



Final Determination

Application for Authorisation

Lodged by

**Hornsby Shire Council, Hunters Hill Municipal Council, Lane
Cove Council, North Sydney Council, the City of Ryde,
Willoughby City Council, Mosman Municipal Council and
Warringah Council**

In respect of

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

Date: 16 December 2004

Commissioners:

Authorisation no. A30231

Public Register no. C2004/31

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Executive Summary

The application

On 11 December 2003, the Australian Competition and Consumer Commission (the Commission) received an application for authorisation (A30231) from Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove Council, North Sydney Council, the City of Ryde, Willoughby City Council, Mosman Municipal Council and Warringah Council (the Councils).

The authorisation process

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

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

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

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

The proposed arrangements

The Councils seek authorisation to advertise for and subsequently jointly tender for the services of qualified contractors to provide waste transfer, processing and disposal services to their respective Local Government areas. The tender will be in the form of a joint tender, where it is proposed that dependent upon the tender evaluation:

- individual councils may decide to independently commission a contractor to service their Local Government area under a separate contract;
- a number of councils may agree to combine their services under the one contract; or
- all councils may decide to enter into the one contract.

Assessment of the public benefit and anti-competitive detriment

The Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal. Given that competition for the provision of the services the subject of the collective tender process to councils contracting individually is currently limited, the Commission considers that the proposed arrangements may increase competition by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.

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

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

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.

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 A30231 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 3 March 2004; and
- for the term of the contracts entered into under the tender process for up to a maximum of 15 years.

Interim authorisation

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

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

List of Abbreviations & Glossary of Key Terms

Alternative Waste Technology	Waste processing technologies that provide an alternative to landfill disposal. Automated systems for the separation of mixed solid waste into its components streams, with the objective of producing higher value material and energy products. Alternative waste technology can also refer to technologies that process organic wastes only.
Anaerobic digestion	Involves the controlled degradation of organic wastes by microbial activity in a reactor in the absence of oxygen.
Bioreactor Landfill	A fully sealed landfill utilising modern technology to capture landfill gas to be used to power electricity turbines.
Clean-Up Waste	Household domestic waste that is set aside for kerbside collection, for example broken and discarded furniture, appliances and fittings, fence palings and other waste materials excluding chemicals, putrescible matter, trade waste, stones, concrete, motor vehicle bodies or engine blocks, tyres, large quantities of building materials.
Cluster	A grouping of two or more member councils that are serviced by one contract.
Dry Recyclable Material	Paper, cardboard and containers separated from organic and other mixed waste at the kerbside and having some value when processed to market specifications.
Enclosed composting	Takes place in a tunnel or enclosed hall under conditions where moisture and oxygen are optimised to achieve rapid stabilisation of the organic material.
Food Waste	Waste generated from the preparation and consumption of food exclusive of grease, oil, fat and meat waste.
Gasification	The conversion of organic material into combustible gases by partial oxidation under the application of heat, leaving an inert residue.
Green Waste	Putrescible green waste (grass clippings); non-woody garden waste; woody garden organics; trees and limbs; and stumps and rootballs separated from inorganic and non-biodegradable materials at the kerbside.
Northern Sydney Region of	A region of Councils formed under section 355 of the New South Wales <i>Local Government Act 1993</i> including

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

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INTRODUCTION

Authorisations

- 1.1 The Australian Competition and Consumer Commission (the Commission) is the 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 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 an opportunity to put oral submissions to the Commission in response to the draft determination. The Commission will also invite interested parties to lodge written submissions in response to the draft.
- 1.7 The Commission then reconsiders the application taking into account the comments made at the conference (if one is requested) and any submissions received and issues a written final determination. Should the public benefit outweigh the public detriment, the Commission may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.
- 1.8 The Commission also has the power to grant interim authorisation, at the time that an application is lodged, or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the Act while the Commission considers and evaluates the merits of the application.
- 1.9 This document is a determination in relation to application for authorisation A30231 lodged with the Commission by Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove Council, North Sydney Council, the City of Ryde, Willoughby City Council, Mosman Municipal Council and Warringah Council (the Councils).

The application

- 1.10 On 11 December 2003, the Commission received an application for authorisation (A30231) from Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove Council, North Sydney Council, the City of Ryde, Willoughby City Council, Mosman Municipal Council and Warringah Council (the Councils).
- 1.11 The application seeks authorisation under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding which may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.¹
- 1.12 The Councils seek authorisation to advertise for and subsequently jointly tender for the services of qualified contractors to provide waste transfer, processing and disposal services (waste disposal services) to their respective Local Government areas. The tender will be in the form of a joint tender, where it is proposed that dependent upon the tender evaluation:
- individual councils may decide to independently commission a contractor to service their Local Government area under a separate contract;
 - a number of councils may agree to combine their services under the one contract; or
 - all councils may decide to enter into the one contract.
- 1.13 While the application is not made on behalf of any other parties, the application was lodged on the assumption that three additional councils, namely – Ku-ring-gai Municipal Council, Manly Council and Pittwater Council will participate in the joint tender process, subject to Commission authorisation. These three councils are named in the application as potential future participants in the tendering process.²

Interim authorisation

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

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

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

³ The NSW Local Government elections were held on 27 March 2004.

Draft determination

- 1.15 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.
- 1.16 The Commission considered that, given that competition for the provision of the services the subject of the collective tender process to councils contracting individually is currently negligible, the Commission considered that the proposed arrangements may in fact increase competition by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.
- 1.17 The Commission considered that this increase in the level of competition for the provision of these services would lead to some reduction in the price of waste management services, likely to be reflected in lower domestic waste management charges to ratepayers, which the Commission considered to be a public benefit.
- 1.18 In addition, the Commission considered that the proposed collective tender may also produce environmental benefits by encouraging the development of alternative waste technologies to the current reliance on landfill for waste disposal more immediately than may have otherwise been the case.
- 1.19 Overall, the Commission was satisfied that the public benefits flowing from the proposed arrangements were likely to outweigh any anti-competitive detriment. Therefore, the Commission proposed to grant authorisation A30231 as sought by the Councils for the following periods:
- for the period of the collective tender process up to a maximum of nine months from 3 March 2004; and
 - for the term of the contracts entered into under the tender process for up to a maximum of 15 years.
- 1.20 Two interested parties 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 Six interested parties provided the Commission with written submissions in response to the draft determination.
- 1.22 Five interested parties provided the Commission with written submissions in response to the pre-decision conference.

