entrants) from providing these services for the next 10 to 20 years. However, in this respect, the Commission notes that all of those providers are able to tender (along with any potential new entrant) to provide these services. In this respect, the proposed arrangements do create a competitive environment for the provision of these

services by both existing providers, and potential new entrants, at a particular point in time (i.e. when the tender process is run).

- 7.42 It can be expected that the result of the tender process will be the most efficient service provider being appointed to service the Councils needs. To the extent that a single provider is unable to meet the needs of all the Councils, or that the appointment of one provider to all the Councils will not provide the most efficient outcome, individual councils can opt out of the arrangements. In this respect, as discussed above in relation to residual waste, the Councils are unlikely to enter into the proposed arrangements unless they will provide for more efficient garden organics waste management services than would be available absent of the arrangements.
- 7.43 With respect to potential new market entrants, the Commission notes that entering into a contract with a single provider will prevent other providers from supplying these services to the Councils for the life of the contract. However, in this respect, the Commission notes that barriers to entry, while not as significant as in the market for the provision of residual waste, do exist even absent of the proposed arrangements. In addition, potential new entrants are not restricted in competing for the supply of these services in the first instance.
- 7.44 Finally, the Commission notes that the garden organic waste generated by the Councils is only a small portion of the total amount generated in the Sydney metropolitan area. Consequently, the proposed arrangements are unlikely to impact significantly on the ability of potential new entrants, or indeed, existing providers unsuccessful in the tender process, to compete to provide these services to other councils.

Effect on downstream markets – dry recyclable material and organic material

- 7.45 The Commission notes that different types of dry recyclable material and organic wastes are effectively raw materials that can potentially be used in the production of new products. Public detriment could arise from allowing councils to collectively tender with service providers if this were to lead to an increase in the price of these products for consumers.
- 7.46 However, the Commission considers this an unlikely prospect for the reasons outlined below.
- 7.47 It appears that the Councils would only be able to negotiate a small reduction in the fee charged to dispose of dry recyclable material and garden organics as a consequence of any increase in bargaining power generated by acting collectively.
- 7.48 By acting collectively, councils would be offering to supply a significantly greater amount of dry recyclable material to material recycling facilities and garden organics to processing facilities than they would if they supplied their material to the facilities separately. Indeed, each council individually supplies only a small portion of all the dry recyclable material and garden organics collected in Sydney.

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

Conclusion

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

Public Benefit

- 7.53 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.
- 7.54 The Commission considers the public is likely to benefit from the introduction of the proposed arrangements on several levels.

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

- 7.55 As noted above, the Commission considers that the proposed arrangements may provide for greater competition between potential new entrants and the current service providers in each of the relevant waste material streams, in particular residual waste.
- 7.56 While the Commission has not had access to information to allow it to independently assess the magnitude of any cost saving which may be generated by the Councils under the proposed arrangements, it accepts that the proposed arrangements are likely to result in increased price competition between potential services providers and consequently cost savings to the Councils.

- 7.57 Further, the Commission notes that the success of the tender process will be measured, in part, by the capability of proponents to demonstrate that the Councils will benefit financially under the regional arrangements. This may mean that, in relation to the supply of material, Councils may either benefit with an improved rate in \$/tonne or a reduced distance to receival facilities.
- 7.58 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.
- 7.59 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

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

Efficiencies

- 7.63 The Councils have submitted that by entering into contracts for waste management services collectively there is potential for improved coordination of collection and disposal services across the four councils.
- 7.64 Specifically, the Councils contend that by entering into a joint tender process:

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

Environmental

- 7.69 The Commission recognises the environmental benefits which are likely to flow from the joint tendering arrangement, specifically an increase in the amount of materials recycled and the potential development of alternative waste technology. That is, waste processing technologies that divert waste away from landfill.
- 7.70 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 the Councils submit it is likely that alternative waste technology will be introduced in the Sydney metropolitan area regardless of whether the Councils collaboratively tender.