BACKGROUND TO THE APPLICATION⁴

- 2.1 Three main sectors produce waste in Sydney:
- the municipal sector
 - the commercial and industrial sector
 - 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 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 Local Government Councils collect domestic waste from residents/small commercial businesses and deliver domestic waste to collection points. After receiving the domestic waste at the collection points, waste service provider(s) transfer, process and dispose of that waste through licensed waste management facilities.
- 2.6 Currently Waste Service NSW, a NSW Government Agency, operates as the primary provider of waste transfer, processing and disposal services to the majority of councils located within the Greater Metropolitan Area of Sydney.⁵ Most Local Government councils do not have formal contractual arrangements with Waste Service NSW for the transfer, processing and disposal of domestic waste but operate under an annual gate price arrangement.⁶
- 2.7 In recent months Collex have entered the market as an alternative supplier to Waste Service NSW within the metropolitan area of Sydney.
- 2.8 In these circumstances, councils may wish to enter into contracts with a waste service provider rather than rely on the informal arrangements they currently have with Waste Service NSW.

⁴ 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.

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

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

2.9 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.⁷

Expressions of interest

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

- Rethmann – Australia Environmental Services Pty Ltd⁸;
- The Enviroenergy Group – Enviroenergy Developments Australia Pty Ltd;
- Waste Service NSW;
- Collex;
- Thiess Services;
- Cleanaway; and
- Environmental Waste Technologies.⁹

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

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

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

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

The market

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

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

The four constituent councils of SHOROC are:

- Manly
- Mosman
- Pittwater
- Warringah

2.13 The combined areas of the NSROC and SHOROC are located in the north eastern sector of the Sydney metropolitan area and represent 24% of the total Sydney metropolitan area. Attachment B provides a map of the Sydney metropolitan area.

2.14 This application for authorisation relates to the provision of services for waste transfer, processing and disposal of the following streams of waste, as defined in the glossary of this draft determination:

- putrescible waste;
- green waste;
- cleanup waste; and
- food waste.

2.15 As such, the application relates mainly to waste transfer, processing and disposal of light commercial and domestic waste. However some member councils also provide collection services to a number of small commercial customers.

2.16 The NSROC/SHOROC Councils accounted for 18.2% of all domestic waste disposed of through landfill in the Sydney metropolitan area in 2003/2004.

Existing market infrastructure

2.17 The existing infrastructure in respect of the transfer, processing and disposal of waste in the Sydney Metropolitan Area is predominately owned and operated by Waste Service NSW.

2.18 In their supporting submission, the Councils submitted that, at that time, Waste Service NSW had been operating in a competitor-free environment. Since the application for authorisation was lodged, Collex have entered the market as an alternative waste management provider to service the Sydney region.

2.19 The Councils' tender document indicates that the waste disposal locations used by the Councils are:¹⁰

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

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

- Rockdale;
- Auburn; and
- Chullora.

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

¹⁰ Councils Tender Document, 9 December 2003, pg 10.

- Eastern Creek;
 - Jack's Gully; and
 - Lucas Heights.
- 2.22 The map at Attachment A details the Waste Service NSW transfer stations and landfill sites available in the Sydney metropolitan area.
- 2.23 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 the 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.
- 2.24 In addition to the infrastructure owned and/or operated by Waste Service NSW, a private disposal facility 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.

Possible future market infrastructure

- 2.25 During the expression of interest process a number of suppliers nominated possible service solutions based on alternative waste technology. That is, waste processing technologies that divert waste away from landfill.
- 2.26 The Councils submit that there are a number of viable technologies which could be introduced to the Sydney market. The main technology types, as described in the glossary of the determination, are:
- enclosed composting;
 - anaerobic digestion;
 - pyrolysis/gasification; and
 - vermicomposting.
- 2.27 Nominations received in response to the expression of interest process identified that, a large dollar value contract plus a reasonable contract period (minimum 15 years) would be required in order to allow the capital investment in infrastructure required in order to establish a viable alternative provider to Waste Service NSW to be recovered over the life of the contract.

Alternative Technology Projects in New South Wales¹¹

2.28 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 2.24.
- 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.

¹¹ 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*.

Restriction on location of transfer stations

2.29 If a transfer station is nominated for a service collection area in the Councils Local Government area, then the location of the transfer station should preferably be no further from the Councils Local Government area boundary than the following distances:¹²

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

The NSW Waste Avoidance and Resource Recovery Strategy 2003

2.30 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.

2.31 The objectives of the WARR Act 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:
 - o avoidance of unnecessary resource consumption;
 - o resource recovery (including re-use, reprocessing, recycling and energy recovery);
 - o disposal.
- (c) to provide for the continual reduction in waste generation;

¹² Councils Tender Document for ACCC, 9 December 2003, pgs 10 – 11.

- (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.

2.32 Section 14 of the WARR Act 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.

2.33 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	<p>Reduce total volume and tonnages of litter reported annually.</p> <p>Reduction in total tonnages of illegal dumped material reported by regulatory agencies and Regional Illegal Dumping (RID) squads annually.</p>

Recent developments

- 2.34 The Commission is aware of recent reports that the four councils of the SHOROC may have entered into a 10 year agreement with Waste Service NSW for the supply of putrescible waste disposal services. The Commission notes reports that the agreement provides for the parties to work together to investigate the development of an alternative waste technology facility in the SHOROC region.

Previous applications for authorisation (A30204 and A30205)

- 2.35 The Commission has previously considered applications for authorisation relating to similar arrangements in the Sydney region waste transfer and processing industry.
- 2.36 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).
- 2.37 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.¹³
- 2.38 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

¹³ 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.

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.¹⁴

- 2.39 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.
- 2.40 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.
- 2.41 Application A30231 differs from the above authorisations mainly in respect of the type of waste proposed to be collected, processed and disposed. Authorisations A30204 and A30205 related specifically to dry recyclable material, whereas application A30231 relates to the provision of services for waste transfer, processing and disposal of light commercial and domestic waste other than dry recyclable materials.

Current similar authorisation application (A90886)

- 2.42 On 16 October 2003, the councils of Camden, Campbelltown City Council, Liverpool City Council, Wollondilly Shire Council and Wingecarribee Shire Council (the Macarthur Region Councils) jointly lodged an application for authorisation. The Macarthur Region Councils have advised the Commission that Liverpool City Council will not longer participate in the arrangements.
- 2.43 The Macarthur Region Councils seek authorisation to collectively tender for the services of qualified contractors, able to process, market or otherwise dispose of kerbside collected waste materials. The Macarthur Region Councils submit that the result of the tender process will be two (or three) contracts jointly signed by the Macarthur Region Councils with the contractors.
- 2.44 The scope of the collective tendering process proposed by the Macarthur Region Councils is wider than previously authorised in A30204 and A30205 and varies from that proposed in the current application. The Macarthur Region Councils propose to tender for dry recyclable material, organic (mainly plant material from gardens) and residual waste.

¹⁴ 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.

- 2.45 On 16 June 2004, the Commission released a draft determination proposing to grant authorisation A90886 as sought by the Macarthur Region Councils.
- 2.46 Interested parties called a pre-decision conference which was held on 27 July 2004.
- 2.47 A separate final determination will be concurrently issued by the Commission in respect of the Macarthur Region Councils' application for authorisation.

Current similar authorisation application (A90926)

- 2.48 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.
- 2.49 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.
- 2.50 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.
- 2.51 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.
- 2.52 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 advertise for and subsequently jointly tender for the services of qualified contractors to provide waste transfer, processing and disposal services to their respective Local Government areas.
- 3.2 The tender will be in the form of a joint tender, where dependent upon the tender evaluation:
- individual councils may decide to independently commission a contractor to service their Local Government area under a separate contract;
 - a number of councils may agree to combine their services under the one contract; or
 - all councils may decide to enter into one contract.

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

Evaluation criteria

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

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

Other considerations

- 3.5 The waste service provider must also comply with the *Protection of the Environment Operations Act 1997* at all times with respect to pollution from noise, air, water, land and waste sources. The waste service provider will be required during the term of the contract to supply and operate all necessary equipment for monitoring leachate, gas emissions, dust, noise, sound and service water associated with the sites. Monitoring is to be in accordance with NSW EPA requirements.
- 3.6 The waste service provider must also develop and rehabilitate waste disposal sites in a manner that reduces loss of amenity and the risk of environmental harm. The contractor must also develop, monitor and maintain a program that ensures that the landfill does not pose a threat to the environment or be a concern to the neighbouring community.

Submission from the Applicant

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

Claimed public benefits

Financial

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

extended contract period) lower than the current gate price. The Councils estimate that based on current tonnages this will result in a saving of \$2 million per annum to the ratepayers of NSROC/SHOROC participating councils.

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

Increasing competition

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

Environmental

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

a consequence of needing to extend the life of the available landfills, Waste Service NSW will need to introduce recycling facilities within future development proposals at these sites.

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

Anti-competitive detriment

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

Period of authorisation

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

SUBMISSIONS FROM INTERESTED PARTIES

Submissions prior to draft determination

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

Written submissions received in response to the draft determination

- 4.3 Submissions were received from the following six interested parties in response to the draft determination:
- Waste Service NSW
 - NSW Department of Environment and Conservation (The Department)
 - Global Renewables Investments Pty Limited (Global Renewables)
 - Total Environment Centre (TEC)
 - The Waste Contractors and Recyclers Association of New South Wales (WCRA)
 - City of Ryde
- 4.4 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.

Waste Service NSW

4.5 Waste Service NSW strongly supports:

- any initiative that seeks to encourage providers of alternative waste technology to commence providing services in Sydney and NSW;
- awarding long term contracts to those persons that wish to provide a genuine alternative waste technology solution in order to remove some of the risk of making the initial capital investment in the necessary infrastructure;
- a free competitive market for alternative waste technology; and
- the NSW State Government decision to introduce competition in landfilling by approving Collex's project developments at Clyde and Woodlawn.

4.6 Waste Service NSW considers that the arrangements proposed by the Councils are not sufficiently prescriptive on the use of alternative waste technology, and that under the proposed arrangements the potential exists for a long term contract to be awarded for the disposal of waste for Councils where the dominant waste disposal technique adopted by the successful tenderer is landfill.

4.7 Waste Service NSW submits that if a contract were awarded to a waste service provider based on a landfill solution, then:

- there would be a lessening of competition in the markets in which waste disposal services in general and landfill services in particular are provided;
- there would be adverse environmental consequences as a result of failing to adequately encourage the development of alternative waste technology as an alternative to landfill, meaning that the proposed conduct would not result in any of the advocated public benefits; and
- these adverse environmental consequences would be inconsistent with NSW Government public policies.

4.8 Waste Service NSW considers that if the Commission were minded to grant authorisation, it should only do so if the authorisation were subject to the following conditions:

- (a) joint tenders for waste disposal services should specify whether the method of disposal is landfill (whether conventional or bio-reactor) or alternative waste technology;
- (b) joint tenders for landfill services should be limited to a period of up to 3 years on the basis that there is no economic or environmental rationale to encourage investment in landfill infrastructure through long term contracts; and
- (c) joint tenders for alternative waste technology should specify the minimum level of waste required to be diverted from landfill. Waste Service NSW recommends a condition on alternative waste technology tenders that after three to five years all waste is to be processed using alternative waste

technology and 70% of this waste is to be diverted from landfill. If such a condition were imposed, a longer term contract of 15 years would be appropriate as this could encourage organisations to invest in alternative waste technology solutions.

- 4.9 Waste Service NSW considers that if these conditions are placed on the proposed arrangements, the arrangements should be authorised.
- 4.10 Waste Service NSW raise the issue that an alternative waste technology solution would involve the provision of some landfill services and that an initial lead time would be required before an alternative waste technology facility would be operational during which time the waste would be disposed of to landfill. Waste Service NSW further states that only 70% - 90% of waste would be diverted away from landfill.
- 4.11 Waste Service NSW states that there is no certainty that the tender will result in an alternative waste technology solution.
- 4.12 Waste Service NSW considers that if a landfill solution is adopted, the contract would be awarded to either Collex or Waste Service NSW, a significant stream of residual waste will be removed from the market for 15 years and will be provided to one of the two existing waste disposal service providers, there will be a trend towards contracts rather than gate price charges, the level of competition in the market will decrease significantly due to the fact that the prospect of entry by a new provider of alternative waste technology services would be low and the unsuccessful tenderer would not proceed with new infrastructure development proposal or close existing infrastructure.
- 4.13 Waste Service NSW submits that if the application were not authorised by the Commission, the following would occur:
- The current level of competition between Waste Service NSW and Collex would gradually increase. Waste Service NSW states that some councils would tender for the provision of landfill services for which Collex and Waste Service NSW would compete vigorously and that any contracts awarded would be short term contracts as the councils would be reluctant to be committed to particular technologies of particular prices for an extended period of time in circumstances where other councils were not.
 - Providers of alternative waste technology services would enter the market. Waste Service NSW submits that this is because there would be large amounts of reliable and geographically diverse streams of waste to dispose of, and environmental attitudes of the Government would encourage this entry and provide alternative waste technology service providers with a competitive advantage over existing landfill service providers when responding to tenders. Waste Service NSW gives examples of at least three instances of councils in the Sydney region individually calling for expressions of interest for alternative waste technology processing of municipal waste and two where councils have called tenders or quotes for landfilling services. Waste Service NSW submits that this demonstrates that some councils in Sydney are willing to tender individually for the provision of alternative waste technology services and that

organisations other than Waste Service NSW and Collex are prepared to submit tenders for contracts with individual councils for the provision of alternative waste technology services. Furthermore, Waste Service NSW submits that there is some evidence that suggests that individual councils have been more successful than joint tenders in implementing alternative waste technology projects.