- 7.71 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.
- 7.72 As discussed, the Commission received numerous submissions raising concerns to ensure that the length of contracts entered into under the tender process did not delay the reduction in the use of landfill as a method of residual waste disposal. As noted at paragraph 6.5, the Commission in applying the public interest test under sub-section 90(6) is required to take into account public detriment constituted by a lessening of competition. This requirement was recently clarified by the Australian Competition Tribunal.¹⁹
- 7.73 In this case, the applicants have claimed that the arrangements the subject of the application give rise to environmental benefits. It is appropriate for the Commission to consider possible environmental detriments in this context.²⁰
- 7.74 The Commission does not consider that the results of the arrangements will necessarily lead to the long term use of landfilling rather than alternative waste technologies. The Commission considers that the arrangements may increase the chance of contracts being entered into with service providers using alternative waste technologies.
- 7.75 The Commission notes the Councils' submission that one of the stated aims of the proposed arrangements is to divert waste materials from landfill and convert them, at a cost, into a resource of some economic value. The Councils have submitted that the State Governments resource recovery targets, currently for the municipal sector 66% by 2014, have provided an incentive, but the key motivation for the Councils is resource recovery leading to reduced resource use and lower environmental impact. Furthermore, the Commission notes from the Councils' Call for Expressions of Interest document that the primary objectives for the Project relate to protecting the environment and conserving resources, at their highest and best value, that are currently lost through landfilling. The Councils' state in this document that performance on these issues will be an important consideration in selecting the successful tenderer.²¹ In addition, the document states that the panel assessing the tenders intends to utilise the alternative waste technology assessment tool developed by the NSW Department of Environment and Conservation in evaluating both the submissions and tenders.²²
- 7.76 The Commission notes from the NSW Department of Environment and Conservation's submissions that it is the agency responsible for delivering the

¹⁹ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4, 7 April 2004.

²⁰ *Re Association of Consulting Engineers, Australia* (1981) ATPR ¶40-202 at 42788

²¹ Call for Expressions of Interest document, South Waste Sydney Councils Resource Recovery Project, advertised October 2004, pg 9.

²² Call for Expressions of Interest document, South Waste Sydney Councils Resource Recovery Project, advertised October 2004, pg 11.

NSW Waste Avoidance and Resource Recovery Strategy. The Commission further notes that in the *NSW Waste Avoidance and Resource Recovery Act 2001*, local councils may be asked by the NSW Department of Environment and Conservation to provide reasons as to any non-compliance with the objectives of the Strategy, which provides the resource recovery targets.

- 7.77 Given this, the Commission expects that the Councils will act in accordance with the *NSW Waste Avoidance and Resource Recovery Act 2001* and take into consideration waste management techniques which will provide outcomes in line with the Strategy when evaluating and selecting tenders.
- 7.78 The Commission also notes that increased efficiencies in material handling, transfer, processing and transportation (as discussed above) may result in more dry recyclable material and organic material being recycled which, again, the Commission considers would be a public benefit.

Conclusion

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

Balance of public benefit and detriment

- 7.80 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.
- 7.81 The Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal. Given that competition for the provision of residual waste management services is currently limited, the Commission considers that the proposed arrangements have the potential to increase competition in this market by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.
- 7.82 With respect to the markets for the provision of dry recyclable material and organic waste management services, any anti-competitive detriment generated by the arrangements is also limited by the current lack of significant competition for the provision of these services. In addition, the combined dry recyclable and organic waste generated by the Councils party to the proposed arrangements is only a small portion of the total amount generated in the Sydney metropolitan area, meaning that existing and potential new providers unsuccessful in the tender process would still be able to compete to provide these services to other councils.

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

Term of the authorisation

- 7.86 The Commission notes that the Councils have amended their application to seek authorisation for a contract term of up to 20 years from the originally sought contract term of 10 years. The Councils submit that the requested term of authorisation has been extended due to the fact that a longer contract period is necessary to maximise competition between service and technology suppliers. The Councils submit that in order to meet the aims of the regional processing arrangements, the application of some form of alternative waste technology is likely to be required and that a critical mass of material combined with a sufficiently long term contractual agreement is an essential component of any arrangement involving the application of alternative waste technology. The Councils also consider that the level of public benefit will also increase with an extension in the contract term up to 20 years. The Councils argue that a contract term of up to 20 years will facilitate the application of best practice integrated resource recovery systems and the development of long term stable secondary resource markets which will lead to a reduction in the dependency on landfill disposal for domestic residual waste and an increase in the conservation of natural resources.
- 7.87 The Commission is not satisfied that the Councils have made a case for the need for a 20 year contract period noting that:
- (a) the Councils did not provide quantitative evidence to support their assertions;
 - (b) Applicants in past authorisation applications sought and were granted similar authorisations for a shorter contract period;²³

²³ Authorisation A30204 was granted for the term of the contract up to a maximum of 10 years. Authorisation A30205 was initially granted for the term of the contract up to a maximum of five years, however at a later date the authorisation was revoked and substituted for a contract term of 10 years.

- (c) prior to the amendment requesting authorisation covering an extended contract period, interested parties did not express concern as to the 10 year duration of the contracts;
 - (d) industry experience demonstrates that a guaranteed contract period of 20 years is not required for service providers to establish the necessary infrastructure;²⁴ and
 - (e) the Councils' Expressions of Interest document proposes a 15 year contract period and 12 parties lodged expressions of interest in response to the invitation.
- 7.88 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.
- 7.89 The Commission notes that in its draft determination it indicated that it considered an authorisation containing a contract period of 10 years, as then requested by the Councils, to be warranted in these circumstances.
- 7.90 However, consistent with the Northern Sydney Region of Councils application and the interest shown in the tender process, the Commission notes that too short a contract period may result in only those service providers who currently have the required infrastructure being able to respond to the tender.
- 7.91 The Commission agrees that adequate lead times are required in order for tenderers to establish the required infrastructure. The Commission notes that the Councils have recognised the often lengthy processes involved in the establishment of new facilities and have made allowances for this in the tendering/establishment process to ensure that it does not have a detrimental effect on potential tenderers. The Commission considers that sufficient lead times can be incorporated into a contract period of 15 years.
- 7.92 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. Having regard to delays experienced in the running of tender processes in similar matters, the Commission will allow a 12 month tender process.
- 7.93 The Commission therefore grants authorisation for the following periods:

²⁴ Collex recently established its Woodlawn facility without the guarantee of 20 year service contracts.

- for the period of the collective tender process up to a maximum of 12 months from the date the final determination comes into effect; and
- for the term of the contracts entered into under the tender process up to a maximum of 15 years.

7.94 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.

DETERMINATION

The Application

- 8.1 On 16 October 2003, the Council of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Councils (the Councils) jointly lodged application A90886 with the Australian Competition and Consumer Commission (the Commission).
- 8.2 The application was amended on 30 August 2004 to withdraw Liverpool City Council from the arrangements.
- 8.3 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.
- 8.4 The application relates to an agreement between the Councils to advertise for and subsequently jointly tender for the provision of services of contractors able to process, market or otherwise dispose of three streams of kerbside collected waste materials, namely dry recyclable material, organic waste, and residual waste.

The Statutory Test

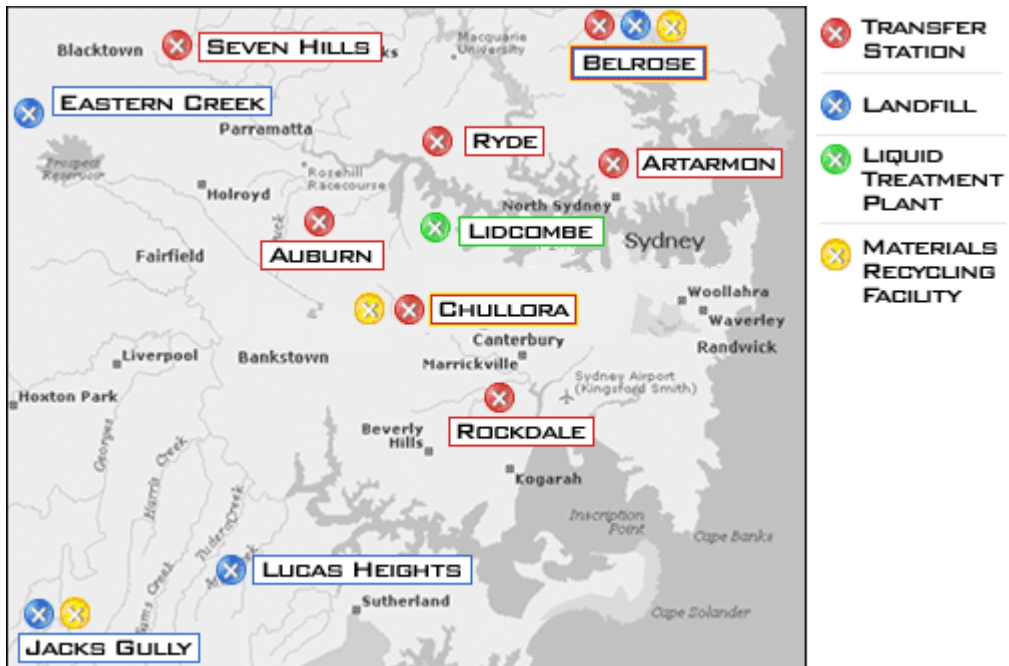
- 8.5 For the reasons outlined in Section 6 of this determination, the Commission concludes that in all circumstances the provisions of the proposed arrangements would or be likely to result in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any 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 grants authorisation

- 8.6 Accordingly, the Commission grants authorisation A90886 for the following periods:
- for the period of the collective tender process up to a maximum of 12 months from the date the final determination comes into effect; and

- for the term of the contracts entered into under the tender process up to a maximum of 15 years.
- 8.7 This decision is subject to any application to the Australian Competition Tribunal for its review.
- 8.8 This determination is made on 16 December 2004. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 7 January 2005. If an application is made to the Tribunal, the determination will come into force:
- (a) where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
 - (b) where the application is withdrawn – on the day on which the application is withdrawn.

ATTACHMENT A



Source: <http://www.wasteservice.nsw.gov.au>



Source - <http://www.dlg.nsw.gov.au>