- 4.14 Waste Service NSW notes that the size of the proposed tender is likely to be the largest waste tender ever called in Sydney, and that if the contract were awarded to a landfill service provider, i.e. Collex or Waste Service NSW, then the lack of access to municipal council waste streams in the northern area of Sydney may lead to the closure of existing and proposed transfer stations and other waste disposal infrastructure in the region owned or operated by Collex or Waste Service NSW. Furthermore, Waste Service NSW considers, that with this outcome, it is unlikely that an alternative waste technology provider would enter the market due to the lack of access to the Councils' waste.
- 4.15 Waste Service NSW considers that there would be no public benefit should the outcome of the tender process result in a contract being serviced by landfilling. Waste Service NSW states that the principal reason for this is that it would be less likely that alternative waste technology service providers could enter the market.
- 4.16 Waste Service NSW submits that, in contrast, should the contract result in an alternative waste technology outcome, market conditions would be more conducive to the entry by alternative waste technology service providers as large amounts of geographically diverse waste streams would be available.
- 4.17 Waste Service NSW notes that an outcome whereby the entry of alternative waste technology service providers was less likely would be contrary to NSW Government policy and refers to the NSW Waste Avoidance and Resource Recovery Strategy 2003.
- 4.18 Waste Service NSW submits that only an outcome involving long term genuine alternative waste technology solution will result in any public benefit as a result of the authorisation.
- 4.19 Waste Service NSW recognises that there may be a public benefit in joint tendering to encourage investment by competitors in alternative waste technology facilities. Waste Service NSW states that while it does not consider it necessary to have long term contracts in place in order to encourage alternative waste technology service providers to commence offering services, however does acknowledge that such entry would be more likely if a long term contract was awarded to remove the risk of making the capital investment in new infrastructure.
- 4.20 In concluding, Waste Service NSW states that it supports the joint tender arrangements, but only to the extent that the tender will result in a genuine alternative waste technology solution being adopted. Waste Service NSW submits that the authorisation should be subject to the following conditions:

- (a) joint tenders for waste disposal services should specify whether the method of disposal is landfill (whether conventional or bio-reactor) or alternative waste technology;
- (b) joint tenders for landfill should be limited to a period of 3 years;
- (c) joint tenders for alternative waste technology should specify the minimum level of waste required to be diverted from landfill. Waste Service NSW recommends a condition on alternative waste technology tenders that after three to five years, all waste is to be processed using alternative waste technology and 70% of this waste is to be diverted from landfill. If such a condition were imposed, Waste Service NSW considers that a longer term contract of 15 years would be appropriate.

NSW Department of Environment and Conservation (The Department)

- 4.21 The Department submits that it is interested in the environmental outcomes of the arrangements and particularly the potential for the arrangements 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.
- 4.22 The Department is concerned that if a decision is made to allow an authorisation, that the authorisation may result in a long term landfilling contract without the opportunity for review as alternative waste technology options become increasingly available.
- 4.23 The Department states that it 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 of green waste, potentially the collection of some organic wastes with the green waste stream and the treatment of the residual waste through one of a number of alternative waste technology systems.
- 4.24 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 collection 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.
- 4.25 The Department states that Sydney will rely on landfill for a number of years given that the establishment time for alternative waste technology plants is lengthy. Once significant alternative waste technology plant is under construction and potential exists for other plants to be established. The Department submits that these may, but need not be, on existing landfill sites.

- 4.26 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. In terms of residual waste processing arrangements, much of the potential benefit that might be realised through such regional contracts is dependant upon achieving alternative waste processing to minimise the use of landfill.
- 4.27 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.
- 4.28 The Department submits that any processing tender should be structured in a way that affords respondents sufficient certainty and clarity to enable the preparation of a well-structured and competitive tender and importantly, to provide a high degree of confidence for project developers and project financiers upon which to base the tender.
- 4.29 The Department considers that it is by no means certain that the tender process as proposed and subsequent tender evaluation will result in an outcome based on an alternative waste technology solution, and that the tender enables the potential landfilling of the residual waste material without further resource recovery for an extended period.
- 4.30 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.

Global Renewables Investments Pty Limited (Global Renewables)

- 4.31 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.
- 4.32 Global Renewables considers that its greatest obstacle to the construction of more facilities like its UR-3R around Australia is the existence of artificially low-priced landfills. Current landfill standards do not require the extensive environmental

protection that a UR-3R Facility must implement, and so landfills frequently emit odours, landfill gas, leachate, contaminated surface water runoff, dust and litter. The cost of these emissions is generally externalised in the case of landfills but must be internalised in the case of the best alternative waste technology facilities. The externalisation of environmental costs in landfilling is uncompetitive and unsustainable behaviour.

- 4.33 Global Renewables submits that ceasing to landfill putrescible waste in the near future is a world trend, and in the public interest.
- 4.34 Global Renewables considers that in order to meet the target of 66% landfill diversion by 2014, a significant portion of Sydney's municipal solid waste will need to be processed in some form of alternative waste technology.
- 4.35 Global Renewables submits that if councils are forced to enter into long term landfilling contracts in order to satisfy their current waste disposal needs, they may not be able to meet their long term strategic obligations.
- 4.36 Global Renewables states that in order to create a competitive market place for alternative waste technology supply, it is necessary to separate short term landfilling needs from long term alternative waste technology contracts. Global Renewables submits that this will allow the lead time for alternative waste technology site 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.
- 4.37 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.
- 4.38 Global Renewables believes that the ability of alternative waste technology companies to compete to provide environmentally sustainable solutions will be enhanced if the Commission authorises only short term landfill contractual arrangements and reserves long term authorisations for alternative waste technology facilities.

Total Environment Centre (TEC)

- 4.39 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.

- 4.40 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.
- 4.41 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.
- 4.42 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.
- 4.43 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.
- 4.44 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.
- 4.45 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.
- 4.46 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.

- 4.47 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.

Waste Contractors and Recyclers Association of NSW (WCRA)

- 4.48 WCRA 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.
- 4.49 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.
- 4.50 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. 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.
- 4.51 WCRA states that the application by the Councils appears to assume that competition will be enhanced by the tender arrangements, however 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. 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.

- 4.52 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. WCRA submits that given time, an operator may be able to secure some facilities.
- 4.53 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. WCRA stated that it is of the view that there is no justification for a 20 year contract in such circumstances.
- 4.54 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.

City of Ryde

- 4.55 The City of Ryde provided a submission summarising the Councils' position on the issues raised by Waste Service NSW.
- 4.56 In respect of environmental outcomes, the City of Ryde states that the tender documentation is comprehensive and requires the completion of a number of mandatory schedules which require the tenderer to address a environmental issues. The City of Ryde submits that in developing the selection criteria the Councils have drawn heavily on the assessment methodology developed by the Department for alternative waste treatment technologies. The City of Ryde states that prospective tenderers have been advised that the tender price is not the dominant criteria and that a comprehensive assessment of the environmental impacts of the tender proposal need to be documented. The City of Ryde considers that this approach should address the issues of concern raised by Waste Service NSW in regard to appropriate environmental outcomes being achieved in the awarding of the contract.
- 4.57 The City of Ryde submits that, to some extent, the tender is a market-driven instrument and that it requires that prospective tenderers provide a tender price which relates to the letting of the contract on an individual basis to each participating council and the provision of a number of alternate tender price offers on a cluster-based arrangement with the contract being let as a single contract servicing a number of councils. The City of Ryde states that the market forces will determine whether a collective arrangement would operate within the market or alternatively whether a contract is let on an individual council basis.
- 4.58 The City of Ryde states that it Councils detailed that the expressions of interest document indicated that for service providers other than Waste Service NSW or Collex Waste Management to enter the market, a tender of the nature of the Councils' tender was required. The City of Ryde submits that the critical aspect for new entrants to the waste transfer processing and disposal service industry is

the need for a long-term contract of 15 years that would permit secure cash flows to achieve capital recovery associated with the infrastructure requirements of the industry.

Issues raised at the pre-decision conference

- 4.59 In response to the draft determination, WCRA and Waste Service NSW requested that the Commission hold a pre-decision conference. The pre-decision conference was held on 27 July 2004.
- 4.60 The majority of oral submissions made by interested parties at the pre-decision conference are summarised in this document as part of the particular organisation's written submissions.
- 4.61 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;
 - the issue of tenderers requiring adequate lead times in order to adequately service the Councils; and
 - the lack of consideration of the NSW Waste Avoidance and Resource Recovery Strategy resource recovery targets.
- 4.62 A representative for the Councils submitted that services providers who had responded to the Councils call for expressions of interest had indicated that a 15 year contract term would be necessary to establish the required infrastructure, and that they could not commence building such infrastructure without the certainty of long term contracts. Additionally, potential service providers had noted the need to enter into short term arrangements with an existing provider while they developed the necessary infrastructure to provide these services in the longer term. The representative submitted that the tender documents provide for this to occur.
- 4.63 It was noted that the arrangements do not bind all councils to participate.
- 4.64 It was submitted that it is likely that the target provided for in the NSW Waste Avoidance and Resource Recovery Strategy will be revised in the future and that the Councils should not be locked into long term contracts past 2014.
- 4.65 A representative for the Councils submitted that the Councils aim to reduce waste tonnages over the term of the contract through increased resource recovery and that the purpose of the proposed arrangements is not to review or undermine the NSW Waste Avoidance and Resource Recovery Strategy.

Written submissions received after the pre-decision conference

4.66 After the pre-decision conference, submissions were received from the following five parties:

- Rethmann Australia Environmental Services Pty Ltd (Rethmann)
- Northern Sydney Regional Organisation of Councils (NSROC)
- NSW Department of Environment and Conservation (The Department)
- Waste Service NSW
- Alternative Waste Technology Working Group (AWTWG)

Rethmann

4.67 Rethmann discuss the history of the waste management industry in Sydney and the development of the Collex Woodlawn landfill facility. Rethmann states that while the development of the Woodlawn facility has created some competition for the transfer and disposal of domestic waste, in the commercial reality there is no competition to Waste Service NSW's existing infrastructure for putrescible waste in Sydney. Rethmann submits that the cost of transport and the existing traffic conditions in Sydney do not allow an effective/viable competition to Waste Service NSW infrastructure. Rethmann considers that, in this light, Waste Service NSW does have a substantial market power in Sydney.

4.68 Rethmann considers that the process and lead time to establish new infrastructure should be taken into consideration. Rethmann submits that a realistic lead time for any waste infrastructure facility in Sydney is somewhere between two and three years. Rethmann submits that one major barrier for any new infrastructure is the availability of land and the fast raising prices for commercial land threaten to make any infrastructure project unviable at the current pricing regime for waste processing.

4.69 Rethmann states that a contract term for an alternative waste treatment facility of 10 years would be considered the absolute minimum and a more realistic term for such investment would be a contract term of between 15 and 20 years. Rethmann further submits that a contract term should not be too long because waste generation and waste consumption can change dramatically over a period of 15 to 20 years.

4.70 Rethmann submits that the tender of the Councils is farcical insofar as no one can de facto compete with Waste Service NSW's existing infrastructure. Rethmann explains that the tender documents state that the transportation of waste for more than a few kilometres outside existing Council boundaries would result in additional costs to Councils, which they would not be prepared to bear or for which a tenderer would have to made a case/convince a tendering Council that these additional costs would be a benefit to the Council.

- 4.71 Rethmann considers that the way the tender document is written it could result in a contract of a term of 15 years be let for all the Councils' waste to go to landfill. Rethmann submits that allowing Waste Service NSW to enter into such a contract would cement its existing market power and substantially lessen competition as the contracted volume of waste would not be available to any potential competitor or to any waste treatment facility for the contract term.
- 4.72 Rethmann states that it believes that there is no commercial reason for any of the participating Councils to enter into a contract of any term for the disposal of waste to landfill. Rethmann submits that if the Commission considers a landfill contract reasonable, then that contract should be limited to one year.
- 4.73 Rethmann notes the submission made by Waste Service NSW that contracts for landfill should not be let for a period of 15 years but only for a period of up to three years. Rethmann states that it does not see any reason why a contract that results in waste being continued to be landfilled should have a term of three years. Rethmann states that it does not believe that the issue of lead time for new infrastructure of two to three years can be used as an argument for landfill contracts not to exceed three years from now on. Rethmann suggests that the State Government could change its planning approach or legislation to allow infrastructure for alternative waste treatment or deviation away from landfill to be erected much faster.
- 4.74 Rethmann submits that any contract that results in landfill and is let to Waste Service NSW should not be contracted for a certain term. Rethmann further submits that the contract should include a clause that would allow the Councils to terminate the contract any time in case an alternative to landfill arises.
- 4.75 Rethmann states that if the contract is awarded to Waste Service NSW, that contract will strengthen the substantial market power that Waste Service NSW already enjoys and would substantially lessen any competition for this contracted volume of waste for the contract period.

Northern Sydney Regional Organisation of Councils (NSROC)

- 4.76 NSROC expressed concern that the request to impose certain conditions on the authorisation by Waste Service NSW did not properly address the issue in respect of the need to require a 15 year contract period. NSROC submits that the critical aspect for new entrants to be able to enter the waste industry market to provide this service is the need for a contract to have sufficient length of contract period and sufficient value in order to permit capital recovery of infrastructure.
- 4.77 NSROC submits that the Waste Service NSW proposal places a restriction on the capability of other parties to enter the market by requiring that the proposal be limited to alternative waste technology. NSROC notes that Waste Service NSW is the only participant in the marketplace at this point in time, currently constructing a waste processing plant that they maintain meets their definition of alternative waste technology.
- 4.78 NSROC states that pre-empting the evaluation process, by placing different contract periods associated with different technologies is flawed. NSROC

considers that this approach will actually restrict the opportunities available to various suppliers to service the contract. NSROC submits that the way the information contained in the tender document is expressed allows for a broad response from the marketplace.

- 4.79 NSROC re-iterates that the evaluation process itself addresses in detail the environmental aspect and technical aspects of each proposal as well as other important community issues of social impact and financial impact.

NSW Department of Environment and Conservation (The Department)

- 4.80 In addition to concerns raised in its earlier submission, the Department submits that it considers that the tender proposed by the Councils will likely put in place contractual arrangements which will effectively lock-up the supply of a significant quantity of waste materials from the participating council areas through a long term agreement. The Department submits that it 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. The Department states that given the structure of the tender proposed by the NSROC councils, it is uncertain that the tender process will result in an outcome based on an alternative waste technology solution.

Waste Service NSW

- 4.81 Waste Service NSW re-iterates its earlier submission and further states that it is opposed to long term joint regional tenders where the method of waste disposal is landfill (whether conventional or bio-reactor).

Alternative Waste Technology Working Group (AWTWG)

- 4.82 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.
- 4.83 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.
- 4.84 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.

- 4.85 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.
- 4.86 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.
- 4.87 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.
- 4.88 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.

THE PUBLIC BENEFIT TEST

- 5.1 The Commission may only grant authorisation where the public benefit test in section 90 of the Act is satisfied.
- 5.2 The Councils lodged an application for authorisation under sub-section 88(1) of the Act to:
- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
 - give effect to a provision of a contract, arrangement or understanding where the provision has the purpose, or has or may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.3 In assessing an application made under sub-section 88(1) of the Act to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the Act, the relevant test that the applicants must satisfy for authorisation to be granted is outlined in sub-section 90(6) of the Act.
- 5.4 Under section 90(6) of the Act, the Commission may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 5.5 In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements or conduct and the public benefits arising from the arrangements or conduct, weighing the two to determine which is greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation.
- 5.6 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.
- 5.7 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

5.8 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.¹⁵

5.9 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.¹⁶

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

Future with-and-without test

5.11 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.

5.12 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

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

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

5.15 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, other than that already covered by interim authorisation.

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

¹⁶ *Ibid* at 42683.

COMMISSION EVALUATION

This application for authorisation

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

Market definition

- 6.2 The first step in assessing the competitive effects and the public benefit/detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 6.3 The Commission may use market analysis to identify and measure the public benefit and anti-competitive detriment resulting from arrangements for which authorisation has been sought. However, depending on the circumstances, the Commission may not need to comprehensively define the relevant markets as it may be apparent that a net public benefit will or will not arise regardless of the scope of the defined market.
- 6.4 In its consideration of this application for authorisation, the Commission considers that it is not necessary to comprehensively define the relevant markets. In this respect, it is the Commission's view that its assessment will not be overly affected by the possible variation in precise market definition.
- 6.5 In respect of the product market in which the Councils seek to collectively tender, the Commission notes that it could be narrowly defined to include the transfer, processing and disposal of light commercial and domestic waste (i.e. those products in respect of which the Councils seek to collectively negotiate) or more broadly defined to include the transfer, processing and disposal of waste more generally. However, as noted above, the Commission does not consider that its analysis of the public benefits and anti-competitive detriment of the proposed arrangements is overly affected by the possible variations in the precise definition of this market.
- 6.6 With respect to the geographical boundaries of the market, the Commission considers that these are most accurately defined as regional due to the fact that, ideally, transfer, processing and disposal stations should be located in close proximity to the area from which the waste is collected.
- 6.7 The Commission considers there to be high barriers to entry into these markets due to the significant capital required to establish waste processing facilities. However, entry is likely to be more feasible for potential entrants who either already provide other waste disposal services in a region, or provide similar waste disposal services to those the subject of the current application in adjoining regions.

Future with-and-without test

- 6.8 As noted at paragraph 5.12, in order to identify and measure the public benefit and public detriment generated by the conduct for which authorisation is sought the Commission applies the ‘future with-and-without test’. This involves identifying a counterfactual, that is, making a prediction as to what will happen if authorisation is denied. The Commission will compare the public benefits and public detriment that will result in the future if authorisation is granted with the counterfactual.
- 6.9 The Commission did not receive any submissions from the applicant on what an appropriate counterfactual would be.
- 6.10 The Commission considers that the likely counterfactual is a situation where the councils either:
- individually tender for the services of contractors to transfer, process and dispose of specific streams of waste;¹⁷ or
 - engage the services of Waste Service NSW under the current annual gate price arrangements.
- 6.11 To the extent that the counterfactual adopted may affect the Commission’s assessment of the proposed arrangements, this is discussed where relevant in the Commission’s assessment of the effects on competition and public benefits of the proposed arrangements below.

Effect on Competition

- 6.12 As discussed in Section 5, the Commission must assess the extent to which the proposed arrangements give rise to any detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.
- 6.13 The Commission notes that, at present, Waste Service NSW, operates as the primary provider of waste transfer, processing and disposal services to the majority of councils in greater metropolitan Sydney, including most of the councils party to the current application. The Commission notes that Collex have recently entered the market as competitors to Waste Service NSW. Given current market conditions, it is unlikely that a contractor other than Waste Service NSW or Collex will seek to enter the market for the provision of these services to these councils if the councils continue to contract for the supply of these services individually.
- 6.14 The current contractual arrangements between the parties 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. The Commission notes that the City of Ryde recently entered into a contract with Collex for the provision of waste disposal services.

¹⁷ If the total value of any Councils prospective contract is less than \$100,000, that council would not be required to tender.

- 6.15 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 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. Therefore, based on the information provided to the Commission, it appears that it will remain the case that any council seeking to individually contract with an alternative provider is unlikely to be able to offer the critical mass of waste necessary to provide sufficient return on the investment required to establish an alternative provider. In this regard, the Commission notes the applicants' assertions that it is only by tendering collectively that they can offer the critical mass of waste necessary to justify such investment.
- 6.16 While barriers to new contractors competing to provide residual waste processing and disposal services are already significant, the Commission notes that, by allowing (potentially) a single company to provide residual waste management services to the Councils for the next 15 years, the proposed arrangements could impose further barriers on other providers entering the market. In this respect, while barriers to entry are high even absent of the proposed arrangements, it is difficult to speculate, particularly given potentially new technological developments, whether this will remain the case over the life of the proposed arrangements. However, the Commission considers, based on the available evidence, that absent of the proposed arrangements, it is likely to remain the case that Waste Service NSW will remain the primary provider of residual waste management services to the Councils for the foreseeable future.
- 6.17 While the proposed arrangements, by allowing (potentially) a single company to provide residual waste management services to the Councils for the next 15 years, restrict on-going day-to-day competition for these services, as noted above, competition in this regard is currently negligible. In this sense, the proposed arrangements do not create a new barrier to entry.
- 6.18 More generally, the Commission notes that the 11 Councils party to the proposed arrangements generate only a small proportion of the total volume of residual waste generated in the Sydney metropolitan area. Potential new market entrants would still be able to compete for the provision of these services to other councils.
- 6.19 In addition, the Commission notes that the cost of any restriction on competition generated by the arrangements, for example, increased prices, less choice or lower quality of products and services, will ultimately be borne by the Councils and their ratepayers. Consequently, it is unlikely that the Councils will seek to engage in conduct which would lessen competition for the provision of these services.
- 6.20 However, the Commission considers that the proposed tender process may in fact increase competition in the market for the provision of waste transfer, processing and disposal services. Specifically, the arrangements create a competitive environment for the provision of these services at a particular point in time (i.e. when the tender process is run). In this respect, the Commission notes that the Councils have received seven responses to the expressions of interest process in respect of the proposed tender, which suggests that competition exists for the

provision of waste transfer, processing and disposal provided that there is a critical mass of waste sufficient to justify the capital investment necessary for new providers to enter the market.

- 6.21 While the proposed tender process will result in either a small number of contractors being appointed either collectively by the 11 councils, collectively by sub-groups of councils, or by individual councils, or a single contractor being appointed to service all 11 councils, this is likely to be on more competitive terms than is currently the case. In this respect, the Commission again notes the argument of the Councils that the potential for joint tender arrangement will increase competition within the market by providing greater tonnages than exist in one council area, consequently providing a level of certainty to encourage service providers to establish infrastructure enabling them to enter the market.
- 6.22 In addition, the Commission notes that if a service provider other than Waste Service NSW is selected by the Councils this may also increase the level of competition within the participating council areas for the provision of other like waste service facilities and in adjoining geographical markets also currently served exclusively by Waste Service NSW. That is, once a new entrant is established, it may be able to compete for the provision of other services with the participating council areas and/or for the provision of services in adjoining areas which do not have the critical mass of waste to justify the investment necessary to establish a competing service provider.

Conclusion

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

Public Benefit

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

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

- 6.26 As noted above, the Commission considers that the proposed arrangements will provide for greater competition between potential new entrants and the incumbent service provider.
- 6.27 The applicants have estimated, based on nominations received through the expressions of interest process, that savings on the cost of acquiring these services as a result of a competitive joint tender process will be \$2 million per annum.

While the Commission has not had access to information to allow it to independently assess the Councils estimated cost saving, it accepts that the proposed arrangements are likely to result in increased price competition between potential services providers and consequently cost savings to the Councils. Based on the information provided by the applicant, particularly in respect of the expressions of interest process conducted, these savings can be expected to be significant.

- 6.28 Given that the *Local Government Act 1993* requires that the income from the domestic waste management charge levied on ratepayers must be calculated so as not to exceed the reasonable costs of the provision of domestic waste management services, lower fees would be passed on to ratepayers in the form of a lower domestic waste management charge which the Commission considers to be a public benefit.
- 6.29 In addition, as noted above, the proposed arrangements may also result in an increase in competition for the provision of other similar waste services within the Councils regions and/or increased competition for the provision of the waste services the subject of the application in adjoining council regions. To the extent that this occurs, this is also likely to be reflected in lower domestic waste management charges to ratepayers.

Transaction cost savings

- 6.30 The Councils contend that the costs of conducting a tender process of the type envisaged is in excess of \$50,000. Consequently, they contend that processing with a joint tender rather than each of the 11 councils individually tendering would result in cost saving of \$500,000.
- 6.31 As noted above with respect to the applicant's estimates of cost savings as a result of increased price competition, the Commission has not had access to information to allow it to independently assess the Councils estimated transaction costs savings through running a joint tender process. It may be for example that the costs of each individual, smaller scale, tender process would be less than the cost of running a single larger scale process. If this were the case, the aggregate cost saving as a result of running a joint tender process would be somewhat less than the \$500,000 estimated by the Councils. However, more generally, the Commission accepts that running a single, joint tender process would result in transaction cost savings compared to a situation where each council individually ran a tender process. As discussed above, such savings are likely to be reflected in lower domestic waste management charges to ratepayers which the Commission considers would be a public benefit.
- 6.32 However, the Commission considers it by no means certain that, in the absence of the proposed arrangements, individual councils would choose to tender for the provision of these services. The Commission notes that in the past only one of the Councils has chosen to do so. The remaining have chosen to operate under an informal arrangement with Waste Service NSW. The introduction of Collex into the marketplace may make it more commercially viable for other potential service providers to tender for the provision of waste transfer, processing and disposal services to Councils individually. However, as noted by the Councils themselves,

it is only by aggregating their waste service management needs that tendering for the provision of these services becomes a commercial viable option for potential service providers other than Waste Service NSW.

- 6.33 In conclusion, while the Commission considers that transaction cost savings would accrue to the Councils in jointly tendering, compared to a situation where each council tendered individually, the extent to which councils would in fact tender individually absent of the proposed arrangements is unclear.
- 6.34 The Commission therefore accepts, but on the basis of the available information does not place great weight on, the argument that a public benefit would arise through reductions in the domestic waste management charge as a result of transaction cost savings accruing through the Councils running a joint tender process for the provision of waste transfer, disposal and processing services.

Environmental benefits

- 6.35 The Commission recognises the environmental benefits which are likely to flow from the joint tendering arrangements, specifically the potential development of alternative waste technology. That is, waste processing technologies that provide alternatives to landfill disposal.
- 6.36 The applicants contend that during the expression of interest process a number of potential suppliers proposed waste management solutions based on alternative waste technology. The applicants contend that potential providers of alternative waste technology have submitted that they would require a large dollar value contract and reasonable contract period (for example, 15 years plus) in order to allow them to recover the investment in infrastructure necessary to develop and enable such technology.
- 6.37 Development of alternative waste technology would lead to a reduction in the use of landfill as a means of waste disposal with associated environmental benefits which the Commission consider would constitute a public benefit. However, the Commission notes that it is likely that alternative waste technology will be introduced in the Sydney metropolitan area regardless of whether the Councils collaboratively tender.
- 6.38 The Commission considers that the proposed arrangements may provide a greater incentive to contractors to establish alternative waste technologies more immediately to meet the waste management needs of the Councils. However, as it is likely that the development of alternative waste technologies will occur in the future regardless of the proposed arrangements, the Commission does not place significant emphasis on this benefit.
- 6.39 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 5.5, 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.¹⁸

- 6.40 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.¹⁹
- 6.41 The Commission notes from the NSW Department of Environment and Conservation's submissions that it is the agency responsible for delivering the 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.
- 6.42 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.

Conclusion

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

Balance of public benefit and detriment

- 6.44 The Commission may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment constituted by any lessening of competition.
- 6.45 The Commission considers that the anti-competitive detriment generated by the proposed arrangements is likely to be minimal. Given that competition for the provision of the services the subject of the collective tender process to councils contracting individually is currently limited, the Commission considers that the proposed arrangements have the potential to increase competition by providing the critical mass of waste necessary to justify investment in the levels of infrastructure necessary for new providers to enter the market.
- 6.46 The Commission considers that this increase in the level of competition for the provision of these services will lead to some reduction in the price of waste

¹⁸ *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4, 7 April 2004.

¹⁹ *Re Association of Consulting Engineers, Australia* (1981) ATPR ¶40-202 at 42788

management services, likely to be reflected in lower domestic waste management charges to ratepayers, which the Commission considers to be a public benefit.

- 6.47 In addition, the Commission considers that the proposed collective tender may also produce environmental benefits by encouraging the development of alternative waste technologies to the current reliance on landfill for waste disposal more immediately than may have otherwise been the case.
- 6.48 Consequently, the Commission concludes that the public benefits likely to result from the proposed arrangements will outweigh the anti-competitive detriment.

Term of the authorisation

- 6.49 The Commission notes that the Councils have sought authorisation for 15 years. The Councils submit that contracts entered into pursuant to the tender process would need to be for at least 15 years in order to provide potential new entrants sufficient time to recover the costs associated with establishing the necessary infrastructure to provide the waste management service.
- 6.50 In considering previous applications for authorisation of similar arrangements, the Commission has considered that given the establishment costs involved in developing new waste management services, amortising establishment costs over too short a period of time is unlikely to produce sufficient cost savings for the tender process to yield a satisfactory outcome for the Councils. In addition, the Commission has noted the general preference in the waste industry for longer term contracts. Consequently, granting authorisation for too short a period, which would necessitate shorter term contracts being offered, would be likely to dissuade many potential waste management service providers from tendering and consequently jeopardise the prospects of the project proceeding. Given this, the Commission considers that in this instance a 15 year authorisation is warranted.
- 6.51 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 stated that this has been taken into consideration in the tendering process. The Commission considers that sufficient lead times can be incorporated into a contract period of 15 years.
- 6.52 Having regard to delays experienced in the running of tender processes in similar matters, the Commission will allow a 12 month tender process. The Commission granted interim authorisation on 3 March 2004 to the process of advertising the tender.
- 6.53 The Commission therefore proposes to grant authorisation for the following periods:
- for the period of the collective tender process up to a maximum of 12 months from 3 March 2004; and
 - for the term of the contracts entered into under the tender process up to a maximum of 15 years.

6.54 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

- 7.1 On 11 December 2003, Hornsby Shire Council, Hunters Hill Municipal Council, Lane Cove Council, North Sydney Council, the City of Ryde, Willoughby City Council, Mosman Municipal Council and Warringah Council (the Councils) lodged application A30231 with the Australian Competition and Consumer Commission (the Commission).
- 7.2 The application was made using Form B, Schedule 1 of the *Trade Practices Regulations 1974*. The application was made under sub section 88(1) of the *Trade Practices Act 1974* (the Act) and the *Competition Code* of New South Wales, and sought authorisation to:
- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
 - give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 7.3 The application relates to an agreement between the Councils to advertise for and subsequently jointly tender for the provision of waste transfer, processing and disposal services to the Councils Local Government areas.

The Statutory Test

- 7.4 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

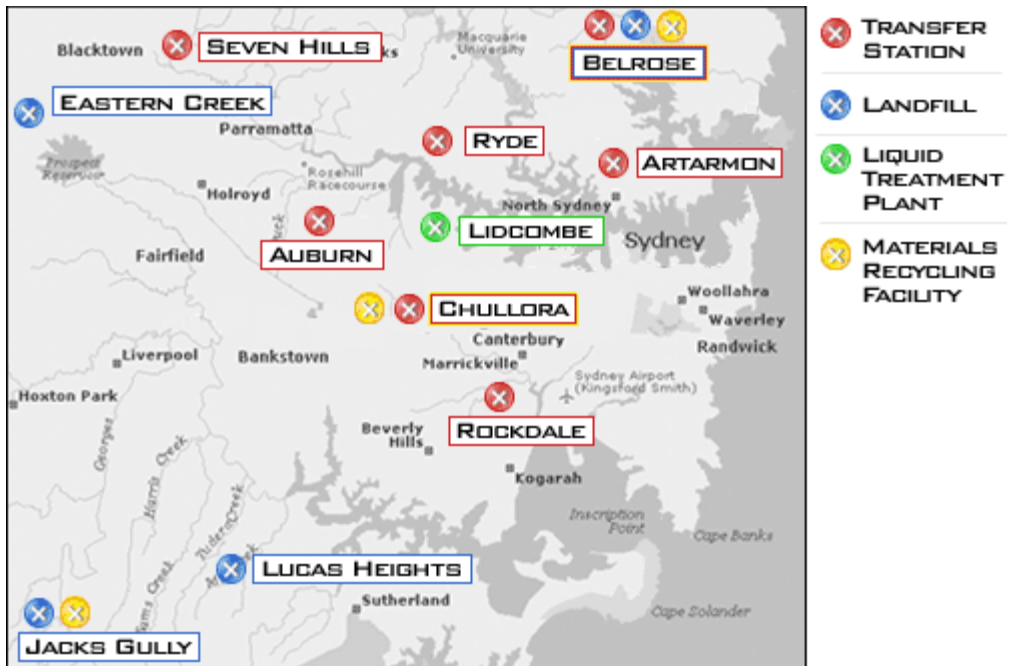
- 7.5 Accordingly, the Commission grants authorisation to application A30231 for the following periods:
- for the period of the collective tender process up to a maximum of 12 months from 3 March 2004; and
 - for the term of the contracts entered into under the tender process up to a maximum of 15 years.

- 7.6 Pursuant to subsection 88(6) the authorisation extends to three additional councils, namely Ku-ring-gai Municipal Council, Manly Council and Pittwater Council.
- 7.7 This decision is subject to any application to the Australian Competition Tribunal for its review.
- 7.8 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:
- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
 - where the application is withdrawn – on the day on which the application is withdrawn.

Interim authorisation

- 7.9 On 11 February 2004, the Councils requested interim authorisation for the process of advertising the tender. On 3 March 2004, the Commission granted interim authorisation in respect of the process of advertising the tender. Interim authorisation will continue to protect the process for advertising of the tender until the date this determination comes into effect.

ATTACHMENT A



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